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, vs.* 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,	Civil Action No. 20-cv-457 **BRIEF OF AMICI CURIAE REPUBLICAN COMMITTEES**

in her official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendants,

and

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,

Intervenors.

BRIEF OF AMICI CURIAE REPUBLICAN COMMITTEES

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INTERESTS OF THE AMICI

The Republican National Committee ("RNC"), the National Republican Senatorial Committee ("NRSC"), and the National Republican Congressional Committee ("NRCC") are national political party committees and national political organizations of the Republican Party of the United States, and the North Carolina Republican Party ("NCRP") is a state political organization of the Republican Party (collectively, "Republican Committees").

The Republican Committees represent interests of Republican voters and candidates for federal, state, and local elected offices. They engage in a wide range of party-building activities including voter registration and turnout programs. Based on their experience with these activities in North Carolina and across the country, the Republican Committees have substantial expertise in voting practices and procedures, and their perspectives these matters will assist the Court.

INTRODUCTION

The Constitution requires that state legislatures "shall" regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Consistent with its authority, the General Assembly enacted, and Governor Roy Cooper signed into law, H.B. 1169, Session Law 2020-17, to address challenges to voting in the 2020 election that might arise from COVID-19. H.B. 1169 provides much of the precise relief requested in Plaintiffs' initial

complaint. Dissatisfied with the legislature's response to the pandemic, Plaintiffs ask this court to replace the duly enacted legislation with its own policy judgments. Not only are Plaintiffs' requests an affront to the constitutional order, they are largely moot. Plaintiffs are unlikely to prevail on the few claims that might remain. Accordingly, Amici urge the Court to deny Plaintiffs' motion, or alternatively, stay the case to allow the state sufficient time to implement the statute's protective measures for voting.

BACKGROUND

On June 12, 2020, the North Carolina General Assembly enacted H.B. 1169, which adopted changes to voting procedures to address the COVID-19 pandemic. The law:

- Eliminates the requirement that two witnesses or a notary public sign an absentee ballot application (the "Two Witness Requirement"). § 1(a).
- Allows voters to call the State or county board of elections to request a blank absentee ballot request form be sent to the voter via mail, e-mail, or fax. § 5(a).
- Enables voters to request absentee ballots online. § 163-230.3(a).
- Allows completed requests for absentee ballots to be returned in person or by mail, e-mail, or fax. § 2.(a).
- Eliminates the precinct residency requirement for poll workers. § 1.(b).
- Permits "multipartisan team" members to help any voter complete absentee ballot request forms and absentee ballots. § 1.(c).

- Provides for "a bar code or other unique identifier" to track absentee ballots. § 3.(a)(9).

- Expands the types of identification an individual can present to vote. § 10(a)(2)(d).

- Requires the Department of Health and Human Services ("DHHS") and the State Board of Elections ("SBE") to develop guidance to allow multipartisan teams safely to assist vulnerable registered voters, and to submit a report to the government by August 1, 2020. § 2.(b).

- Appropriates $26 million to the SBE "to prevent, prepare for, and respond to the coronavirus pandemic during the 2020 federal election cycle." § 11.1.(a).

Because the new law resolved many claims in Plaintiffs' initial complaint, Plaintiffs were granted leave to file a Second Amended Complaint, Doc. 30, and an Amended Motion for Preliminary Injunction, Doc. 31 ("Amended Motion"). The Amended Motion removed several of Plaintiffs' earlier claims, but they continue to challenge provisions:

- Requiring voter registration applications to be postmarked at least 25 days before the election. N.C.G.S. § 163-82.6(d)(1); Am. Mot., Doc. 31 at 4; *see also* Second Am. Compl., Doc. 30 at ¶ 92.

- Restricting requests for absentee ballots by phone. *See* N.C.G.S. § 163-230.2(a), (e)(1); Am. Mot., Doc. 31 at 4; Second Am. Compl., Doc. 30 at ¶¶ 103–05.

- Limiting who can assist a voter to return an absentee ballot request, and mark and return an absentee ballot. N.C.G.S. § 163-226.3(a)(4)–(6), § 163-231(a), § 163-231(b)(1); Am. Mot., Doc. 31 at 4–5; Second Am. Compl., Doc. 30 at ¶ 96.

- Requiring one witnesses or a notary public to witness and sign an absentee ballot application (the "Witness" requirement). N.C.G.S.

§ 163-231(a), as amended by H.B. 1169; Am. Mot., Doc. 31 at 5; Second Am. Compl., Doc. 30 at ¶¶ 99–100.

- Requiring that poll workers reside in the county where they serve on election day. *See* N.C.G.S. § 163-42(b), as amended by H.B. 1169; Am. Mot., Doc. 31 at 5.

- Requiring uniform hours at early voting locations in every county. *See* N.C.G.S. § 163-227.6(c); Am. Mot., Doc. 31 at 5; *see also* Second Am. Compl., Doc. 30 at ¶ 110.

- Preventing individuals from submitting alternative proof of residency such as HAVA documents with their absentee request forms. Am. Mot., Doc. 31 at 4; Second Am. Compl. at ¶ 97.

Plaintiffs also contend the laws are insufficient because they do not provide:

- A "fail-safe" option for mail-in absentee voters if state election officials cannot deliver mail-in ballots on time. Am. Mot., Doc 31 at 7; Second Am. Compl. at ¶ 97.

- "Contactless drop boxes" to minimize the possibility of COVID-19 transmission. Am. Mot., Doc. 31 at 6; Second Am. Compl., Doc. 30 at ¶ 103.

- A procedure to cure defects in absentee ballot request forms or absentee ballots. Am. Mot., Doc. 31 at 7; Second Am. Compl., Doc. 30 at ¶ 104.

- A "centralized way" for voters and advocates to "monitor precinct consolidation." Am. Mot., Doc. 31 at 7; Second Am. Compl., Doc. 30 at ¶ 113.

- Personal protective equipment ("PPE") for poll workers. Second Am. Compl. at ¶ 114.

- Use of Federal Write-in Absentee Ballots ("FWAB") if an absentee ballot does not arrive in time. *See* Second Am. Compl. ¶ 73.

Plaintiffs ask the Court to declare North Carolina's voting procedures unlawful, enter an order imposing these additional measures, and supervise Defendants' compliance with any relief granted. *See* Second Am. Compl. at 79, 81–86.

STANDARD OF REVIEW

As the Fourth Circuit recognizes, "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quotation marks omitted). A plaintiff seeking a preliminary injunction must establish a likelihood of success on the merits, irreparable harm without relief, that the balance of equities tips in plaintiff's favor, and that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Plaintiffs' First and Fourteenth Amendment challenges to North Carolina's voting laws are subject to the "*Anderson-Burdick*" balancing test set in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). *See Parson v. Alcorn*, 157 F. Supp. 3d 479, 492 (E.D. Va. 2016). The test requires the Court to (1) "consider the character and magnitude" of any injury to rights protected by the First and Fourteenth Amendments, (2) evaluate the precise interests of the State that justify the burden imposed, and (3) "determine the legitimacy and strength

of each of [the State's] interests" and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605 (4th Cir. 2016) (citation and quotation marks omitted). The level of scrutiny depends on the burden: "[w]hen the plaintiffs' rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance[,]" but "when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Alcorn*, 157 F. Supp. 3d at 492. Moreover, the state's interests are measured against the remedy plaintiffs seek. *See Crawford*, 553 U.S. at 199–200 (under the balancing test, a court must take into account the specific relief sought by the plaintiffs). State election laws are generally not subject to strict scrutiny, "even though voting rights are fundamental under the Constitution." *Lee*, 843 F.3d at 605.

To prevail on their claims under the Americans with Disabilities and the Rehabilitation Acts,[1] Plaintiffs must prove they (1) have a disability; (2) are qualified to receive the benefits of a public service, program, or activity; and (3) are denied

[1] As Plaintiffs recognize (Doc. 10 at 64 n.10), "[c]laims under the ADA's Title II and the Rehabilitation Act can be combined for analytical purposes because the analysis is 'substantially the same.'" *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 336 n.1 (4th Cir. 2012) (citation omitted).

those benefits or otherwise discriminated against because of their disabilities. *Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 502–03 (4th Cir. 2016).

ARGUMENT

Plaintiffs' case for a preliminary injunction fails. *First*, the authority to regulate elections is vested in the General Assembly, not the courts. *Second*, H.B. 1169 moots a significant portion (if not all) of Plaintiffs' claims. *Third*, Plaintiffs' remaining challenges, such as to the 25-day post-mark requirement for absentee ballots and uniform voting hours for early voting, are unlikely to prevail on the merits. *Finally*, Plaintiffs' request for injunctive relief is premature because H.B. 1169 requires state officials to evaluate the new voting procedures to determine if they are sufficient to address any impediments to voting that *might* be caused by the pandemic. A preliminary injunction would undermine that evaluation. Accordingly, if the Court were inclined to issue relief, Amici urge the Court to enter a brief stay to allow the State to complete its evaluation, and then determine if H.B. 1169 addresses Plaintiffs' remaining claims.

I. Plaintiffs' Suit Is an Affront to the Constitutional Order.

In June, by a vote of 105-14 in the House and 37-12 in the Senate, strong bipartisan majorities of the legislature passed H.B. 1169, and Governor Cooper signed the bill into law. *See* Declaration of Matthew Leland (June 26, 2020) ("Leland Decl."), Exhibit 1 (H.B. 1169, Voting Record). The legislation responds

directly to the possible effect of the pandemic on the election. By passing H.B. 1169, the General Assembly fulfilled its obligation under Article I, Section 4, of the United States Constitution, which mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." It also acted in accord with the North Carolina Constitution, which provides that the legislative power rests "with the people and is exercised thorough the General Assembly, which functions as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546 (2001).

Plaintiffs invite this Court to ignore the constitutional order and substitute its judgment for the collective judgment of two duly elected houses of the General Assembly and the duly elected Chief Executive. The issues before this Court were presented to the General Assembly, fully considered, and resolved. Acting swiftly and deliberately, the legislature balanced policy goals, reached compromises, and enacted substantial legislation to address the pandemic. Not every legislator got what he or she wanted, but H.B. 1169 represents an appropriate resolution.[2] The

[2] *See* Leland Decl. Ex. 2 (Wilkie, NC House Passes Bipartisan Election Bill To Fund COVID-19 Response, Carolina Public Press (May 29, 2020) (quoting Democratic representative Allison Dahle: "[n]either party got everything they wanted," but the "compromise bill" was "better for the people of North Carolina."); Ex. 3 (Pulliman, NC Lawmakers to Discuss Bipartisan Bill on Absentee Voting this Week, 11 Eyewitness News (May 26, 2020) (quoting Democrat Pricey Harrison: it was "an inspiring experience to work across the aisle and across chambers to come up with a bill that's common sense that also helps voters.").

process worked exactly as the United States and North Carolina Constitutions require. *See id.* at 546, 354 (under the North Carolina Constitution, an act of the General Assembly is "an act of the people and is presumed valid unless it conflicts with the Constitution") (emphasis and citation omitted). It is not for the judiciary to second guess those judgments. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) ("unelected federal judiciary" should not decide "which state policies it favors and which ones it dislikes").

It is true, of course, that if the General Assembly intrudes upon the rights of citizens, the injured citizens often have recourse to the Courts. But, even then, the judiciary's role is limited. *E.g. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) ("[w]hen evaluating a neutral, nondiscriminatory regulation of voting procedure, '[w]e must keep in mind that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'") (citations omitted). In this case, Plaintiffs do not ask the Court to declare individual statutes unconstitutional. They do not even claim the statutes were invalid before the recent pandemic or that the General Assembly failed to respond expeditiously. Rather, they complain that the General Assembly did not act in the manner *the Plaintiffs* believe most appropriate. As relief, they boldly demand that this Court impose a brand-new election scheme to their liking, discarding the public policy balance reached by the General Assembly. It is no exaggeration that Plaintiffs are asking the Court to usurp

the role vested by the Constitution in the legislature, to rewrite election laws of North Carolina, and then to task itself with administering the implementation of this anti-democratic scheme.

As the United States Supreme Court admonished last week, however, "judges [] possess no special expertise or authority to declare [] what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them." *Bostock v. Clayton Cty., Georgia*, 2020 WL 3146686, at *17 (U.S. June 15, 2020).

To support their demands, Plaintiffs may point to broad judicial statements from unrelated contexts, or to relatively rare instances in which federal courts have modified or invalidated State election statutes. Almost all those decisions were based on alleged racial discrimination—which is not alleged here. And the Republican Committees are aware of ***no*** decision in which a federal court expansively rewrote a State election statute within weeks of the statute's passage, on the ground that the statute might be insufficient to solve the problem the General Assembly explicitly addressed.[3]

[3] *Cf.*, *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 532 (2020) (due to legislature's failure to act, ordering temporary reduction in signature requirements and extension of deadlines for candidate petitions).

II. The Enactment of H.B. 1169 Moots a Significant Portion of Plaintiffs' Claims.

Federal courts lack authority to rule on moot questions. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). This principle applies when a plaintiff challenges a law that is subsequently amended or repealed. *See N.C. Growers' Ass'n, Inc. v. Solis*, No. 1:09CV411, 2011 WL 4708026, at *2–4 (M.D.N.C. Oct. 4, 2011) (Osteen, Jr., J.) (implementation of new rule mooted challenge to previous rule), *aff'd sub nom. N.C. Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755 (4th Cir. 2012).

The Supreme Court's decision in *Kremens v. Bartley*, 431 U.S. 119 (1977), is illustrative. The district court found unconstitutional portions of a statute governing voluntary commitment to mental health institutions. Pennsylvania "enacted a new statute substantially altering its voluntary admission procedures" which "completely repeal[ed] the provisions" the district court found unconstitutional. *Id.* at 126. Emphasizing that "[c]onstitutional adjudication [is] a matter of 'great gravity and delicacy,'" *id.* at 127–28 (quoting *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring)), the Supreme Court held the new statute "eradicated" the plaintiffs' challenges to the previous law, and "clearly moot[ed]" the plaintiffs'

claims.[4] *Id.* at 129. Here, H.B. 1169 renders most of Plaintiffs' challenges to the state's voting procedures moot. For those not expressly mooted, H.B. 1169 expresses a legislative judgment that Plaintiffs' proposals are unsound.

A. Challenges to the Requirements for "Two Witnesses" and Absentee Ballot Procedures Are Moot.

Of all Plaintiffs' original claims, the Two Witness requirement and the inability to request absentee ballots by phone or online were at the forefront. For instance, Plaintiff Clark alleges he is house-bound because he fears contracting COVID-19 and already applied for his ballot. Second Am. Compl., Doc. 30 at ¶ 17. He alleges his "wife could serve as one witness for his mail-in absentee ballot," but he could not safely obtain a second witness because of health risks and did "not know how he can safely cast a ballot by mail." Doc. 27-2 at ¶ 17. Similarly, Plaintiff Cates alleges she never voted by mail but if she could submit an absentee ballot request online or by phone, she would do so. Second Am. Compl., Doc. 30 at ¶ 18. Cates has only one person to witness her ballot. Doc. 27-2 at ¶ 18. H.B. 1169's elimination of the Two Witness requirement and procedure for requesting absentee

[4] *See also, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (amendment mooted challenge to old law); *Massachusetts v. Oakes*, 491 U.S. 576, 578, 582–83 (1989) (amendment mooted First Amendment overbreadth challenge); *U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 557–60 (1986) (amendment mooted challenge); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (amendment to regulation mooted challenge to earlier regulation).

ballots by phone or online gave these Plaintiffs the relief they seek. The same is true for other provisions of the election code challenged by Plaintiffs. *Compare* N.C.G.S. § 163-42(b) (requirement that a majority of poll workers reside in the precinct where they serve on election day), *with* H.B. 1169 Section 1.(b) (eliminating this requirement); *compare* Second Am. Compl. ¶ 104 (seeking procedure for curing defects in absentee ballots), *with* H.B. 1169 at Section 3.(a)(b)(9) (requiring a "bar code or other unique identifier" to allow county board of elections and voter to track ballot); *compare* Second Am. Compl. ¶¶ 103, 114 (seeking provision of PPE at voting sites and contactless drop boxes for absentee ballots), *with* H.B. 1169 Section 11.1.(a) (appropriating over $26 million to SBE "to prevent, prepare for, and respond to the coronavirus pandemic"); *see also* Second Am. Compl., Doc. 30 at ¶ 62 (alleging that under H.B. 1169 multipartisan teams may assist voters with completing and delivering an absentee ballot request, but speculating there may not be a sufficient number of team members).

A statutory change giving a party the "precise relief" requested moots claims for declaratory and injunctive relief. *N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. at 1526. Because H.B. 1169 provides Plaintiffs with many of the precise measures they seek, their claims are moot.

B. Plaintiffs' Procedural Due Process Claim is Moot.

Plaintiffs allege state law provides no remedy to "cure deficiencies" with absentee ballot request forms and absentee ballots. But H.B. 1169 requires that a "bar code or other unique identifier" accompany each absentee ballot return envelope so the county board of elections and voter can track the ballot following the return of the voted ballot to the county board. H.B. 1169 Section 3.(a)(9). The new law ensures voters can track their absentee ballots and monitor them for voting anomalies. H.B. 1169 also allows voters to request ballots online. If their applications are deficient, the portal would likely not accept them, and Plaintiffs will be able to correct the request before re-submitting. This process moots Plaintiffs' procedural due process claim.

C. Plaintiffs' Have No Voting Rights Act Claim.

Plaintiffs also allege violations of Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508 ("Section 208"), which requires that individuals with blindness, disability, or inability to read or write be permitted to receive assistance with voting. Because of H.B. 1169, that claim is moot, too.

Plaintiffs contend individuals covered by Section 208, including Plaintiff Hutchins, require assistance submitting a request for, marking, completing, and delivering an absentee ballot. *See* Pls' PI Br., Doc. 10 at 71. H.B. 1169 specifically addresses Plaintiffs' concerns. First, H.B. 1169 provides that individuals of a

"multipartisan team" may assist a voter in completing a request for an absentee ballot or in delivering the completed request. H.B. 1169 § 1(c). Second, a member of a multipartisan team may assist with delivery of the completed absentee ballot. H.B. 1169 §2.(a). Third, DHHS and SBE will develop guidance to "safely allow multipartisan teams to assist registered voters within hospitals, clinics, nursing homes, assisted living or other congregate living situations" in the 2020 election. H.B. 1169 § 2.(b). Finally, N.C.G.S. § 163-231 provides that, in addition to completing the ballot herself or himself, a voter may "cause [an absentee ballot] to be marked . . . in the voter's presence according to the voter's instruction."

In these ways, H.B. 1169 addresses Plaintiffs' concerns, and thus moots their claims. *See Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006).

III. Plaintiffs Are Unlikely To Succeed on the Merits of Claims Involving North Carolina's Administration of Voting.

A. North Carolina's Voting Laws Do Not Unduly Burden the Right to Vote.

The Second Amended Complaint asserts violations of the First and Fourteenth Amendments based on the following provisions: (1) the requirement that voters register to vote at least 25 days before the election; and (2) the regulation allowing only a voter's near relative, verifiable legal guardian, or multipartisan team member to help complete and deliver an absentee ballot. *See* Second Am. Compl., Doc. 30 at ¶¶ 88–115. Plaintiffs also challenge the General Assembly's failure to adopt

contactless dropboxes for voting and a "fail-safe" option for mail-in absentee voters if state election officials cannot successfully deliver mail-in ballots on time. *E.g.,* Pls' PI Br., Doc. 10 at 17, 21–22, 36–47.

Plaintiffs' claims fail because North Carolina's voting regulations meet the *Anderson-Burdick* test. The burden to the Plaintiffs from the regulations, if any, is minimal, they are applied neutrally, and they concern legitimate state interests, including protecting the integrity and reliability of the electoral process. *See, e.g.*, *Crawford*, 553 U.S. at 191–96 (recognizing states' legitimate interests in protecting the integrity and reliability of the electoral process in the context of an Equal Protection challenge to a voter identification requirement).

First, it is not unduly burdensome to voters—and is indeed common—to require registration by mail, through state agencies, or online through the Department of Motor Vehicles at least 25 days before an election. At least 13 other states impose registration cutoffs of at least 25 days before an election. Leland Decl. Ex. 4 (Voter Registration Deadlines).[5] North Carolina has "valid and sufficient interests" in imposing registration deadlines so that it can prepare adequate voter records and protect its electoral processes from fraud. *See Key v. Bd. of Voter*

[5] State cutoffs range from 25 days (*e.g.*, New York) to 30 days (*e.g.*, Tennessee).

Registration of Charleston Cty., 622 F.2d 88, 90 (4th Cir. 1980) (South Carolina's 30-day pre-registration requirement did not violate constitutional right).

Second, there is, at most, a minimal burden when allowing only a voter's near relative, a verifiable legal guardian, or a multipartisan assistance team member to help complete and deliver an absentee ballot. *See* H.B. 1196, Sections 1.(c), 2.(a). And to address the needs of voters who are more vulnerable, H.B. 1169 requires the DHHS and the SBE to develop guidance on how the multipartisan teams can help people in "congregate living situations," such as nursing homes, to vote in the 2020 election. H.B. 1169, Section 2.(b).

Third, North Carolina has a valid interest in preventing voter fraud. *Lee*, 843 F.3d at 606 (finding that a voter identification requirement did not unduly burden the right to vote and that Virginia had a valid interest in preventing voter fraud which justified any burden imposed by the law). Indeed, measures limiting who may collect absentee ballots are widely recognized as appropriate and necessary. The bi-partisan commission led by former President Jimmy Carter and former Secretary of State James Baker explicitly recommended laws restricting ballot collection by candidates or party workers. *See* Leland Decl. Ex. 5 (Commission on Federal Election Reform, Building Confidence in U.S. Elections, § 5.2.1 (Sept. 2005) ("the Carter–Baker Report").

Finally, Plaintiffs' demand for contactless dropboxes and federal write-in ballots or other "fail-safe" options for mail-in absentee voters who do not receive their mail-in ballots on time also fails. *E.g.,* Pls' PI Br., Doc. 10 at 17, 21–22, 36–47. To begin, the time period within which to request absentee ballots—by 5 p.m. on the Tuesday before the date of the election—is entirely sufficient. And, with over four months before the November election, Plaintiffs have specified no reason why they cannot request their absentee ballots sufficiently in advance to avoid delivery issues. Indeed, Plaintiff Clark has already done so. Further, H.B. 1169 provides options (phone, email, and fax) for requesting mail-in ballots that will expedite the time between request and delivery. And finally, if a voter does not receive the requested ballot in time, the voter always has the option to vote in person.

To the degree the Court has any remaining doubts about the fairness of the ballot delivery process, it can stay this aspect of the case to see how State election officials address it. H.B. 1169 provides funds to address COVID-19, and North Carolina has the discretion to allocate the funds for preventative measures. H.B. 1169, Section 11.1.(a) (appropriating over $26 million to the SBE to "to prevent, prepare for, and respond to the coronavirus pandemic during the 2020 federal election cycle"); *Bostock*, 2020 WL 3146686, at *17 (noting that "judicial humility" requires courts to "refrain from adding to statutes"). In any event, Plaintiffs have not made the case for a mandatory preliminary injunction.

B. The North Carolina Absentee Voting Laws Do Not Implicate Plaintiffs' First Amendment Rights.

The organizational Plaintiffs and Plaintiff Schaffer are also unlikely to prevail on their First Amendment claims. Plaintiffs allege that SB 683 violates their First Amendment rights to free speech and association by impeding their ability to assist voters with absentee ballot request forms. *See* Pls' PI Br., Doc. 10 at 55. For the 2020 election, the absentee ballot laws provide that absentee ballot request forms may be delivered by (1) the voter, (2) the voter's near relative or verifiable legal guardian, or (3) a member of a multipartisan team trained and authorized by the county board of elections pursuant to N.C.G.S. 163-226.3. *See* H.B. 1169; N.C.G.S. § 163-230.2. The absentee ballot laws also allow a voter's near relative, legal guardian, or individual working as part of a multipartisan team pursuant to G.S. 163-226.3, to assist a voter in preparing a request for an absentee ballot. H.B. 1169; N.C.G.S. § 163-226.3.

The First Amendment forbids only the abridgment of "speech," and conduct "sufficiently imbued with elements of communication." *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *see also ex Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (citing *Texas v. Johnson* and noting that the Court has "extended First Amendment protection only to conduct that is inherently expressive"). If an election law implicates these interests, then the Court must apply the *Anderson-Burdick* test. *See Voting for America v. Steen*, 732 F.3d 382, 393 (5th

Cir. 2013) (*Anderson-Burdick* balancing test applies if the challenged law implicates First Amendment interests).

Plaintiffs' claims fail because the absentee ballot laws do not implicate First Amendment rights. Courts have held that submitting completed voter registration forms or completed ballots on behalf of another person is not "speech" or "sufficiently imbued with elements of communication" to qualify for First Amendment freedom of speech protection. *Id.* at 392 ("[T]here is nothing 'inherently expressive' about receiving a person's completed application and being charged with getting that application to the proper place.") (citation and quotation marks omitted); *League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1319 (S.D. Fla. 2008) (same); *Knox v. Brnovich*, 907 F.3d 1167 (9th Cir. 2018) (same). The acts of completing an absentee ballot on behalf of another voter (pursuant to that voter's desires) and submitting the ballot requests are not materially different from the acts of submitting completed voter registration forms or completed ballots. As the Fifth Circuit concluded in rejecting an analogous claim, "if actually registering citizens to vote is necessary to 'express' the canvasser's belief in the importance of voting, then [plaintiffs] essentially seek a 'First Amendment right not just to speak out or engage in 'expressive conduct' but also to succeed in their ultimate goal regardless of any other considerations.'" *Steen*, 732 F.3d at 391.

"[O]nly the voter decides to 'speak' by registering," or, in this case, submitting a request for an absentee ballot. *Id*. at 390.

Even if the North Carolina absentee ballot laws did implicate Plaintiffs' First Amendment interests, the laws pass the *Anderson-Burdick* balancing test. *See Steen*, 732 F.3d at 391 (laws limiting who can handle a completed voter register application pass the *Anderson-Burdick* balancing test). As the Supreme Court held in *Crawford*, states have legitimate interests in enacting measures to prevent fraud. 553 U.S. at 194–95 (upholding voter identification requirement against an Equal Protection challenge). Indeed, measures limiting who may collect absentee ballots are widely recognized as appropriate and necessary to prevent fraud, as evidenced by the conclusions of the Carter-Baker commission on election reform, which recommended states enact similar laws to prevent persons, such as employees of the organizational plaintiffs, from handling ballots. *See* Leland Decl. Ex. 5 (Carter–Baker Report, § 5.2.1).

By contrast, any burden to Plaintiffs is minimal. The organizational Plaintiffs and Plaintiff Schafer remain free to encourage voters to request an absentee ballot and to instruct them how to properly complete the necessary application. And Plaintiffs may also be eligible to become part of the "multipartisan team" that may assist voters with completing absentee ballot requests. *See* H.B. 1169.

C. The Voting Laws Do Not Violate the ADA or Rehabilitation Act.

Plaintiffs argue that North Carolina's witness requirement and restrictions on assistance in completing absentee ballot request forms and ballots violate the ADA and Rehabilitation Act because they fail to accommodate Plaintiffs' disabilities. Pls' PI Br., Doc. 10 at 62–63, 68.

1. North Carolina Adopted Reasonable Accommodations for Voters under the ADA and Rehabilitation Act.

To prevail on their failure-to-accommodate claims, Plaintiffs must prove they (1) have a disability; (2) are qualified to receive benefits of a public service, program, or activity; and (3) are being denied those benefits or otherwise discriminated against because of their disabilities. *Nat'l Fed. of the Blind v. Lamone*, 813 F.3d 494, 502–03 (4th Cir. 2016). Plaintiffs cannot satisfy the third requirement, and, in turn, are not entitled to a preliminary injunction.

To show discrimination, Plaintiffs bear the burden of demonstrating that North Carolina has "fail[ed] to make reasonable modifications in policies, practices, or procedures" that implicate Plaintiffs' absentee voting rights, "when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities." *J. D. by Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663, 671 (4th Cir. 2019) (quoting 42 U.S.C. § 12182(b)(2)(A)(ii)). The statute therefore requires Plaintiffs to show Defendants failed to make accommodations that are both necessary and reasonable

in light of Plaintiffs' alleged disabilities. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683 n.38 (2001). Neither requirement is satisfied here.

First, H.B. 1169 resolves Plaintiffs' concerns about absentee voting. Section 1.(a) reduces the witness requirement for absentee ballots, reconciling Plaintiffs' limited "ability to have contact with others during this pandemic," Pls' PI Br., Doc. 10 at 63, with the public's right to have confidence in the integrity of the election results. *See Lee,* 843 F.3d at 606. Furthermore, H.B. 1169 accommodates nursing home residents by requiring DHHS and SBE to "develop guidance to safely allow multipartisan teams to assist registered voters" within nursing homes and assisted living or other congregate living situations. H.B. 1169 § 2.(b).

Plaintiffs claim the recent legislation is "inadequate" because more could be done to address their concerns, Second Am. Compl., Doc. 30 at ¶ 7, but this argument falls far short of establishing that Plaintiffs' proposed modifications are "necessary." Under the ADA and RA, it is not a requirement to "eliminate all discomfort or difficulty." *A.L. by and through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1296 (11th Cir. 2018). Rather, "[f]acilities need make only reasonable accommodations that are 'necessary.'" *Id.* When determining the necessity of a proposed accommodation, the Fourth Circuit "requires an individualized inquiry into the plaintiff's capacity." *J.D. by Doherty*, 925 F.3d at 673. Under that approach, when a defendant has already implemented disability accommodations, "a plaintiff

may still be entitled to something more if he can show that the accommodation does not account sufficiently for his disability." *Id*.

Plaintiffs cannot make this showing. North Carolina reduced the two-witness requirement and will provide specialized assistance for vulnerable registered voters who wish to submit absentee ballots. *See* H.B. 1169 §§ 1.(a), 2.(b). Further accommodations are warranted only if absentee voting remains "beyond the capacity of plaintiffs," a standard Plaintiffs cannot satisfy because H.B. 1169 provides for absentee voting assistance for registered voters within nursing homes and other congregate living facilities and reduces the witness requirement sufficiently to account for Plaintiffs' desire to limit social interaction. *See id.* (citing *Argenyi v. Creighton Univ.*, 703 F.3d 441, 450 (8th Cir. 2013); *A.L. by and through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1296 (11th Cir. 2018)).

Second, Plaintiffs cannot show their proposed changes to the law are "reasonable" under the ADA or RA. The ADA requires "reasonable" accommodations for disabilities, a standard satisfied only if the Plaintiffs' proposed modification is "reasonable on its face, *i.e.*, ordinarily or in the run of cases." *J.D. by Doherty*, 925 F.3d at 673. But the North Carolina General Assembly already implemented several measures to address Plaintiffs' safety concerns, so there is "no need for injunctive relief" when plaintiffs are "already being reasonably accommodated." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003).

And, as shown (p. 16 above), North Carolina's approach is in line with many other states.

Even if Plaintiffs showed their proposed accommodations were prima facie reasonable, those modifications would "fundamentally alter" the nature of North Carolina's elections because they would eliminate the administration and enforcement of the witness requirement and restrictions on those who can provide absentee ballot assistance. *See* 28 C.F.R. § 35.130 (requiring public entities to make "reasonable" modifications "necessary to avoid discrimination on the basis of disability, *unless the entity can demonstrate that making such modifications would fundamentally alter the nature of* the service, program, or activity." (emphasis added)). States have "valid interests in preventing voter fraud," along with "an independent interest in protecting voter confidence in the integrity of [their] elections." *Lee*, 843 F.3d at 607 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194-97 (2008)). The witness requirement and ballot assistance restrictions are measures approved by the General Assembly to preserve the integrity of North Carolina's elections.

2. North Carolina's Voting Laws Do Not Have a Disparate Impact on Disabled Voters.

Plaintiffs have not provided evidence showing the challenged voting laws disproportionately burden disabled voters, and their disparate impact claims fail for that reason. Establishing a prima facie ADA or RA violation under a disparate

impact theory requires a plaintiff to "demonstrate (1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices." *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016) (internal quotation marks omitted). Plaintiffs failed to identify *any* evidence that the witness requirement or ballot assistance restrictions have a "significantly adverse or disproportionate impact" on disabled voters, much less the statistical evidence courts routinely expect. *See Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575–76 (2d Cir. 2003). Instead, Plaintiffs assert that "Defendants' policies have a disparate impact on vulnerable voters like the ADA/RA Plaintiffs"—a paradigmatic example of the kind of "inference of discriminatory impact" that other circuits have rejected. *See id.* at 575; *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997). The same result is appropriate here.

IV. A Stay is Appropriate to Assess the State's Election Reforms.

Plaintiffs have not cleared the high bar for entry of a preliminary injunction, and Amici urge the Court to deny any relief. In the alternative, if the Court has doubts about the sufficiency of the new procedures, Amici urge the Court to stay the action until the Board and HHS fulfill their legislative obligation to "develop guidance to safely allow multipartisan teams to assist registered voters within hospitals, clinics, nursing homes, assisted living or other congregate living situations

in the 2020 elections during the COVID-19 pandemic in accordance with law" by August 1, 2020. H.B. 1169 § 2.(b). As it stands, Plaintiffs' Motion assumes that North Carolina will not take appropriate action to modify its election procedures to account for the pandemic. H.B. 1169 has already proven that assumption false. Before the Court takes the extraordinary step of imposing new requirements on the State, the public interest supports a stay of this litigation pending additional guidance from the Board and HHS.

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court deny Plaintiffs' motion or, alternatively, stay this case until further action from the Board and HHS.

Respectfully submitted this 26th day of June, 2020.

Respectfully submitted,

/s/ *Bobby R. Burchfield*
Bobby R. Burchfield
Matthew M. Leland
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
Telephone: (202) 626-5524
Email: bburchfield@kslaw.com
Email: mleland@kslaw.com

R. Scott Tobin

North Carolina Bar No. 34317
Taylor English Duma LLP
4208 Six Forks Road, Suite 1000
Raleigh, North Carolina 27609
Telephone: (404) 640-5951
Email: stobin@taylorenglish.com

Counsel for the Republican Committees

STATEMENT PURSUANT TO L.R. 7.5(d)

Amici represent that (1) no party's counsel authored the brief in whole or in part, (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (3) no person—other than amicus, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

This the 26th day of June, 2020.

/s/ *Bobby R. Burchfield*
Bobby R. Burchfield

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for this Amici Curiae Brief is 6242 words. The word count excludes the case caption, signature lines, cover page, and required certificates of counsel. In making this certification, the undersigned has relied upon the word count of Microsoft Word, which was used to prepare the brief.

/s/ Bobby Burchfield
Bobby Burchfield

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which automatically sends e-mail notification of such filing to any attorneys of record.

This 26th day of June, 2020.

/s/ Bobby Burchfield
Bobby Burchfield