IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRACY NORTH CAROLINA, THE LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DONNA PERMAR, JOHN P. CLARK, MARGARET B. CATES, LELIA BENTLEY, REGINA WHITNEY EDWARDS, ROBERT K. PRIDDY II, WALTER HUTCHINS, AND SUSAN SCHAFFER,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; KEN RAYMOND, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; DAVID C. BLACK, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as TRANSPORTATION SECRETARY; THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; MANDY COHEN, in her official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendants,

and

Civil Action

No. 20-cv-00457

LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR PRELIMINARY INJUNCTION

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; and TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES,

Legislative Defendant-Intervenors.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions, Statutes, and Rules

Legislative Materials

Other Authorities

INTRODUCTION AND STATEMENT OF FACTS

This is a fundamentally irresponsible lawsuit that threatens to harm the very interests Plaintiffs purport to be seeking to protect. The U.S. Constitution expressly vests the North Carolina General Assembly with the authority to prescribe the times, places, and manner of holding elections for federal office in the State of North Carolina, subject to a legislative check by the U.S. Congress. U.S. CONST. art. I, § 4. On March 26, 2020, the Executive Director of the State Board of Elections accordingly addressed a letter to General Assembly members and Governor Cooper requesting various changes to the State's election laws to account for the COVID-19 pandemic. *See* Riggs Decl. Ex. 1, Doc. 12-7 (June 5, 2020). The General Assembly responded by crafting bipartisan legislation, House Bill 1169 ("HB1169") (attached as Exhibit 1). The Bill was introduced in the House on May 22, and it was signed into law by Governor Cooper on June 12 after passing the General Assembly by a total vote of 142–26. The law makes several changes to North Carolina election procedures for the 2020 General Election, including by reducing to one the number of individuals required to witness an absentee ballot, expanding the pool of authorized poll workers to include county residents beyond a particular precinct, allowing absentee ballots to be requested online, by fax, or by email, directing the State Board of Elections to develop guidelines for assisting registered voters in nursing homes and hospitals,

giving additional time for county boards to canvass absentee ballots, and providing over $27 million in funding for election administration.

Plaintiffs, however, believe they know better than North Carolina's elected officials what needs to be done to balance the State's interests in election administration, access to the polls, and election integrity during a global pandemic. Apparently unsatisfied with HB1169, which gives them some, but not all, of what they seek, Plaintiffs filed suit on May 22, the same day the Bill was introduced. They now seek a preliminary injunction requiring radical changes to North Carolina election procedures, including the construction of absentee ballot drop boxes across the state, the development and implementation of an additional online voter registration system, and the elimination of the uniform hours requirement for early voting locations.

Any one of these changes would divert precious time and resources and could threaten to throw preparations for the November elections into disarray, imperiling the very values Plaintiffs purport to advance. *Cf.* Office of Inspector Gen., *HealthCare.gov: CMS Management of the Federal Marketplace* at i, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 16, 2016), https://bit.ly/2Z328M8 ("The development of HealthCare.gov faced a high risk of failure, given the technical complexity required, the fixed deadline, and a high degree of uncertainty about mission, scope, and funding."). Taken

together, the risks they pose are even greater. And the basis for which Plaintiffs seek to impose these risks is unfounded: "Voters can wear masks, avoid crowds, bring their own hand sanitizer with them, practice frequent hand hygiene, and avoid touching their face. Doing so will bring their risk of transmission of the virus close to zero." Plush Decl. ¶19.

Fortunately for the People of North Carolina, Plaintiffs' claims are utterly without merit and indeed fail for several threshold reasons. First, "equity demands . . . haste," *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989), yet Plaintiffs let *over two months* pass from the time of the Executive Director's letter to the General Assembly to the filing of their motion for a preliminary injunction. That delay alone is reason enough to deny Plaintiffs' motion. Second, the Supreme Court "has repeatedly emphasized that lower federal courts should not ordinarily alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam), and that principle applies with full force here, particularly when state election officials *already* are working to adjust the rules to implement HB1169. Third, Plaintiffs' attempt to enlist this Court in second-guessing the General Assembly's considered judgment on how to adjust the rules of voting for a pandemic are foreclosed by the political question doctrine. And fourth, Plaintiffs lack standing to bring most of

their claims, as the individual and organizational plaintiffs generally fail to assert cognizable injuries. Finally, to the extent this Court has jurisdiction to consider any of Plaintiffs' claims those claims fail on the merits.

For these reasons, the Court should deny Plaintiffs' motion for a preliminary injunction.

ARGUMENT

I. Plaintiffs' Claims that North Carolina Law Unconstitutionally Burdens the Right To Vote Are Unlikely To Succeed.

A. Plaintiffs Do Not Have Standing To Assert Their *Anderson-Burdick* and Unconstitutional Conditions Claims.

1. No Plaintiff Has Article III Standing.

The "irreducible minimum requirements" of standing are an injury in fact, causation, and redressability. *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). In addition to suing on its own behalf, an organizational plaintiff may seek to establish standing to represent its members' interests by demonstrating that "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991).

Both the individual and organizational Plaintiffs lack standing to challenge what they allege are unconstitutional burdens on the right to vote.

a. Voter Registration

Plaintiffs seek to enjoin the State's requirement that voters must register at least 25 days before the relevant election. *See* Pls.' Mem. In Support of their Mot. for Prelim. Inj. & Request To Expedite 2, Doc. 7 (June 5, 2020) ("PI Br."). And they seek to require the State Defendants to "offer broader online registration through DHHS." *Id.* at 20.

However, *every single one* of the individual voter-plaintiffs is already registered to vote in North Carolina. *See* Permar Decl. ¶2, Doc. 11-3 (June 5, 2020); Clark Decl. ¶3, Doc. 11-4 (June 5, 2020); Cates Decl. ¶3, Doc. 11-5 (June 5, 2020); Bentley Decl. ¶2, Doc. 11-6 (June 5, 2020); Edwards Decl. ¶2, Doc. 11-7 (June 5, 2020); Priddy Decl. ¶2, Doc. 11-8 (June 5, 2020); Hutchins Decl. ¶3, Doc. 11-9 (June 5, 2020). The State's registration regime therefore poses no injury to any of them and they have no standing.

The organizational plaintiffs lack standing as well. Neither has identified any members who would independently have standing to challenge the registration system. LWVNC asserts that "voters who need to update their registration and were previously able to do so during one-stop voting, including LWVNC members, will now be unable to do so because they are unable to vote in person due to

the risk to their health." Nicholas Decl. ¶8, Doc. 11-2 (June 5, 2020). But this kind of general, conclusory statement is insufficient because an organization must "make specific allegations establishing that at least *one identified member* had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498, (2009) (emphasis added). LWVNC's "terse allegation of its injury—without specific mention of any individual member's injury" is insufficient." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013).

The organizational plaintiffs have likewise failed to establish their own standing. They make general allegations that they must "divert significant resources to help voters problem-solve complying with existing rules," Lopez Decl. ¶18, Doc. 11-1 (June 5, 2020), or "devote resources to helping voters register that [they] would otherwise use in other initiatives leading up to the election," Nicholas Decl. ¶9, but these general statements again do not suffice. "Although a diversion of resources might harm the organization by reducing the funds available for other purposes, it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices." *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (quotation marks omitted). Finding standing in such circumstances "would not comport with the case or controversy requirement of Article III of

the Constitution." *Id.*; *see also Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1994).

b. The Witness Requirement

Of the individual plaintiffs, only Plaintiffs Bentley and Hutchins are potentially capable of challenging the Witness Requirement as amended. Bentley lives alone, *see* Bentley Decl. ¶1, and attests that she "do[es] not know that [she] will be able to find witnesses, or who [she] would ask," *id.* ¶9. Bentley lacks standing because her "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (quotation marks omitted).

Bentley has until the day of the General Election in November 2020 to postmark her ballot. *See* N.C. GEN. STAT. § 163-231(b)(2)b. And a great deal can change in the next four months with respect to the danger posed by the virus. Moreover, Bentley attests only that she "follow[s] the stay-at-home order as best as [she] can," and if she "do[es] not need to leave [her] house, then [she doesn't]." Bentley Decl. ¶6. This implies that since she began self-isolating on March 10, *see id.* ¶4, she *has* left her house on occasion. And Bentley has not alleged facts showing that she will not need to leave her house in the months preceding the election such that she will necessarily come in contact with at least one

person eligible to serve as her witness. Nor has she alleged facts showing that no member of her own family will visit her from out-of-town between now and Election Day who could serve as a witness.

Moreover, while Bentley emphasizes the magnitude of harm she may suffer should she contract the virus, that truth has no bearing on the imminence inquiry, as "[s]tanding depends on the probability of harm." *520 Mich. Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006) (Easterbrook, J.). And Bentley has proffered no evidence or declaration indicating that the probability of contracting the virus is so high as to be "certainly impending." An injury that "could very likely" occur does not suffice to secure standing. *Matherly v. Andrews*, 859 F.3d 264, 277 (4th Cir. 2017). Indeed, even a 33% chance of harm "falls far short" of establishing standing. *Beck v. McDonald*, 848 F.3d 262, 275–76 (4th Cir. 2017). Assuming the Bentley continues to behave as she has in the past, *see South Carolina v. United States*, 912 F.3d 720, 728–29 (4th Cir. 2019), she will maintain diligent social distancing and compliance with CDC recommendations regarding masks, sanitization, etc. Should Bentley thereafter engage as a witness a neighbor who has no COVID-19 symptoms and has likewise engaged in social distancing, and should she and the neighbor meet outdoors while complying with CDC recommendations, it is highly improbable that Bentley would contract the virus. *See* Plush Decl. ¶¶7, 11–14, 18–19, 21; Schauder Decl. ¶¶11–18.

Hutchins also lacks standing to challenge to the Witness Requirement. As with Bentley, Hutchins relies on speculation failing to show any certainly impending injury. First, while Hutchins's living facility is currently on lockdown, that may not be so by the time of the November General Elections. And if there is no lockdown, then Hutchins's wife should be able to assist him in completing an absentee ballot and serving as his witness. *See* Hutchins Decl. ¶¶4, 11. Second, Hutchins proffers no allegations explaining why one of his fellow residents at the living facility could not serve as his witness. Although Hutchins notes that residents are told to be 6 feet from each other, he does not explain how that requirement would prevent another resident from serving as his witness. Third, HB1169 requires the Department of Health and Human Services ("DHHS") and State Board of Elections ("SBOE") to develop guidance allowing trained multipartisan assistance team ("MAT") members to enter nursing homes "to assist registered voters" there. HB1169 § 2(b). Hutchins may therefore also have a MAT member serve as his witness.

The organizational plaintiffs also lack standing to challenge the Witness Requirement. Neither addresses whether their members would not be able to meet the one-witness requirement, much less identified any such member. *See Summers*, 555 U.S. at 498. The organizational plaintiffs lack standing in their own right because the most they assert is that the Witness Requirement requires them

to reallocate space on their printed voters guides, *see* Lopez Decl. ¶23, or "divert [their] limited resources towards educating voters on how to vote safely . . . with this restriction in place," Nicholas Decl. ¶15. But these allegations merely concern the diversion of resources and are not enough to secure organizational standing. *See Lane*, 703 F.3d at 675.

c. Requesting Absentee Ballots

Plaintiffs Cates and Hutchins challenged the State's former laws requiring voters to request absentee ballots through submission of a hard-copy ballot request form to the county board of elections. HB1169 now provides that voters or their near relatives may additionally request absentee ballots through online submissions, email, or fax. HB1169 §§ 1(b), 7(a). Because Cates declared that she has a tablet and a smart phone and "would request a ballot that way," Cates Decl. ¶8, she no longer has standing. And Hutchins has alleged no facts indicating that neither his wife nor any other near relative would be unable to submit the online form or send a fax or email on his behalf or that he has any preference between those options and requesting his ballot over the phone. He therefore lacks standing as well.

d. Drop Boxes

None of the individual plaintiffs has declared a need for using a contactless drop box to submit their absentee ballots. Therefore, none has standing to raise this claim.

Nor do the organizational plaintiffs. Because neither specifically identifies any members who need or plan to use such drop boxes, they lack representational standing. And they lack organizational standing too, because they simply allege a potential diversion of resources caused by the lack of drop boxes. *See* Lopez Decl. ¶26; Nicholas Decl. ¶16. These allegations are highly speculative, and mere diversions of resources are not enough for organizational standing in any event. *See Lane*, 703 F.3d at 675.

e. Opportunity To Cure Absentee Ballots

The individual plaintiffs who plan to vote by mail with absentee ballots do not make allegations showing that it is "certainly impending" that they will need an opportunity to cure any deficiencies in submitting their absentee ballots. None express a concern that they will make a mistake in completing their ballots that will necessitate any opportunity to cure. Moreover, given that millions of citizens every year are able to successfully cast absentee ballots across the country, and given that these individual plaintiffs are sophisticated enough to initiate this very suit, one would be hard-pressed to think it "imminent" that they will err in filling out their absentee ballots.

The organizational Plaintiffs likewise lack standing to challenge this alleged burden on the right to vote. They do not have representational standing because they have not identified

any individual members who would have standing. And they do not have organizational standing because their bare assertions of resource diversion, *see* Lopez Decl. ¶27; Nicholas Decl. ¶18, are insufficient. *See Lane*, 703 F.3d at 675.

f. The Home County and Uniform Hours Requirements

The only individual plaintiff expressing any desire to vote in-person is Permar. *See* Permar Decl. ¶4. She asserts that because she is blind she uses public transportation and "[i]f precincts are consolidated in a manner in which [she] would not have access to [her] polling place via public transportation, it would place a severe burden on [her] ability to [her] vote in-person." *Id.* ¶7. She also asserts that she does not believe that she "should have to stand in long lines because of excessive precinct consolidation." *Id.* ¶8.

These concerns are entirely speculative. Permar makes no assertions supporting the highly unlikely proposition that Durham County—should it even need to engage in precinct consolidation—would not locate any polling places near public transportation. Indeed, in the 2020 Primary Election, one early voting location in Durham County was the Broadhead Center at Duke University, *see 2020 Primary Election Early Voting Schedule*, DURHAM CTY. BD. OF ELECTIONS (2020), https://bit.ly/3hxxhzH, the same campus on which Permar works, *see* Permar Decl. ¶1.

Likewise, Permar's speculative concern about long lines lacks sufficient factual support to secure her standing to challenge either the Home County Requirement or the Uniform Hours Requirement.

Finally, the organizational plaintiffs lack standing to challenge the Home County or Uniform Hours Requirements. Neither has representational standing because they have not identified any individual members who would have standing. And they do not have organizational standing because their bare assertions of resource diversion, *see* Lopez Decl. ¶28; Nicholas Decl. ¶20, are insufficient. *See Lane*, 703 F.3d at 675.

2. The Organizational Plaintiffs Do Not Have Prudential Standing.

The organizational plaintiffs face a second, insurmountable obstacle to pressing claims based upon the constitutional right to vote: they do not have any such right. The organizational plaintiffs' complaint is that state laws and policies violate the rights of unspecified North Carolina voters—third parties who are strangers to this action.

To overcome the limits on third-party standing, the organizational plaintiffs must show that: (1) they have a " 'close' relationship" with the individuals whose constitutional rights they seek to assert; and (2) the individuals whose constitutional rights are at issue face a "hinderance" to their "ability to

protect [their] own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Neither is satisfied here. First, the relationship between the organizational plaintiffs and third-party voters is nothing like the special relationships of intimacy and confidence that courts have found sufficient for third-party standing. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (parent-child); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 (1989) (attorney-client); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440 n.30 (1983) (abortion provider-patient). Moreover, the organizational plaintiffs' interests are antagonistic to those of voters to the extent that the organizational plaintiffs challenge laws that safeguard the integrity of the State's elections.

Second, parties whose rights are directly affected are their own best representatives, to the exclusion of others, unless third-party plaintiffs make an affirmative showing otherwise. *See Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002); *Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 422 (4th Cir. 1984). The organizational plaintiffs cannot make such a showing. The claims of individual plaintiffs Clark, Cates, Edwards, Priddy, and Hutchins, who suffer from various ailments, demonstrate that voters readily can bring their own suits.

Other courts have found a lack of third-party standing in voting rights cases, including in the current pandemic, and this

Court should do the same. *See Priorities USA v. Nessel*, No. 19-13341, 2020 WL 2615766 (E.D. Mich. May 22, 2020), *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1115 (N.D. Ala. 2016).

B. Plaintiffs' Constitutional Voting Rights Claims Must Be Dismissed Under the Political Question Doctrine.

When recently presented with claims that Georgia election officials had not adequately responded to the threat of COVID-19 in violation of the constitutional right to vote, a federal court dismissed the claims under the political question doctrine. *See Coal. for Good Governance v. Raffensperger*, No. 20-1677, 2020 WL 2509092 (N.D. Ga. May 14, 2020). The court reasoned that the claims had two characteristics that Supreme Court precedent makes important when deciding whether a case presents a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; and (2) a lack of judicially discoverable and manageable standards for resolving it. *See Baker v. Carr*, 369 U.S. 186, 217 (1962). As to the first, the court pointed to the Elections Clause's commitment of "the administration of elections to Congress and state legislatures—not courts," which is "especially important during crises such as the present one involving a medical pandemic." *Coal. for Good Governance*, 2020 WL 2509092, at *3. As to the second, the court explained that the plaintiffs' claims ultimately turned on

"whether the executive branch has done enough," and resolving that issue "with any degree of certainty would be impossible, as there are no judicially discoverable and manageable standards." *Id.*

Coalition for Good Governance is on all fours with this case, its reasoning is persuasive, and this Court should follow it. Any standard for resolving claims in the sensitive area of election regulation "must be grounded in a limited and precise rationale and be clear, manageable, and politically neutral." *Common Cause v. Rucho*, 139 S. Ct. 2484, 2498 (2019) (quotation marks omitted). Here, the General Assembly balanced many incommensurable values when deciding upon procedures for the upcoming election during a pandemic. The Court cannot second-guess this judgment without making "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217, and even after making that threshold legislative judgment the Court would need to set about making a series of further "unmoored determination[s]" before deciding whether to order the sweeping relief Plaintiffs request *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012).

C. The State's Election Laws Do Not Unduly Burden the Right To Vote.

Even if the Court has jurisdiction, Plaintiffs are unlikely to succeed on the merits of their constitutional right-to-vote claims.

1. The Applicable Legal Framework

The Court's review is dictated by the *Anderson-Burdick* framework. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 604–05 (4th Cir. 2016) (citing *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992)). That framework accepts "that there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 605 (quotation marks omitted).

Reviewing courts accordingly first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Id.* (quotation omitted). If the restriction is "severe," it "must be narrowly drawn to advance a state interest of compelling importance." *Id.* at 606. But this strict scrutiny is applicable only when "the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020) (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)). Meanwhile, "a reasonable, nondiscriminatory restriction on voting rights" is "justified by a State's important regulatory interests." *Lee*, 843 F.3d at 606 (quotation marks omitted); *see also Fusaro v. Cogan*, 930 F.3d 241, 257–58 (4th Cir. 2019).

2. Voter Registration

Plaintiffs argue that "[i]n light of the COVID-19 pandemic North Carolina's 25-day registration deadline and failure to provide broader online voter registration severely burden the right to vote." PI Br. 18. Plaintiffs cannot credibly claim that the 25-day registration deadline somehow "totally denie[s]" the right to vote, because the State provides ample registration opportunities. In addition to traditional registration methods, the State provides online voter registration for all residents with a North Carolina driver's license or DMV-issued ID. Furthermore, voters may continue to register after the 25-day deadline at one-stop early voting locations that are available beginning the third Thursday before an election through the last Saturday before an election. *See* N.C. GEN. STAT. § 163-227.2(b).

Given these ample registration opportunities, Plaintiffs cannot plausibly allege that voters will be denied the opportunity to register. The State makes that opportunity *available* for *every* voter; the State is not responsible if any voters choose not to avail themselves of those opportunities. Because voters "have ample time and opportunity" to register, the 25-day requirement's burden on voters is, at most, "modest." *Pisano v. Strach*, 743 F.3d 927, 936 (4th Cir. 2014).

The State's interests justify the registration deadline. The State has "an interest in ensuring orderly, fair, and efficient

procedures for the election of public officials." *Id.* at 937 (quotation marks omitted). "This interest necessarily requires the imposition of some cutoff period to verify the validity of" the applications. *Id.* (quotation marks omitted). Plaintiffs give no reason to think that the 25-day requirement is incongruent with that interest. The balance between the modest burden of the registration deadline and the State's interest in verification favors the State.

For similar reasons, the State's decision offer online registration only through the DMV's website is perfectly constitutional. Legislative Defendants are not aware of any case holding that a State is obligated by the federal Constitution to have *any* online voter registration system in addition to the traditional paper-based one. That the State even offers even a single website for online registration puts it ahead of about 11 other states including Maine, New Hampshire, and Texas. *See Online Voter Registration* ("*Online Voter Registration I*"), NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 3, 2020), https://bit.ly/2YALXqd.

Plaintiffs offer virtually no explanation for how an additional registration website administered by DHHS would meaningfully improve registration opportunities. They offer no evidence of the proportion of eligible, unregistered North Carolina citizens who do not have DMV-issued identification and cannot register through other means. *See Online Voter*

Registration, N.C. STATE BD. OF ELECTIONS, https://bit.ly/31oVKSd (last visited June 26, 2020). Available statistics indicate that the number is likely is substantially less than 10% and perhaps as low as 0.1%. *See N.C. State Conference of NAACP v. Cooper*, 430 F. Supp.3d 15, 38 (M.D.N.C. 2019) (observing that in 2019 the SBOE found that at least 91.9% of registered voters had DMV-issued ID); *Citizen Voting-Age Population: North Carolina*, U.S. CENSUS BUREAU (Nov. 15, 2016) (7,296,335 citizens of voting age), https://bit.ly/3dpNtzv; Office of Highway Policy Info., *Highway Statistics 2018*, FED. HIGHWAY ADMIN. (Feb. 28, 2020) (7,267,042 licensed drivers in North Carolina in 2016), https://bit.ly/31dzLxu; Kim Westbrook Strach, *Prior Education Efforts on Voter Identification Requirements (2014-16)*, at slides 30-31, N.C. STATE BD. OF ELECTIONS & ETHICS ENFORCEMENT (Nov. 26, 2018) (less than 0.1% of voters in March 2016 primary cast provisional ballot for lack of qualifying ID, which included DMV-issued ID), https://bit.ly/2lLiV6M. Nor do Plaintiffs explain how restricting online registration to those with DMV-issued ID unduly burdens the right to vote, when that is majority practice of the States. *See Online Voter Registration I*, *supra*. And Plaintiffs further do not explain how even a single voter has ever been hindered from registering to vote because DHHS has not operated a registration website apart from the DMV's. In short, they point to no tangible,

concrete burden that the State's registration system imposes on any would-be voter.

On the other side of the *Anderson-Burdick* calculus, Plaintiffs entirely ignore the need to avoid voter confusion and to secure sensitive voter information. Were there a proliferation of State agency websites available for registration, the State would need to expend significant resources to securely maintain the information deposited through the websites and would need to make efforts to allow voters to differentiate those agencies whose websites permit voter registration from those that do not. Moreover, because the State must ultimately verify each voter registration application, *see* N.C. GEN. STAT. § 163-82.7, a DMV-centered online registration system helpfully connects any applicant to an existing DMV account and therefore streamlines the verification process.

"[F]ederal courts don't lightly tamper with election regulations," especially when "the new election procedures proffered by Plaintiffs threaten to take the State into unchartered waters." *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam). It is perhaps possible the registration scheme proposed by Plaintiffs here "will prove workable," but those same changes "may also pose serious security concerns and other, as yet unrealized, problems." *Id.* While federal courts "can enter positive injunctions that require parties to comply with existing

law," they may not usurp the authority of State officials "to choose among many permissible options when designing elections." *Id.* Whether to have one, two, or many online portals for voter registration is exactly the kind of discretionary choice left to the State.

3. The Ballot Harvesting Ban

Before HB1169, North Carolina law: (1) required that an absentee ballot request be physically submitted using the State's Absentee Ballot Request Form; (2) allowed only a "voter's near relative or verifiable legal guardian" or MAT members to "complete[], partially or in whole" or to "sign[]" the request form, *see* N.C. GEN. STAT. § 163-230.2(e)(2); and (3) allowed only the voter, his near relative or verifiable legal guardian, a MAT member, the Postal Service, or a statutorily authorized delivery service to deliver a completed request form, *see id.* § 163-230.2(c), (e)(4).

Plaintiffs challenged all three of these laws, the former of which they dubbed the "Form Requirement" and the latter two of which they refer to as the "Organizational Assistance Ban," PI Br. 21–22, although it would be more aptly described as a "Ballot Harvesting Ban."

Of course, "there is no constitutional right to an absentee ballot." *Mays*, 951 F.3d at 792. Therefore, restrictions on absentee ballots are reviewed only for rationality unless the putative voter

is "in fact *absolutely prohibited* from voting by the State" when looking at the state's election code "as a whole." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 & 808 n.7 (1969) (emphasis added); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 403 (5th Cir. 2020).

North Carolina "permits the plaintiffs to vote in person; that is the exact opposite of absolutely prohibiting them from doing so." *Tex. Democratic Party*, 961 F.3d at 404 (quotation marks and alterations omitted). Therefore, "*McDonald* directs [this Court] to review [North Carolina absentee-ballot laws] only for a rational basis." *Id.* at 406. This is true not only for the Ballot Harvesting Ban but also for the additional absentee restrictions that Plaintiffs challenge. That said, as Legislative Defendants show below, each challenged provision of North Carolina law satisfies even the inapplicable *Anderson-Burdick* framework.

With the passage of HB1169, Plaintiffs' challenge to the Form Requirement has largely been mooted; the State will now allow absentee ballot requests online and by email and fax for all further 2020 elections. While Plaintiffs continue to fault the State for choosing not to allow absentee ballot requests to be submitted over the phone, *see* PI Br. 29, the lack of such an option when voters can request absentee ballots online, by email or fax, or through the mail is not a "severe" burden on the right to vote. Whatever burden exists is minute, as any voter with an internet

connection (or any near relative who has access to the internet) would be able to secure an absentee ballot without the need to travel. And the State's interest in maintaining written and electronic records, complete with wet signatures or e-signatures for verification, is legitimate and demonstrates why the State continues to disallow over-the-phone requests.

HB1169 also completely neuters Plaintiffs' challenge to the Ballot Harvesting Ban. The thrust of Plaintiffs' *Anderson-Burdick* claim with respect to absentee ballot requests hinged primarily on the burdens allegedly imposed by the Form Requirement. The Ballot Harvesting Ban, according to Plaintiffs, merely "augments" the challenges previously posed by the Form Requirement by allegedly "preventing organizations like LWVNC from helping voters to correctly complete and deliver request forms." PI Br. 23.

The suspension of the Form Requirement in the 2020 elections undercuts Plaintiffs' claim of undue burden from the Ballot Harvesting Ban, because without the Form Requirement voters will be less likely to need the assistance of organizations to complete their absentee ballot requests. For example, Plaintiffs argued that because Plaintiff Cates could not print the request form, she would need "to seek help from others" and that the Ballot Harvesting Ban interferes with that assistance. *Id.* However, now that Cates can submit an online request, she no longer requires such assistance. The same is true of Plaintiff Hutchins; under

HB1169, his wife may now submit the absentee ballot request for him using the online option.

Plaintiffs' remaining gripes with the Ballot Harvesting Ban stem from a substantial over-reading of the statute's restrictions. Section 163-230.2 prohibits three discrete acts: (1) "complet[ing]" the applicant's request form; (2) "sign[ing]" the form; and (3) "deliver[ing]" the form to the county board of elections. The so-called "Organizational Assistance Ban" does not actually prohibit all forms of "assistance" that an organization may provide a voter. The three acts prohibited by Section 163-230.2 still leave organizations with plenty of opportunities to help voters themselves "complete," "sign," and "deliver" their requests.

For instance, organizational Plaintiffs lawfully may provide oral or written guidance to voters who "are not confident that they understand the process of voting by mail" and "need[ ] assistance to navigate the ballot request process." PI Br. 23–24. A LWVNC volunteer could, consistent with Section 163-230.2, discuss filling out an absentee ballot request line-by-line with any of the individual Plaintiffs or any other voter, answering whatever questions the voter has along the way, so long as the volunteer does not "complete" the application in whole or part by putting pen to paper or by making keystrokes; "sign" the application on behalf of the voter; or "deliver" the application

by physically bringing the request to the county board of elections. The prohibition is exceedingly limited. The narrowness of the Ballot Harvesting Ban means that the law poses only a minimal burden on the right to vote, especially now that voters in 2020 elections are not physically required to deliver paper requests to the county boards.

Meanwhile, the government's interests in the Ballot Harvesting Ban are weighty. While Plaintiffs concede that the Ban "was passed in the wake of the Dowless Scheme and therefore has some connection to preventing voter fraud," they fault the restriction as "not narrowly drawn" because the state can "achieve its anti-fraud goals in other, less burdensome ways." PI Br. 29. This fundamentally misunderstands the *Anderson-Burdick* framework.

"The 'narrow tailoring' or 'least restrictive means' analysis has always been reserved for a court's *strict scrutiny* of a statute." *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (emphasis added). And under *Anderson-Burdick*, "requirements constituting an unreasonable, discriminatory burden are the only requirements subject to strict scrutiny review." *Id.* While Plaintiffs argue about "the extent to which [the State's] interests make it necessary to burden [their] rights," that question "only becomes relevant when the challenged statute constitutes an unreasonable, discriminatory burden" subject to strict scrutiny. *Id.* For "reasonable and nondiscriminatory rules"—like the Ballot

Harvesting Ban—the court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (quotation marks and alterations omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate empirical verification." *Id* (quotation omitted).

The State has met its burden. The Dowless scheme exposed that absentee ballots are particularly susceptible to fraud. *See* Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. Indeed, Legislative Defendants' expert found evidence of at least 1,265 voters who voted in both North Carolina and another state in the 2016 general election—64% of whom cast an absentee ballot in North Carolina. Block Decl. ¶38. In the aftermath of the Dowless scandal, the State reasonably and credibly decided that preventing abuse of the ballot collection process required targeted restrictions on handling absentee ballot requests by individuals outside of the voter's family and the MAT. SB 683 passed with unanimous support in the Senate and with a lone nay in the House. Plaintiffs cannot credibly contend that 160 state legislators lacked any "reasoned" or "credible" arguments for enacting this limited regulation on ballot harvesting. In these circumstances, the Court thus has "no basis for finding [the] state statutory scheme unconstitutional." *Wood*, 207 F.3d at 717.

4. The Witness Requirement

North Carolina law requires that for the 2020 elections an absentee-by-mail voter need only "mark[] the ballot in the presence of at least one person who is at least 18 years of age" and not otherwise disqualified by North Carolina law, "provided that the person signed the application and certificate as a witness and printed that person's name and address on the container-return envelope." HB1169 § 1(a).

The State's relaxed Witness Requirement satisfies the *Anderson-Burdick* test. The law is not subject to strict scrutiny because it does not impose "an unreasonable, discriminatory burden" on voting rights. *Wood*, 207 F.3d at 716. Indeed, the Witness Requirement poses a modest burden even for those voters who live alone and are susceptible to the virus. The law only requires that the ballot be marked "in the presence" of a witness, HB1169 § 1(a), and "presence" in similar contexts (like signing wills) is satisfied even if a witness is in a different room or several feet away from the individual signing a document. *See, e.g.*, *Umstead v. Bowling*, 150 N.C. 507, 64 S.E. 368, 371 (1909).

Voters therefore can satisfy the Witness Requirement while abiding by all relevant social-distancing and sanitization guidelines. For example, any family member, friend, neighbor, mail-delivery person, food-delivery person, or MAT member can watch the voter mark their ballot through a window, glass door, or

other barrier. At that point, the voter can pass the ballot under a closed door or through an open window to be marked, signed, and returned (after handwashing or sanitizing) without direct interaction between the two persons. These options are available to practically all voters living alone and would not require the voter or the witness to come within six feet of each other or break other social-distancing guidelines. By engaging in these sorts of protective activities, voters can vote without exposing themselves to any appreciable risk of contracting the virus. *See* Plush Decl. ¶¶7, 11–14, 18–19, 21; Schauder Decl. ¶¶11–18.

Because the Witness Requirement is a "reasonable and nondiscriminatory rule[]," the State's burden is merely to "articulate its asserted interests", with "[r]easoned, credible argument," rather than "elaborate empirical verification." *Libertarian Party of Va.*, 826 F.3d at 708 (quotation marks and alterations omitted). The Witness Requirement is a rational means of promoting the State's interest in deterring, detecting, and punishing voter fraud. And that interest is compelling. *See Citizens for Tax Reform v. Deters*, 518 F.3d 375, 387 (6th Cir. 2008). Articulation of this interest alone suffices to "justify[] [the State's] reasonable, nondiscriminatory" Witness Requirement. *Wood*, 207 F.3d at 717.

Plaintiffs argue that the Witness Requirement is "not a particularly effective anti-fraud measure," PI Br. 33, and "is not

narrowly tailored," *id.* at 34. But the Witness Requirement does not need to be narrowly tailored, *see Wood*, 207 F.3d at 716, and Plaintiffs' criticism of the requirement's effectiveness misses the mark. Plaintiffs' appeal to *Thomas v. Andino*, No. 20-01552, 2020 WL 2617329 (D.S.C. May 25, 2020), is misplaced because under the South Carolina provision there election officials arguably "have no ability to verify the witness signature" because it law did not mandate the inclusion of verifying information. *Id.* at *19–20. The 2020 Witness Requirement requires the witness to print his or her name and address, thereby serving as a more "effective fraud deterrence, prevention, detection, [and] prosecution tool[]." PI Br. 35.

5. Drop Boxes

Plaintiffs seek to enjoin the State to "provide for contactless drop boxes for voters to deliver absentee ballots." PI Br. 22. Plaintiffs make this claim despite the fact that "there is no constitutional right to an absentee ballot" in the first place, *Mays*, 951 F.3d at 792, let alone a right to deliver that ballot however one sees fit.

Plaintiffs assert that drop boxes "would allow voters without access to postage and USPS pick-up to securely deposit their ballots without breaking social distancing guidelines, and would further reduce the strain on North Carolina's mail infrastructure." PI Br. 27. But simply because such drop boxes

might benefit some absentee voters, that alone does not mean that the State's decision to allocate its limited resources toward other election-related matters somehow runs afoul of the Constitution. Plaintiffs impliedly speculate that voters "rel[iance] on USPS to safely submit their ballots" will potentially prove insufficient given that "USPS will have to handle an unprecedented volume of absentee ballots." *Id.* These conclusory suppositions—unsupported by any evidence—fall far short of showing that voters lack adequate opportunities to submit their mail-in ballots without drop boxes.

Plaintiffs cite no judicial authority either questioning the constitutional adequacy of permitting Postal Service delivery of absentee ballots or imposing on a State a particular method of returning absentee ballots. Indeed, at most only "[t]en states provide ballot drop boxes in some or all counties." *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONFERENCE OF STATE LEGISLATURES (June 22, 2020), https://bit.ly/3ezVWll. Given that the historical and present norm among the states is *not* to provide drop boxes, it would be unusual indeed if 80 percent of states were unknowingly violating the Constitution.

And while Plaintiffs assert that "North Carolina can easily implement" a drop box program, PI Br. 27, that is untrue. Contactless drop boxes present several problems including (1) the risk of partisan manipulation and discrimination in selecting the

locations of the drop boxes (or a perception thereof); (2) the cost of purchasing and securing the boxes; (3) the need to monitor and collect ballots from the drop boxes and to prevent loss, tampering, vandalism, or theft; and (4) the burdens of providing the security for county board employees who will need to collect and transport the ballots. *See* Devore Decl. ¶10; Hawkins Decl. ¶7.

Because the State's decision to abstain from providing drop boxes is nothing more than a "reasonable and nondiscriminatory rule[]," the State's burden is merely to "articulate its asserted interests" with "[r]easoned, credible argument." *Libertarian Party of Va.*, 826 F.3d at 719 (quotation omitted). Its asserted interests in administrative convenience and the allocation of limited resources in the remaining time before the election "readily falls under the rubric of a state's regulatory interests, the importance of which the Supreme Court has repeatedly recognized." *Wood*, 207 F.3d at 715 (quotation marks omitted). And the State's decision to abstain from wading into the practice of drop boxes clearly "furthers these interests." *Id.*

6. Opportunity To Cure

Plaintiffs argue that the State unduly burdens the right to vote by not guaranteeing to voters statewide "an opportunity to cure deficient absentee ballot requests or ballots, or to submit a [Federal Write-in Absentee Ballot] as an alternative of last

resort." PI Br. 36. Plaintiffs confuse what they believe to be good policy with what the Constitution demands of States.

Some of Plaintiffs' concerns derive from mistaken premises already addressed. For example, Plaintiffs assert that "there is a heightened risk that voters new to mail-in absentee voting will fail to follow the proper procedures" due to the Ballot Harvesting Ban. But the Ban does not prevent any person from helping an individual understand the procedures surrounding mail-in absentee voting and would permit the organizational plaintiffs' members to walk a voter line-by-line through an absentee ballot. More fundamentally, Plaintiffs cannot identify a single instance where election officials rejected an absentee ballot based on some mistake that could have been cured. This alone indicates that the purported burden here is, at most, minimal.

Plaintiffs' other predominant concern—that State and county election officials, as well as the Postal Service will "fail[] to timely deliver" absentee ballots to voters in the mail, *id.* at 37—rests on speculation that falls short of establishing a significant burden. Plaintiffs merely assert that because of the expected increase in absentee mail-in ballot use this November "it is likely that many North Carolina voters will likewise receive their ballots too late to cast them." *Id.* Plaintiffs' only evidence concerns the failure to deliver absentee ballots in recent elections this past spring. Of course, there is a significant difference between those

primary elections and the November general elections: time. Given the timing of COVID-19's spread in the United States, election officials and the Postal Service had little time to make adjustments in the spring. The November election, meanwhile, is still more than four months away and both government officials and postal employees have greater notice of the challenges that lie ahead and are therefore better equipped to confront them effectively.

Plaintiffs also ignore the State's substantial interests in finality and administrative convenience. What Plaintiffs seek—a formal administrative apparatus designed to cure approximately 90,000 absentee ballots, *see* Gronke Decl. ¶15 fig. 4, Doc. 12-2 (June 5, 2020) (2016 statistics), and countless more absentee ballot request forms—could upend the finality of North Carolina's elections—and perhaps their legitimacy. Absentee ballots can be received by the county boards as late as election day itself and requiring election officials to dedicate potentially thousands of hours to assessing the curative potential for each rejected absentee ballot could easily delay election results—particularly in close contests—by weeks. While some county boards have opted to undertake this process, *see* Devore Decl. ¶11; Hawkins Decl. ¶8, the State's decision to refrain from imposing such a curative process on each county board is nonetheless backed by important

and substantial interests in finality and administrative convenience.

Further, while Plaintiffs demand that mail-in absentee voters be permitted to correct mistakes made in casting their ballots, they have not a word to say about in-person voters, who clearly do not have an opportunity to cure any mistakes they make after casting their votes. Absentee voters therefore are not treated any worse than other voters.

Because the State's decision to abstain from providing a mandatory curative process for absentee ballots is a "reasonable and nondiscriminatory rule[],"and because the State's articulated its asserted with "[r]easoned, credible argument," *Libertarian Party of Va.*, 826 F.3d at 719, its practice is constitutional.

7. The Home County Requirement

North Carolina law applicable to the 2020 elections requires that at least one poll worker be a resident of the precinct, and that all poll workers in the precinct at least be members of the county. *See* HB1169 § 1(b). Plaintiffs take aim at even this modest polling-place regulation. *See* Second Am. Compl. ¶¶79–82, Doc. 30 (June 18, 2020).

Plaintiffs' challenge to the "Home County Requirement" can be rejected summarily. The thrust of Plaintiffs' claim is that enjoining the Home County Requirement is "required to prevent the closure of polling locations in the November election in light of

the anticipated persistence of COVID-19 and the advanced age of poll workers." PI Br. 41. But none of Plaintiffs' preliminary injunction papers address the central premise of this argument: that the Home County Requirement causes precinct consolidation. While Plaintiffs' exhibits and declarations do address the potential connections between a Majority Precinct Requirement and precinct consolidation, *see, e.g.*, Lopez Decl. ¶29; Gronke Decl. ¶¶23, 50, 60; Bartlett Decl. ¶22, Doc. 12-3 (June 5, 2020); Riggs Decl. Ex. 1, at 5, Doc. 12-7 (June 5, 2020); Riggs Decl. Ex. 2, at 4, Doc. 12-7 (June 5, 2020), they say *nothing* about how a Home County Requirement—which significantly expands the pool of potential poll workers for any given polling place—would have a similar effect.

Indeed, one of Plaintiffs' own exhibits specifically requested that the legislature "allow county boards to recruit and train poll workers *from across the county*," Riggs Decl. Ex. 3, at 1, Doc. 12-7 (June 5, 2020) (emphasis added), i.e., that the General Assembly adopt the very Home County Requirement that Plaintiffs now assail. *See also* Second Am. Compl. ¶81.

The most that Plaintiffs can say about the Home County Requirement is the assertion in their amended complaint that a June primary election in Georgia shows "that this expansion will still be insufficient to prevent a poll worker shortage, as even county-wide recruitment of poll workers proved insufficient to

properly staff poll locations." *Id.* ¶82. This conclusory allegation would not suffice to survive a motion to dismiss, let alone justify a preliminary injunction. Plaintiffs offer no explanation for how an anecdotal news account of a handful of polling locations in another state is at all probative of the Home County Requirement's effect on the 2020 General Election in North Carolina.

Plaintiffs cannot show that the law burdens their rights to vote *at all* and it therefore necessarily satisfies *Anderson-Burdick*. *See McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995). At any rate, the State's interest in election administration and integrity supports the requirement that poll workers reside in-county.

8. The Uniform Hours Requirement

Finally, Plaintiffs argue that the State's Uniform Hours Requirement—that all early voting sites remain open during uniform hours and that all sites aside from the county board office must be open from 8:00 AM to 7:30 PM—unconstitutionally burdens the right to vote. But this claim rests upon speculation and a disregard for the State's important interests in election integrity.

Plaintiffs claim that the Uniform Hours Requirement "caused 43 counties to reduce the number of early voting sites in the 2018 general election compared to 2014 and over two-thirds of counties

to reduce weekend hours." PI Br. 41. But the overall picture is one of vastly *expanded* early voting opportunities in 2018. Statewide, there was a modest 17% decrease in the number of early voting *sites*, but that was coupled with a robust 94% *increase* in early voting *hours*. *See* Callanan Decl. ¶¶9–10. Plaintiffs therefore have zero evidence that the Uniform Hours Requirement restricted voting opportunities.

Plaintiffs also lack any basis for asserting that any precinct consolidation resulting from the Uniform Hours Requirement will cause voters "confusion," "increased travel time," or "long lines and crowds." PI Br. at 42. First, the Uniform Hours Requirement is designed to *reduce* voter confusion. Under the law, "[v]oting hours for a county can be publicized and a voter in that county can be assured that their voting site will be open on those days and times without having to do further research." Hawkins Decl. ¶5; *see also* Devore Decl. ¶8; Weatherly Decl. ¶3. And to the extent that a county confronts precinct consolidation (for whatever reason), it must give the public 45 days' notice through a variety of media and must mail individual notices to all registered voters no later than 30 days before the election. *See* N.C. GEN. STAT. § 163-128(a).

Second, Plaintiffs point to no concrete evidence showing that the Uniform Hours Requirement has led to "increased travel time" for Permar or any other early voter. The early voting sites for Durham County have not yet been announced and at least one

convenient early voting location close to Permar's place of work existed prior to the March Primary Election. *See supra* Part I.A.1.f. Nor have Plaintiffs proffered any evidence that the Uniform Hours Requirement would inevitably lead to unavoidable lines and crowds at early voting locations. Indeed, one should suspect the law to have the opposite effect: Even if fewer early voting locations are established for the 2020 General Election, the locations that remain open will operate at least every weekday from 8:00 AM to 7:30 PM. As explained above, in 2018 the requirement led to a near-doubling of the total early voting hours in the State. If anything, then, the ability to avoid a crowded polling station should be *enhanced* under the Uniform Hours Requirement.

Perhaps most importantly, Plaintiffs' speculation about the need for precinct consolidation lacks foundation in light of HB1169, which allocates an additional $6 million "for early one-stop voting-related expenses" in counties "that adopt uniform early one-stop voting plans." HB1169 § 11.1(b)(5). This substantial funding significantly decreases the likelihood that the Uniform Hours Requirement will cause precinct consolidation on the scale that Plaintiffs' imply.

The Uniform Hours Requirement is designed to *expand* access to one-stop early voting. To the extent that the law may not fully produce that intended effect and instead burdens the right to vote,

that burden is modest. Moreover, the State's interests in avoiding voter confusion by promoting uniformity and promoting administrative convenience by making it easier for counties to publicize early voting hours, *see* Devore Decl. ¶8; Hawkins Decl. ¶5; Weatherly Decl. ¶5, justify such a reasonable, nondiscriminatory election regulation. The State's additional interest in reducing the potential for discrimination in allocation of early voting hours throughout a county (or the suspicion thereof) likewise justifies whatever burdens may flow from the Uniform Hours Requirement. *See id.*

D. Plaintiffs' "Unconstitutional Conditions" Claim Fails.

1. The unconstitutional-conditions doctrine is irrelevant to this case because the State has not conditioned the provision of any government benefit on Plaintiffs agreeing to forgo exercise of their constitutional rights. "[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by *coercively withholding benefits* from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (emphasis added); *see also Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–28 (1989). The circumstances that trigger the unconstitutional-conditions doctrine are not present here: Plaintiffs are not challenging the withholding of government

benefits, and Legislative Defendants are not arguing that Plaintiffs voluntarily agreed to give up a constitutional right in exchange for such benefits.

Plaintiffs contend that the unconstitutional-conditions doctrine is implicated because North Carolina election law allegedly forces them to choose between their constitutional voting rights and their substantive due process right to bodily integrity. But the correct way to analyze cases in which more than one constitutional right is at stake is to apply the ordinary legal standards that govern claims under each of the constitutional rights in question. That is what the en banc Fourth Circuit did when it upheld a Maryland statute that was alleged to unconstitutionally force an indigent criminal defendant to choose between his appellate rights under the Due Process Clause and his Sixth Amendment right to counsel of choice. *Miller v. Smith*, 115 F.3d 1136, 1139–44 (4th Cir. 1997) (en banc); *see also Telescope Media Grp. v. Lucero*, 936 F.3d 740, 762 (8th Cir. 2019). The Supreme Court cases that Plaintiffs cite are not to the contrary. Each of those cases applied the ordinary legal standard that was appropriate for the constitutional rights that were at issue, not the unconstitutional-conditions doctrine. *See Lefkowitz v. Cunningham*, 431 U.S. 801, 807–08 (1977); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Simmons v. United States*, 390 U.S. 377, 394 (1968).

Preceding sections of this brief have already explained why Plaintiffs have not stated viable claims for abridgement of their constitutional voting rights. Those same claims cannot succeed when repackaged under the inapplicable unconstitutional-conditions doctrine.

2. Although mislabeled as a claim under the unconstitutional-conditions doctrine, much of Plaintiffs' discussion of this claim focuses on their contention that application of North Carolina's election laws in the upcoming general election would violate their substantive due process right to bodily integrity. This argument is meritless.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Supreme Court held that the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without due process of law, but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 194–95 (quotation marks omitted). Under *DeShaney* and its progeny, the baseline rule is that "[l]iability does not arise when the state stands by and does nothing in the face of danger." *Stevenson ex rel. Stevenson v. Martin Cty. Bd. Of Educ.*, 3 Fed. App'x 25, 31 (4th Cir. 2001).

Outside the custodial context, the only exception to that rule applies when "*affirmative* misconduct by the state . . .

creat[es] or enhanc[es] the danger" that someone confronts. *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) (quotation marks omitted). "[A]ffirmative conduct" on the state's part is "[a] key requirement for liability" under this "narrow" exception, and government officials cannot trigger the exception "merely through inaction or omission." *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015). Plaintiffs cannot establish any such affirmative conduct by the State. The spread of the coronavirus is a natural phenomenon that the State did not cause, much less cause through any "affirmative" act. *Cf. Coal. for Good Governance*, 2020 WL 2509092, at *3 n.2. Just as the Constitution would not affirmatively require the State to protect Plaintiffs were they required to traverse crime-ridden streets to reach the polling place, it likewise does not affirmatively require the State to protect Plaintiffs from a pandemic when voting. Imposing such a burden would be particularly inappropriate here, when voters can take simple and common-sense measures such as wearing masks, engaging in social distancing, and using hand sanitizer to protect themselves at the polls. *See* Plush Decl. ¶¶7, 11-14, 18-19, 21; Schauder Decl. ¶¶11-18.

Plaintiffs cannot sidestep this issue by artfully recharacterizing the State's failure to take additional precautions against the coronavirus as an "affirmative act"; the Fourth Circuit has often and recently rejected such efforts to use "semantics" to "disguise" the lack of an affirmative act by

government officials. *Rosa*, 795 F.3d at 440; *see also, e.g.*, *Graves v. Lioi*, 930 F.3d 307, 328–29 (4th Cir. 2019); *Pinder*, 54 F.3d at 1175.

Even if Plaintiffs' feared injuries were attributable to an affirmative act by the State, their substantive due process argument would still fail because the right that Plaintiffs assert falls far outside the ambit of any right the Supreme Court has ever recognized under the heading of "bodily integrity." Supreme Court precedent requires a "careful description of the asserted fundamental liberty interest," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see Hawkins v. Freeman*, 195 F.3d 732, 747 (4th Cir. 1999) (en banc), and Plaintiffs claim a substantive due process right to physical safety while voting. Plaintiffs are unable to cite *any* case that has recognized such a right—much less the sort of weighty authority that would be necessary to show that this right is "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 721. "The mere novelty" of Plaintiffs' claim "is reason enough to doubt that 'substantive due process' sustains it." *Reno v. Flores*, 507 U.S. 292, 303 (1993).

Cases in which the Supreme Court has recognized substantive due process rights related to bodily integrity reinforce the conclusion that there is no basis for the novel right that Plaintiffs assert. The Court has held that due process prohibits forced sterilizations of criminals, *Skinner v. Oklahoma ex rel.*

Williamson, 316 U.S. 535, 541 (1942), certain invasive medical procedures to secure evidence against individuals suspected of committing crimes, *Rochin v. California*, 342 U.S. 165, 166, 172 (1952), and, in some scenarios, forced administration of antipsychotic medication, *Washington v. Harper*, 494 U.S. 210, 221–22 (1990). The Fourth Circuit has extended these cases to prohibit extreme forms of corporal punishment in public schools. *See Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980). The fact patterns in each of those cases involved direct, severe, and intentional intrusions on the body by state officers; they are far afield from election officials' alleged failure to take adequate measures to guard against the spread of a communicable disease.

Further counseling against recognition of the substantive due process right Plaintiffs assert is the fact that the First and Fourteenth Amendments as interpreted in the Supreme Court's voting rights cases already define a set of constitutional requirements for balancing the benefits and burdens of various voting procedures. Plaintiffs' claims are properly analyzed under those precedents, not by extending substantive due process—a doctrine the Supreme Court "has always been reluctant to expand . . . because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

Guertin v. Michigan, 912 F.3d 907 (6th Cir. 2019), cannot fill the chasm between existing substantive due process precedents and the right Plaintiffs ask this Court to invent. *Guertin* ruled that plaintiffs injured by contaminated water in Flint, Michigan, could sue city officials for violating their "constitutional right to be free from forcible intrusions on their bodies against their will." *Id.* at 919. The panel majority in *Guertin* erred in describing the relevant substantive due process right at such a high level of generality, and the panel majority's decision lies well beyond the outer fringes of the bodily integrity rights that any other American court has recognized. *Id.* at 954–57 (McKeague, J., dissenting). Plaintiffs' substantive due process argument asks this Court to move to go considerably farther than even this highly questionable decision.

II. Plaintiffs Are Unlikely To Succeed on Any of Their Other Claims.

A. The Ballot Harvesting Ban Does Not Violate the First Amendment.

Plaintiff Schaffer and the organizational Plaintiffs claim that the Ballot Harvesting Ban violates their rights to free speech and free association under the First Amendment. But the Ballot Harvesting Ban does not touch on protected speech or association *at all*.

First, Plaintiffs entirely ignore their burden to show that the ballot harvesting that North Carolina regulates is expressive

conduct protected by the First Amendment. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). First Amendment protection extends "only to conduct that is inherently expressive." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Conduct is inherently expressive if it "is intended to be communicative and . . . in context, would reasonably be understood by the viewer to be communicative." *Clark*, 468 U.S. at 294.

Plaintiffs fail to make this showing. The Ballot Harvesting Ban regulates three discrete forms of "assistance": (1) "complet[ing]" the applicant's absentee ballot request form; (2) "sign[ing]" it; and (3) "deliver[ing]" it to the county board of elections. None of these actions constitute inherently expressive activity. And Plaintiffs offer no explanation for how this limited regulation of conduct infringes on their First Amendment rights. Plaintiffs can say *anything* they want to *any* registered voter regarding absentee ballot requests. Indeed, they can stand over the shoulder of a voter and explain step-by-step how to correctly fill out the absentee ballot request.

Courts assessing the constitutionality of ballot-collection measures regularly hold that they do not implicate the First Amendment. The Fifth Circuit has stated that the "receipt and delivery of completed voter registration applications"—analogues to the restriction here on ballot request delivery—are "two non-

expressive activities" beyond the protection of the First Amendment. *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013). The Ninth Circuit has likewise rejected that "the conduct of collecting ballots would reasonably be understood by viewers as conveying . . . a symbolic message of any sort." *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018). The non-expressive conduct regulated by the Ballot Harvesting Ban falls beyond the protections of the First Amendment. And even if "complet[ing]" or "sign[ing]" a ballot request form constitutes protected speech, it is the speech of *the voter*, not the organization or individual assisting the voter. *See Knox*, 907 F.3d at 1182; *Voting for Am., Inc.*, 732 F.3d at 390.

Because the Ballot Harvesting Ban "regulate[s] conduct only and do[es] not implicate the First Amendment, rational basis scrutiny is appropriate." *Voting for Am. Inc.*, 732 F.3d at 392. Under that standard the Ballot Harvesting Ban comes to this Court "bearing a strong presumption of validity" and it falls upon Plaintiffs "to negative every conceivable basis which might support it." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993. Meanwhile, the law passes constitutional muster so long as it is "rationally related to legitimate governmental goals," which can be based on " 'rational speculation unsupported by evidence or empirical data.' " *Wilkins v. Gaddy*, 734 F.3d 344, 348 (2013) (quoting *Beach Commc'ns, Inc.*, 508 U.S. at 315). The Ballot

Harvesting Ban clearly survives under such a deferential standard: It is a rational means of promoting the government's legitimate interest in combating election fraud. As explained above, the Ballot Harvesting Ban also easily passes the *Anderson-Burdick* test, to the extent applicable.

B. Plaintiffs Lack Standing To Assert Their Procedural Due Process Challenge, and the Due Process Clause Does Not Require the Procedures Plaintiffs Demand.

1. The individual plaintiffs lack standing to assert their due process claims because speculation that they "may well make errors" on their ballots or ballot request forms, PI Br. 62, falls far short of the "certainly impending" injury that is required to establish Article III standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

The organizational plaintiffs likewise "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 410. Moreover, the organizational plaintiffs also lack prudential standing. Plaintiffs never suggest that the practices they challenge violate the organizations' procedural due process rights, and the organizations cannot invoke the constitutional rights of a third party unless they have (1) a sufficiently close relationship with the third party, and (2) the third party is hindered in suing to protect his or her own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). As has already been explained,

the organizational plaintiffs do not satisfy either of those requirements.

2. On the merits, Plaintiffs assert that North Carolina violates the due process rights of its absentee voters because election officials do not provide a uniform, mandatory process through which voters who submit error-ridden absentee ballots are given a second chance at filling them out. This claim would fail even if Plaintiffs were correct in their premise that election officials provide no such procedures. The Fourth Circuit uses a two-pronged test to determine procedural due process violations: "a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). Here, Plaintiffs cannot satisfy either prong.

First, the absentee vote is not a protected interest. Plaintiffs correctly state that under *Wilkinson v. Austin*, protected interests may derive from the U.S. Constitution or from "an expectation or interest created by state laws or policy." 545 U.S. 209, 221 (2005). But the option of an absentee ballot is not a right itself. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("The right to vote . . . does not entail an absolute right to vote in any particular manner."). North Carolina upholds its voters' protected rights by facilitating elections, regardless of voter access to absentee ballots. *See McDonald v. Bd. of Election*

Comm'rs of Chi., 394 U.S. 802, 807–08 (1969). Even if more North Carolinians may choose to vote absentee in 2020 than in previous years, the preference for the absentee option is just that—a preference, not a protected interest. Plaintiffs fail the first prong of the test.

Second, even if absentee voting were a protected interest, it does not follow that North Carolina deprives voters of that interest because the State has not adopted Plaintiffs' chosen procedural safeguards. In considering safeguards, courts weigh three factors: the protected interest; the risk that the interest will be erroneously deprived and the probable value of additional safeguards; and the public interest, including "the fiscal and administrative burdens" that the safeguards would impose. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). If the burdens of added safeguards would overwhelm their expected value, states may reject them without violating the Due Process Clause. *See id.* at 349. So it is here.

Plaintiffs insist that North Carolina does not afford mail-in absentee voters "any notice of or opportunities to cure material defects in their absentee ballot request form[s] or the absentee ballots themselves." PI Br. 61. But in fact some, if not all, county boards of election already reach out to absentee voters to help them cure defects when doing so is feasible, *see* Devore Decl. ¶11; Hawkins Decl. ¶8, and the State Board of Elections has a

uniform policy encouraging county officials to contact voters to help them correct mistakes on absentee ballot request forms, Numbered Memorandum 2020-03 from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to County Bds. Of Elections 2–4 (Jan. 15, 2020), https://bit.ly/3eASDdj. Plaintiffs say nothing about these existing safeguards and do not even attempt to establish that additional safeguards would have value. These omissions are fatal to Plaintiffs' effort to establish a likelihood of success on the merits of their procedural due process claim. *See Wilkinson*, 545 U.S. at 225–28.

In contrast to the dearth of evidence that additional or different procedures would have value, the financial and administrative costs of what Plaintiffs appear to contemplate are overly burdensome. The Fourth Circuit has already ruled on this issue. *See Kendall v. Balcerzak*, 750 F.3d 515 (4th Cir. 2011). When a county election board rejected 2,603 referendum petition signatures without giving an opportunity for cure, the *Kendall* court found that there was no procedural due process violation because "the costs of allowing thousands of people to demand a hearing on the validity of their signatures would be disproportionate to the benefits." *Id.* at 530. The costs in this case would be significantly greater than in *Kendall*. One of Plaintiffs' experts observes that North Carolina "stands out as having a rejection rate higher than average" for absentee ballots,

Gronke Decl. ¶17, which means that Plaintiffs' proposed safeguards would require election workers to devote higher-than-average time and manpower to correcting absentee voter errors. In-person voters who make errors on their ballots generally cannot correct mistakes, and mail-in absentee voters are not entitled to any greater procedural protections.

C. The Court Lacks Jurisdiction To Consider Plaintiffs' Claims Under the Americans With Disabilities Act and Rehabilitation Act, Which Also Fail on the Merits.

The organizational plaintiffs do not claim that any of their members are disabled, and the only individual plaintiffs who claim to be disabled are Clark, Edwards, Priddy, and Hutchins. Plaintiffs say that Clark, Edwards, and Priddy "may well" not receive their absentee ballots in time to cast votes in the upcoming election, Second Am. Compl. ¶¶101, 149, but this is pure speculation. They have suffered no injury-in-fact and do not have a ripe claim under the Americans With Disabilities Act ("ADA") or the Rehabilitation Act ("RA"). *See Clapper*, 568 U.S. at 402; *Leifert v. Strach*, 404 F. Supp. 3d 973, 985 (M.D.N.C. 2019) (Osteen, J.).

Plaintiff Hutchins also has neither standing nor a ripe claim under the ADA and the RA. The SBOE has been tasked with developing guidelines to ensure that MATs will be available to assist voters like Hutchins in completing their ballots, but Plaintiffs complain that the guidelines—which the General Assembly called for less than three weeks ago—"do not exist." Second Am. Compl. ¶150.

Plaintiffs also speculate that, regardless of what the guidelines say, Hutchins's nursing home may not allow a MAT into the facility to provide help. *Id.* Hutchins will only sustain an injury if: (1) his nursing home remains under lockdown when it is time to cast an absentee ballot, such that his wife cannot help him; (2) some combination of the forthcoming guidelines and the nursing home's policy prevent a MAT from assisting Hutchins; and (3) there is no non-staff person (such as another nursing home resident) available to help. Hutchins lacks standing because he does not have a certainly impending injury, *see Clapper*, 568 U.S. at 402, and further factual developments are necessary before the Court can adjudicate any claim that Hutchins may ultimately have, *see Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

Even if Hutchins's ADA and RA claims did not fail for threshold jurisdictional and prudential reasons, they would fail on the merits. If no one else is available to help Hutchins cast his ballot, he can receive help from another nursing home resident. *See* N.C. GEN. STAT. § 163-226.3(a)(4). There is no scenario in which Hutchins will be disenfranchised by the prohibition on nursing home staff assisting him, and thus there is no violation of the ADA or the RA. The ADA and RA entitle Hutchins to "meaningful access" to the opportunity to cast an absentee ballot. *Alexander v. Choate*, 469 U.S. 287, 301 (1985); *Nat'l Fed'n for the Blind v. Lamone*, 813 F.3d 494, 505–06 (4th Cir. 2016). These statutes do

not entitle Hutchins to cast his ballot with assistance from whomever he chooses.

D. Plaintiffs Lack Standing To Assert a Claim Under Section 208 of the Voting Rights Act, and Section 208 Does Not Prohibit States from Placing Reasonable Restrictions on Who May Assist Blind Voters in Completing Their Ballots.

1. Section 208 of the Voting Rights Act applies to voters who "require[ ] assistance to vote by reason of blindness, disability, or inability to read or write." 52 U.S.C. § 10508. Nothing in the record suggests that the organizational plaintiffs have members who fit into that category, and the only individual plaintiff who qualifies is Hutchins. And Hutchins has not demonstrated that he is affected by either of the features of North Carolina law that Plaintiffs challenge under Section 208.

First, Plaintiffs argue that North Carolina law runs afoul of Section 208 by limiting who may hand-deliver a written request for an absentee ballot. PI Br. 70. But North Carolina law allows Hutchins to send the request himself via mail, N.C. GEN. STAT. § 163-226.3(e)(4), and nothing in his declaration suggests that this option would not be his preferred method of delivery. Moreover, Hutchins's wife has assisted him with voting in the past, *see* Hutchins Dec. ¶5, and she is a "near relative" who could lawfully hand deliver his request to the county board of elections, N.C. GEN. STAT. § 163-226.3(c). Even while Hutchins's nursing home is under lockdown, nothing in North Carolina law would prevent him

from telephoning his wife and asking her to fill out and deliver an absentee ballot request on his behalf. In the absence of any evidence that Hutchins would choose to avail himself of the option to have someone other than his wife hand-deliver the request form, he has not demonstrated that he is threatened with an injury that would provide standing to challenge this aspect of North Carolina law.

Second, Plaintiffs argue that North Carolina law is inconsistent with Section 208 because it does not permit nursing home staff to assist Hutchins in filling out his absentee ballot. *See* N.C. GEN. STAT. § 163-226.3(a)(4). Hutchins says that he "would like [nursing home] staff members to be permitted to assist [him] in voting and returning [his] absentee ballot," Hutchins Dec. ¶11, but he does *not* say that he has no other equally effective options available to him. Under Section 163-226.3(a)(4), both Hutchins's wife and a MAT member may lawfully help Hutchins complete his absentee ballot. Moreover, other nursing home residents could assist him.

2. If Hutchins had standing to bring a Section 208 claim, this claim would fail on the merits. By its terms and with certain exceptions, Section 208 allows blind, disabled, and illiterate voters to be "given assistance by *a* person"—not *any* person—"of [their] choice." 52 U.S.C. § 10508 (emphasis added). The statute's text thus "allows the voter to choose a person who will assist the

voter, but it does not grant the voter the right to make that choice without limitation." *Ray v. Texas*, No. 2-06-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008). Congress anticipated that "[s]tate provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon the facts." S. REP. NO. 97-417, at 63 (May 25, 1982). Courts have repeatedly rejected Section 208 challenges to state laws that narrowed, but did not eliminate, a voter's choice as to who may assist with the completion of a ballot. *See Ray*, 2008 WL 3457021, at *7; *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1198 (Ill. App. 1st Dist. 2004); *DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1135-36 (Pa. Commw. Ct. 1995). North Carolina law leaves Hutchins with many options for who will assist him in filling out his ballot—including his wife, a MAT member, and (if neither of the first two options is available) any resident of Hutchins's nursing home. Forbidding nursing home staff to help Hutchins and other vulnerable voters with this sensitive task is a reasonable step designed to prevent fraud or undue influence, and it does not unduly burden Hutchins's selection of who will assist him.

Furthermore, Section 208 only requires that states make *some* method of voting with assistance available to voters who are covered by the provision; North Carolina law is consistent with Section 208 so long as there is at least one means by which Hutchins

can cast his ballot with help from a person of his choice. If Hutchins wishes to complete his ballot with help from a member of his nursing home's staff, that staff person may accompany him to vote absentee at a one-stop voting location. N.C. GEN. STAT. § 163-227.2(e). The same staff person could also help Hutchins with his ballot at a polling place on election day. *Id.* § 163-166.8(a)(2). While Plaintiffs generally allege that these options are too dangerous, nothing in the record suggests that Hutchins could not take simple measures to protecting himself, including wearing a mask and gloves, using hand sanitizer, and bringing his own pen. *See* Plush Decl. ¶¶7, 11–14, 18–19, 21; Schauder Decl. ¶¶11–18. Especially in the absence of any concrete evidence establishing that these alternatives are unduly risky, Section 208 does not mandate that Hutchins be permitted to choose a member of his nursing home's staff to help him complete his ballot from his nursing home.

III. No Preliminary Injunction Should Issue, and Any Relief Ordered Must Be Limited to Redressing Plaintiffs' Injuries.

A. The Remaining Factors Weigh Heavily Against Issuance of a Preliminary Injunction.

Even if Plaintiffs could show that they are likely to prevail on the merits, they also must establish an irreparable injury, that the injunction will serve the public interest, and that the threatened injury outweighs any damage that an injunction may cause the opposing party. These factors tilt heavily against the issuance

of an injunction, especially the sweeping injunction that Plaintiffs request. The "inability [for a State] to enforce its duly enacted [laws] clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The election-law context of this case heightens the State's interest. Voter confusion, once caused, will not be easily remedied. In fact, a preliminary injunction modifying North Carolina election procedures followed by a later court order contradicting it would exacerbate that confusion. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Furthermore, the State's and the public's interest in the enforcement of existing North Carolina election law is especially potent in the middle of a global health crisis. State and local executive officials are closest to the problems at hand, and they need discretion to decide—consistent with the duly enacted laws of the General Assembly—how best to achieve the competing objectives of protecting public health, preventing voter fraud, and promoting participation in the upcoming general election.

B. The *Purcell* Doctrine Bars the Relief Sought by Plaintiffs.

The Supreme Court, invoking its decision in *Purcell v. Gonzalez*, "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140

S. Ct. 1205, 1207 (2020) (per curiam). That is because "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426, (2008). For example, "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that will increase "[a]s an election draws closer," *Purcell*, 549 U.S. at 4–5.

Even if Plaintiffs are correct that one or more aspects of North Carolina election law violate federal law, this Court should abstain from issuing an injunction disrupting the State's upcoming elections. "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Here, equity favors judicial modesty.

In recent months, other courts of appeals faced with election-law challenges prompted by the COVID-19 pandemic have followed the Supreme Court's lead in *Republican National Committee* and have recognized the need to "heed the Supreme Court's warning that federal courts are not supposed to change state election rules as elections approach." *Thompson*, 959 F.3d at 813; *see also Tex. Democratic Party*, 961 F.3d at 412. And they have exercised caution

under *Purcell* even though "the November election itself may be months away," *Thompson*, 959 F.3d at 813, because States cannot reasonably be expected to dramatically alter their election procedures overnight; they need sufficient time to coordinate and plan the logistics of any election-related changes.

For at least some of the relief that Plaintiffs seek—such as building a Statewide system of contactless drop boxes, creating and implementing a Statewide program for curing deficient absentee ballots, or developing secure computer software to process online registrations—the logistical challenges facing state officials are daunting. Indeed, the full effect of Plaintiffs' proposed remedies cannot even be anticipated with any precision because "moving or changing a deadline or procedure now will have inevitable, other consequences." *Id.*

Likewise, the *Purcell* principle has special purchase where, as here, "local officials are actively shaping their response to changing facts on the ground." *Tex. Democratic Party*, 961 F.3d at 412 (quotation omitted). North Carolina legislators have already revised the State's election laws to address the pandemic. These elected officials are far better positioned than a federal court to assess the balance of benefits and harms that are likely to result from altering the State's election regulations in the final months before a general election.

Finally, "[e]quity demands that those who would challenge the legal sufficiency of [legislative] decisions concerning time sensitive public [decisions] do so with haste and dispatch." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989). This rule carries additional force in the electoral context and courts have consequently withheld equitable relief on several occasions from plaintiffs who delay in initiating an action or moving for a preliminary injunction. *See, e.g.*, *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990); *Ariz. Democratic Party v. Reagan*, No. 16-3618, 2016 WL 6523427, at *16–18 (D. Ariz. Nov. 3, 2016); *Liddy v. Lamone*, 919 A.2d 1276, 1289–91 (Md. 2007).

Plaintiffs here did not file their initial complaint until May 22, 2020—nearly two months after the SBOE's Executive Director raised the potential need for legislative reform to address the impact of the pandemic on the State's elections. *See* PI Br. 11. And then Plaintiffs did not move for a preliminary injunction until more than two weeks later. Both *Purcell* and *Quince Orchard* demand that Plaintiffs' motion be denied.

C. Plaintiffs' Requested Injunction Is Overbroad.

Plaintiffs' requested injunction is overbroad in two basic ways. First, Plaintiffs ask the Court not only to prohibit North Carolina officials from taking certain unlawful actions but also to take it upon itself to effectively rewrite North Carolina election law. *See* Pls.' Am. Mot. for Prelim. Inj. 6–8, Doc. 31

(June 18, 2020). But federal courts "cannot usurp a State's legislative authority by re-writing its statutes to create new law." *Thompson*, 959 F.3d at 812 (cleaned up). Plaintiffs' efforts to enlist this Court in what amounts to legislation must be rejected.

Second, whenever this Court exercises its equitable discretion to fashion an injunction, the injunction must be "no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added). The terms of Plaintiffs' proposed preliminary injunction transgress this bedrock principle because they would have the Court universally enjoin enforcement of a variety of provisions of North Carolina law and rewrite others even though a far narrower remedy would fully redress any cognizable injuries the plaintiffs may sustain.

Take, for example, the recently amended witness requirement. Any injury suffered by the individual named plaintiffs would be fully redressed by enjoining enforcement of that requirement as applied to those individuals; the Court need not enjoin enforcement of the requirement throughout the state to provide the individual plaintiffs complete relief. A similarly tailored injunction could require the State to allow the individual plaintiffs to request absentee ballots over the telephone and without completing the form required by N.C. GEN. STAT. § 163-230.2(a); could authorize

the individual plaintiffs to receive help from whomever they choose in completing and submitting their absentee ballots; and could direct the State to contact the individual plaintiffs and help them correct any deficiencies on their absentee ballots. Awarding the individual plaintiffs any broader relief would do nothing to cure their alleged injuries and therefore contravene Fourth Circuit precedent on the appropriate scope of injunctive relief. *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003); *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393 (4th Cir. 2001); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

An injunction awarded to the organizational plaintiffs should be similarly tailored to the extent that the Court concludes that either of those plaintiffs may proceed on a representational standing theory. Before the Court issues a preliminary injunction, it should direct these entities to specifically identify any individual members on whom they rely for purposes of representational standing. If the Court concludes that preliminary injunctive relief is otherwise appropriate, it should tailor the injunction to secure the interests of identified individual members of the organizational plaintiffs—not universally enjoin or blue pencil the challenged provisions of North Carolina law. To be sure, broader relief might be appropriate if the organizational plaintiffs could show that they have organizational standing to

sue based upon a diversion-of-resources theory, but that theory fails for both Article III and prudential reasons discussed above. *See supra* Part I.A.

Even if the Supreme Court and Fourth Circuit precedents cited in the preceding paragraphs did not require this Court to tailor any preliminary injunction to the plaintiffs' actual injuries, additional considerations would make that the appropriate course.

First, to seek injunctive relief that would benefit nonparties, Plaintiffs must ask this Court to certify a class action under Federal Rule of Civil Procedure 23(b)(2). The procedural requirements of that Rule are more than empty formalisms; they reflect, among other things, decades of Supreme Court due process precedent on what courts must do to ensure that nonparties are adequately represented in litigation before their rights are adjudicated. Had Plaintiffs sought class certification, it is far from certain that they could have satisfied the Rule's typicality and adequacy requirements, for they are challenging statutory provisions that *benefit* voters by safeguarding the upcoming election—features of a larger statutory regime that balances competing objectives in a manner that was blessed by overwhelming bipartisan majorities of the General Assembly just two weeks ago. *See Alston v. Va. High School League, Inc.*, 184 F.R.D. 574, 579 (W.D. Va. 1999); *see also Schlaud v. Snyder*, 785 F.3d 1119, 1127 (6th Cir. 2015); *Valley Drug Co. v. Geneva Pharm.*,

350 F.3d 1181, 1198 (11th Cir. 2003). The Court should not permit Plaintiffs to sidestep Rule 23(b)(2) by awarding them a preliminary injunction that does more than redress their own injuries.

Second, issuing an injunction designed to remedy injuries sustained by individuals who are not parties to this litigation would exceed this Court's authority under Article III. As the Supreme Court has explained, "[t]he actual-injury requirement would hardly serve the purpose . . . of preventing courts from undertaking tasks assigned to the political branches . . . if once a plaintiff demonstrated harm from one particular inadequacy [of] government administration, the court were authorized to remedy *all* inadequacies in that administration." *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *accord DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 353 (2006).

Third, the specific subject matter of this case requires this Court to proceed with particular caution in fashioning equitable remedies. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016). The Framers understood that regulating elections is an inherently legislative task, and Article I, Section 4 reflects a careful balance of competing state and federal legislative interests. Legislative policy choices are owed special deference in this context, and the Supreme Court has repeatedly admonished the lower courts in redistricting cases for "fashioning a court-ordered plan that reject[s] state policy choices more than . . .

necessary to meet the specific constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (1982); *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018); *White v. Weiser*, 412 U.S. 783, 787–88 (1973); *see McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988). For this reason as well, the Court should resist Plaintiffs' invitation to issue a preliminary injunction that does more than redress the named plaintiffs' injuries.

CONCLUSION

The motion for a preliminary injunction should be denied.

Dated: June 26, 2020

Respectfully submitted,

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**Notice of Appearance Forthcoming*

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1) and this Court's Order of June 18, 2020 (Doc. 29), the undersigned counsel hereby certifies that the foregoing Response in Opposition to Plaintiffs' Amended Motion for Preliminary Injunction, including body, headings, and footnotes, contains 14,967 words as measured by Microsoft Word.

/s/Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 26th day of June, 2020, I electronically filed the foregoing Response in Opposition to Plaintiffs' Amended Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
Nicole J. Moss