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

Defendants,

Civil Action

No. 20-cv-457

PLAINTIFFS' REPLY IN SUPPORT OF THEIR AMENDED MOTION FOR PRELIMINARY INJUNCTION

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

Defendant-Intervenors.

Plaintiffs have requested preliminary relief to protect their right to vote in the upcoming General Election, given the continued threat posed by Covid-19. This Court should grant Plaintiffs' motion for preliminary relief because Plaintiffs are likely to prevail on the merits, they will suffer irreparable harm absent this Court's intervention, and the remaining equitable considerations tilt in favor of issuing a preliminary injunction.

Plaintiffs' requested relief is crucial to preserving the mechanisms by which North Carolinians vote in this state: voter registration, absentee vote-by-mail, and in-person voting opportunities that will ensure a safe, free, and fair election. If the challenged restrictions are not lifted, Plaintiffs and all voters in North Carolina will be subject to unconstitutional and unlawful conditions for voting, as demonstrated by recent elections in other states, causing irreparable harm to Plaintiffs and our democracy as a whole.

The State Defendants acknowledge the burden imposed on voters by these restrictions but fail to provide what state interests would be furthered by them. And Intervenor-Defendants would have the Court ignore overwhelming evidence that these restrictions will severely burden the right to vote during the Covid-19 pandemic, baldly asserting that "a great deal can change in the next for months." Their assertions as to the state interests furthered by the challenged restrictions are directly contradicted by the State Defendants' submission and lack credibility. Because the arguments raised by Defendants and *amici* lack merit, Plaintiffs' motion should be granted.[1]

I. Plaintiffs Have Standing To Bring This Action

A. Organizational Plaintiffs

Intervenor-Defendants incorrectly contend that Organizational Plaintiffs lack standing to assert certain claims.[2] Under *Havens Realty Corp. v. Coleman*, 455 U.S. 363,

---

[1] Hereafter, Plaintiffs incorporate by reference any previous abbreviations used in their memorandum in support of their motion for preliminary injunction and request to expedite. *See* Doc. 10. Further, Plaintiffs incorporate the facts pleaded in their SAC. Doc 30, ¶¶ 14-87.

[2] Intervenor-Defendants do not challenge Organizational Plaintiffs' standing to challenge the Absentee Ballot

379 (1982), an organization suffers an injury in fact when the defendant's actions impede the organization's efforts to carry out its mission requiring it to "devote significant resources to identify and counteract" the challenged practices. *See Lane v. Holder*, 703 F.3d 668, 674-75 (4th Cir. 2012) (applying *Havens*). Organizational Plaintiffs meet the *Havens* standard here.

LWVNC's core missions are promoting and encouraging voter participation and removing barriers to voting. Nicholas Decl. ¶¶ 3–4. It has alleged and substantiated that Defendants' enforcement of the voter registration deadline and lack of expanded online voter registration will frustrate this purpose by hindering specific voter registration efforts, including initiatives to facilitate voter registration during the pandemic, especially because LWVNC expects many voters will seek to register closer to the election. *Id.* ¶¶ 8–10; *see also* Second Amended Complaint ("SAC") ¶ 94, Doc. 30. LWVNC has similarly shown that enforcement of the other challenged restrictions will impede its core missions and that LWVNC will need to divert limited resources to remedy the effects

---

Assistance and Request restrictions and Defendants' failure to guarantee PPE.

of these restrictions. *See* Nicholas Decl. ¶¶ 12–20 (addressing remaining challenged restrictions).

Similarly, DemNC's core mission is "increasing voter access and participation" through "substantial election protection efforts" and "producing voter guides." SAC ¶ 14; *see also* Lopez Decl. ¶¶ 2–3. It has alleged and substantiated similar frustrations of its core purpose as LWVNC and demonstrated that Defendants' enforcement of the challenged provisions will divert limited DemNC resources to overcoming these restrictions rather than fulfilling their core missions. *See* Lopez Decl. ¶¶ 19–21, 22–27, 28–29.

Organizational Plaintiffs' initial declarations clearly establish their standing, and the Reply Declarations remove any remaining doubt . *See* Nicholas Reply Decl. ¶¶ 7–13; Lopez Reply Decl. ¶¶ 3–4.

Lane is not to the contrary. There, the organization failed to show that the "defendant's alleged practices 'perceptibly impaired [the organization's] ability to" engaged in "a key component of [its] mission." as *Haven* requires. 703 F.3d at 674-75 (quoting Havens, 455 U.S. at 379). Consequently, the "drain on its resources" was not an injury in fact. *Id.* Here, Organizational Plaintiffs have

shown that Defendants' enforcement of the challenged restrictions creates considerable barriers to their voter registration, outreach, assistance, and education efforts, frustrating their core missions and requiring diversion of limited resources, and courts have rejected similar arguments relying on *Lane*. *See, e.g.*, *Harrison v. Spencer*, 2020 WL 1493557, at *7 (E.D. Va. Mar. 27, 2020) (where defendants' actions have "perceptibly impaired" organization's ability to carry out its mission and drained its resources, standing exists, and *Lane* "does not compel a contrary conclusion").

Plaintiffs also dispute that Organizational Plaintiffs lack, in the alternative, prudential standing here. As the Supreme Court recently observed, such standing is "generally permitted … in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.'" *June Med. Servs. L.L.C. v. Russo*, 2020 WL 3492640, at *9 (U.S. June 29, 2020) (*quoting Kowalski v. Tesmer*, 543 U. S. 125, 130 (2004) and finding third-party standing) (emphasis in original). Plaintiffs further satisfy the requisite factors under *Kowalski;* they have developed close relationships with the voters they assist and who are presented with an undue burden,

and the urgent nature of the relief needed here presents a hindrance to individual voters to protect their own rights. Nicholas Decl. ¶¶ 13–14, 22; Lopez Decl. ¶ 18; *see also Mayor & City Council of Baltimore v. Azar*, 2019 WL 4415539, at *5–6, 15–16 (D. Md. Sept. 12, 2019).

B. Individual Plaintiffs

Intervenor-Defendants' arguments challenging the standing of Plaintiffs Bentley, Hutchins, and Permar are likewise unavailing. As an initial matter, "a voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote." *People First of Ala. v. Merrill*, 2020 WL 3207824, at *6 (N.D. Ala. June 15, 2020), *stay denied sub nom. People First of Ala. v. Sec'y of Ala.*, 2020 WL 3478093 (11th Cir. June 25, 2020), *stay granted Merrill v. People First of Ala.,* 591 U.S. -- (July 2, 2020). Even were this not true, whether plaintiffs have standing is governed by the nature of their claims and the applicable tests employed by the court in assessing those claims. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975). None of those standards requires a showing that they are certain to contract Covid-19.

As to their undue burden claims, Plaintiffs face additional concrete and imminent injuries: the severe risk to their physical health that the challenged provisions will force them to incur, and the measures they will need to take to comply with the challenged provisions.[3] *See Thomas v. Andino*, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (preliminarily enjoining the state's witness requirement for absentee voting) ("[T]he character and magnitude of the burdens imposed . . . in [plaintiffs] having to place their health at risk during the COVID-19 pandemic likely outweighs the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity."); *see also id.* at *19 ("[T]he Witness Requirement further burdens [plaintiffs] from exercising their right to vote by absentee ballot by requiring them to expose themselves to other people in contravention of maintaining safe social distancing practices"); *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d

[3] Plaintiff Permar will be severely burdened if there is excessive precinct consolidation forcing her to stand in long lines risking her health. *See Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969) (finding defendant's failure to provide adequate voting facilities, despite their foreknowledge of precinct consolidations, deprived voters of their constitutional rights).

1312, 1319 (11th Cir. 2019) (noting "Florida's signature-match scheme subjects vote-by-mail and provisional electors to the *risk* of disenfranchisement") (emphasis added). The threat of airborne transmission of SARS-CoV-2, the virus that causes Covid-19, in indoor settings where people congregate, like a polling place, is real, substantial, and not meaningfully mitigated by the measures Intervenor-Defendants' experts suggest. Murray Reply Decl. ¶¶ 1–5, 9–16. As Dr. Murray concludes after analyzing several studies on post-election Covid-19 transmission dynamics, "despite labor-intensive and costly efforts to maintain the safety of in-person voting during the [April 7] Wisconsin election, a rigorous study provides support for the contention that this election increased Covid-19 transmission." *Id.* ¶ 24; *see also id.* ¶¶ 20–24.

Plaintiff Bentley has clearly articulated a concrete and particularized injury. She is at risk of severe illness from Covid-19 and has not entered anyone else's home, allowed anyone to enter hers, or left her neighborhood since mid-April. Bentley Reply Decl. ¶¶ 3–4. She cannot ask a neighbor to witness her ballot, due to those neighbors breaking social distancing guidelines within her view, her unfamiliarity with

others' hygiene and social distancing practices, and still others' regular contact with vulnerable family members. Bentley Decl. ¶ 7. Similarly, she will not be familiar with the precautions taken by any stranger she may encounter. Bentley Reply Decl. ¶ 6. Intervenor-Defendants' proposal that she ask an asymptomatic neighbor to witness her ballot ignores the fact that "the virus can be transmitted by people who are asymptomatic as well as by those who are demonstrably ill." Murray Decl. ¶ 23. Plaintiff Bentley does not have contact with her family members, who live outside North Carolina. Bentley Reply Decl. ¶ 5. For these reasons, should the witness requirement remain in place for the November election, Plaintiff Bentley's right to vote will be severely burdened.

As to Plaintiff Bentley's unconstitutional condition claim, this Court does not need to find that the condition is certain to cause her to contract Covid-19, because it is the giving up of one constitutional right—the right to bodily integrity—in order to exercise another—the right to vote—that constitutes the injury. *See Saenz v. Roe*, 526 U.S. 489, 504 (1999). She therefore has standing for this claim because she has shown that satisfying the witness requirement coerces her in this manner.

To have standing to bring their procedural due process claim, Plaintiffs Clark, Cates, Edwards, Priddy, Hutchins, and Bentley need only demonstrate a liberty interest created by law and a risk of erroneous deprivation of that interest due to the procedures used. *See Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).[4] They have satisfied this requirement. Here, North Carolina law vests them with the statutory right to request and cast a mail-in ballot, *see* N.C. Gen. Stat. § 163-226(a), which merges with their right to vote because vote by mail remains the only viable option for safely casting their ballot during the pandemic, due to their risk of severe illness. *See infra* at 17-18.

C. Plaintiffs' Claims Are Not Precluded By The Political Question Doctrine

Intervenor-Defendants contend that the political question doctrine bars the Court's resolution of Plaintiffs' claims. *See also* Brief of *Amici* Republican Committees, Doc. 52-3 at 7-8 (arguing that this action is "an Affront to the Constitutional Order" because it asks the Court to "substitute its judgment" for that of North Carolina's

[4] To succeed on the *merits* of this claim, they must show that their interest and the risk of erroneous deprivation outweigh any governmental interest in maintaining existing procedures. *See Mathews*, 424 U.S. at 335.

elected representatives). This argument is absurd. First, it is beyond cavil that our "constitutional order," *id.* at 8, vests federal courts with the duty and the power "to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). That is precisely what Plaintiffs ask of this Court: to exercise its Article III authority to determine whether Defendants have violated Plaintiffs' rights under the U.S. Constitution and federal statutes.

That this lawsuit concerns election procedures does not negate the power of judicial review. The *amici* Republican Committees suggest that any constitutional challenge to a state's election laws would require the reviewing court "to usurp the role vested by the Constitution in the legislature." Doc. 52-3 at 9–10. Hyperbole aside, the Supreme Court rejected this argument long ago and instead affirmed that courts have an important role to play even—and especially—in the election context, "an area so closely touching our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (*quoting NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Court is fully equipped to decide this case on the basis of what the law requires.

II. Plaintiffs Have Shown a Likelihood of Success on the Merits

A. Undue Burden on the Right to Vote

Defendants' arguments as to Count One suffer from three global defects. First, the challenged restrictions must all be analyzed under *Anderson-Burdick* and in the contexts of Covid-19, where epidemiological evidence show that voters are at the severe risk to exposure. Recent elections have also demonstrated that similar restrictions severely burden the right to vote. Because these restrictions are severe, they must be justified by compelling interests, substantiated with concrete evidence: "While states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent 'evidence that such an interest made it necessary to burden voters' rights.'" *Thomas*, 2020 WL 2617329, at *20 (quoting *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020) (affirming injunction against Kansas's documentary proof of citizenship requirement for voter registration)). Defendants have failed to offer compelling interests or requisite evidence.

Second, even if the Court determines the challenged restrictions are not severe, Defendants admit that these restrictions burden voters, and have failed to show they serve

any interests with the "legitimacy and strength" that would justify "the extent to which those interests make it necessary to burden the plaintiff's rights," especially during Covid-19. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

Finally, Defendants fail to acknowledge that a "panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Conner, J., concurring). While Defendants would like the Court to weigh each restriction in a vacuum, applicable precedent requires the Court to assess the cumulative impact of the challenged restrictions in the context of the pandemic. Analyzed accordingly, the challenged provisions taken together undeniably present an undue burden on the right to vote in North Carolina. [5]

[5] Plaintiffs' claims are not mooted by HB1169 as the *amici* Republican Committees contend. Even by their own description and purported legal standard, HB 1169 falls far short of providing the "precise relief" requested by Plaintiffs, and they fail to cite even one example where this law would either fulfill or require the relief requested in the SAC as a court order would. *See* Doc. 52-3 at 20 (citing holding in *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) that claims are only moot if new law grants the "precise relief"

i. Voter Registration

State Defendants admit that, even in a typical year, "a very high volume of forms are received at the end of the voter registration deadline." Doc. 50 at 15; *see also* Ketchie Reply Dec. ¶¶ 5–6, Ex. 2 (showing high registration rates toward the end of voter registration periods in 2016 and 2018). And they do not dispute that this burden will increase because typical in-person voter registration options are not available. In-person registration at a county board office poses a risk to health, Murray Reply Decl. ¶¶ 1–5, 9–16, and the pandemic continues to frustrate in-person voter registration efforts and keep registration numbers low. Nicholas Reply Decl. ¶ 7; Ketchie Decl. ¶ 4. The current DMV option is no salve, as only DMV customers can use that portal for registration. Just as there are nearly 350,000 registered voters who do not have DMV-issued identification (that is, are not DMV customers), Ketchie Reply Decl. ¶ 8, it is reasonable to expect that a similar (if not greater)

---

requested). Additionally, *amici* overstate and mischaracterize what HB 1169 provides, for example stating it provides a "phone" option for "requesting mail-in ballots" where voters may only receive a *request form* this way, which they still must submit in order to receive an actual ballot. *Id.* at 18.

proportion of unregistered voters are likewise unable to use online DMV options. Accordingly, there is no such "ample time and opportunity" before the election to register during Covid-19, as Defendants contend.

Defendants have also failed to show a legitimate state interest in enforcing the deadline during the pandemic. The purported issues regarding extensive "double" registration caused by extending the deadline are speculative and, to the extent there is any overlap, easily mitigated by use of supplemental lists. Bartlett Reply Decl. ¶¶ 5–8. Furthermore, Defendants express concern about the timing of mail verification, while elsewhere disclaiming any concern about USPS delivering absentee ballots, directly undercutting the rationality of this purported interest. Accordingly, Defendants have failed to rebut that enforcement of the voter registration deadline and failure to provide expanded online options present a severe burden on voters, or that it is justified by a countervailing interest.

ii. Absentee Ballots

Intervenor-Defendants improperly rely on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969) to contend that the default standard for reviewing

restrictions on absentee ballots is "rationality." Where "'other means of exercising the right' to vote are not easily available," restrictions on absentee voting do impede the right to vote and must be analyzed under *Anderson-Burdick*'s balancing analysis:

> In-person voting, while still technically an available option, forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease. . . . [D]uring this pandemic, absentee voting is the safest tool through which voters can use to effectuate their fundamental right to vote. To the extent that access to that tool is unduly burdened, then no matter the label, "denial of the absentee ballot is effectively an absolute denial of the franchise [and fundamental right to vote]." *O'Brien* [*v. Skinner*], 414 U.S. [524,] 533 [(1974)] (Justice Marshall concurring). As such, in these circumstances, absentee voting impacts voters' fundamental right to vote.

Thomas, 2020 WL 2617329, at *17 n.20. Their reliance on *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) is similarly inapposite as it considered claims of age-related disparate treatment, not claims of undue burden based on the interaction of specific voting restrictions and pandemic conditions, as argued here.

In any event, even if rational basis review applied, Defendants have failed to establish *any* legitimate state interest for any of the myriad of burdens the challenged restrictions placed on absentee vote-by-mail.

Witness Requirement.

The Witness Requirement does not further the state's interest in preventing and prosecuting voter fraud. "[W]hen a state imposes unreasonable, discriminatory burdens, a court must consider not only the 'legitimacy and strength' of the interests assertedly justifying those burdens, but also 'the extent to which [the state's] interests make it necessary to burden the plaintiff's rights.'" *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000)) (citation omitted). As explained by Marshal Tutor, the witness requirement has extremely limited law enforcement value. Tutor Decl. ¶ 8. Defendants simply avoid Mr. Tutor's declaration and ignore entirely that a witness signature may be easily forged. *Id.* ¶ 5. Intervenor-Defendants rely on data that purports to show some voters have illegally voted in two states. This is a distraction: The witness requirement does not and cannot prevent illegal voting in two states. Notably, the Defendants do not even attempt this baseless argument. *See* Doc. 50 at 26-30.

Even if it served a legitimate state interest in general, the Witness Requirement is unreasonable and unnecessary as applied during the pandemic. The Intervenor-Defendants' purported solution shows why: elderly people with multiple

Covid-19 risk factors who live alone would need to identify a neighbor, postal worker, or a *complete stranger* to observe them voting through a window or glass door and then pass the ballot under a closed door or through a crack in an open window "to be marked, signed, and returned (after handwashing or sanitizing)." Doc. 51 at 29. This suggested process imposes non-statutory restrictions to the witness requirements, narrows who can witness a ballot, and is impossible for individuals living in an apartment or above ground floor. Such a rigmarole could only be justified by a requirement that held unmistakable benefits for law enforcement, which witnessing does not, as stated by the State Board of Elections' former chief election fraud inspector. Tutor Decl. ¶ 8. And contrary to Defendants' contentions, the Witness Requirement would impact a significant number of North Carolinians. In some counts, as many as 37% of householders are individuals living alone, totaling to over 1.1 million North Carolinians statewide. Ketchie Reply Decl. Ex. 4 at 12 ("Householder Living Alone" for "North Carolina"). This includes 416,121 over the age of 65. *Id.*, Ex. 5 at 15 ("Householder Living Alone 65 and over" for "North Carolina). Finally, Director Karen Brinson Bell's recommendation that

the Witness Requirement be eliminated, Doc. 1, Ex. A at 4, undercuts that this is a truly effective or necessary election regulation.

The evidence further shows the burden of the Witness Requirement on voters like Plaintiff Bentley is severe. Ms. Bentley suffers from hypertension, a Covid-19 risk factor, and periodic severe respiratory illness. Bentley Decl. ¶ 3; Murray Decl. ¶¶ 21, 32. She is self-isolating because of the pandemic, *id.* ¶¶ 4–5, and states that she "would not ask a stranger to witness [her] ballot, for the same reason [she] cannot ask [her] neighbors", because she is "not certain as to what precautions they've taken to protect themselves from contracting the virus and what risk contact with them will pose to [her] health." *Id.* ¶ 6. It is not reasonable to require Plaintiff Bentley to interact with a stranger who may or may not be taking precautions. People who live alone and suffer from comorbidities that put them at severe risk from Covid-19 are justified in doubting the strictness of others' social distancing and/or hygienic practices and avoiding all contact. Studies have demonstrated that surface contamination can lead to Covid-19 transmission. Murray Decl. ¶ 24. And MATs cannot alleviate this risk of exposure, assuming they

were available in the first place, a doubtful proposition. Myers Reply Decl. ¶¶ 3–11 and Ex. A; Bartlett Reply ¶¶ 10–11.

Defendants do not attempt to provide "'evidence that such an interest [makes] it necessary to burden voters' rights'" in this fashion. *Thomas*, 2020 WL 2617329, at *20 (citation omitted). They instead improperly contend that the Witness Requirement need not "map closely" to the state's interest in preventing voter fraud, Doc. 58 at 28. But voting regulations cannot be upheld *if they are wholly ineffective* at advancing the state's proffered interest. Such a restriction, like the Witness Requirement, fails to meet the balancing test required under *Anderson-Burdick*. *See Thomas,* 2020 WL 2617329, at *21 (finding plaintiffs likely to prevail on their constitutional challenge to the Witness Requirement under *Anderson-Burdick* because "the character and magnitude of the burdens imposed . . . during the COVID-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity").

Restrictions on Absentee Requests

Defendants have similarly failed to show why the additional restrictions on absentee voting satisfy *Anderson-Burdick.*

As to the Organization Assistance Ban, Defendants rely on excerpts of the 2005 Commission Report discussing the risks associated with absentee *ballots*, not *ballot request forms,* as is relevant here. They further contend the ban is only a "modest burden" by referencing MATs, but have failed to rebut Plaintiffs' evidence that these teams are inadequate, as noted above. *See* Myers Reply Decl. Ex. A (SBOE General Counsel Love admitted that "[u]nfortunately not every county has a MAT team. although most counties do. It may be difficult to find a team of bipartisan volunteers to serve, and the MAT program has no funding allocated to it by the legislature."). Defendants and Intervenor-Defendants have also failed to explain why less restrictive measures, such as restricting public access to information on absentee ballot requests, Tutor Decl. ¶¶ 6-7, do not already fully serve the state's interests. And the statistics regarding alleged "double" voting presented in the Block Declaration are inapposite where there is no discernable link to absentee ballot request

assistance. Finally, the burden imposed by the assistance ban is severe for LWVNC, *see, e.g.*, Nicholas Decl. ¶ 13; Nicholas Reply Decl. ¶ 14, if enforced during Covid-19, and the online option is no salve for the voters who need assistance from knowledgeable individuals for assistance, or who lack technical skills or internet access needed for the brand-new online option.[6]

As to the failure to permit voters to submit HAVA documentation for proof of residence with an absentee ballot request, State Defendants agree this "would be sound policy." Doc. 58 at 21–22. Their reliance on *Democratic Nat'l Comm. v. Bostelmann*, is inapposite given the plaintiffs in that case requested striking down the requirement entirely, not allowing alternative methods of proof. *See* 2020 WL 1320819, at *7 (W.D. Wis. Mar. 20, 2020).

The Defendants have also misconstrued Plaintiffs' requested relief to let voters submit absentee ballot requests by phone. Plaintiffs seek a waiver of the form requirement under N.C. Gen. Stat. § 163-230.2(a) and its

[6] *See* Appendix 5, *2019 Broadband Deployment Report*, FCC 132-136 (May 29, 2019), https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf.

subparts *to the extent required to achieve a request-by-phone mechanism*. This includes at most the signature requirement, as a phone option can be made available while requiring all other information to be provided by the voter. Accordingly, the purported state interests in "reducing voter confusion" and processing time, which would only result from allowing alternative written requests, simply do not apply. And the purported "interest in maintaining written and electronic records," is not furthered where the county board of elections receiving phone requests can make such a record, similar to the log of absentee ballots they already maintain. *See* Bartlett Decl. ¶ 18.

Voting-by-mail Fail-Safes

There is no legitimate interest in failing to allow Federal Write-in Absentee Ballots ("FWABs") to be sent to voters who fail to receive their absentee ballots in time. The Defendants concede that "failure to receive a timely requested absentee ballot would present severe burdens to the right to vote." Doc. 50 at 36. Defendants' claims that this requested relief would cause severe administrative burdens essentially concedes that they do believe there will be problems with absentee ballot delivery. And for good reason:

many states with a sufficiently large electorate and unprecedented demand for mail-in voting, including Ohio, Pennsylvania, Georgia, and Wisconsin, have all experienced ballot delivery failures. Gronke Reply Decl. ¶¶ 25–27.

Defendants contend that other undisclosed methods would be more "administratively feasible." Doc. 58, at 36. But to the extent permitting FWABs would require greater resources, the Supreme Court has made clear that voting rights do not bend to administrative convenience and financial considerations. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986). If indeed this option required significant resources due to the volume of FWABs, it would simply prove that this option is necessary to prevent mass disenfranchisement due to delays in receiving absentee ballots. Nonetheless, if the Defendants have other potential remedies in mind, they should disclose them and seek to settle this claim.

As for the failure to provide a uniform opportunity to cure, State Defendants admit this is not available in all counties. And Director Bell's plan to issue such guidance, Doc. 58 at 35–36, disproves any state interest in failing to provide one. Contrary to Defendants' contentions, the 15%

rejection rate for absentee ballots in the March 2020 primary illustrates the burden of this restriction: at least 48% and as many as 78% of those were rejected for non-compliance with statutory requirements. Ketchie Reply Decl. ¶ 7, Ex. 3. Furthermore, Intervenor-Defendants' contention that a cure process would take "thousands of hours," Doc. 51 at 34, is unsupported and, even if true, would prove the dire need for such a process. Finally, any purported interests in election "finality" and "convenience" would not be furthered by failing to provide a cure process, especially where such a cure process had a set deadline, and the assertion that such a cure process would give absentee voters an "advantage" ignores entirely the restrictions already imposed on absentee voters compared to those voting in-person. *See* Bartlett Reply Decl. ¶ 19.

Finally, the burden placed on voters by a failure to provide secure drop boxes is real and concrete; issues of absentee voter delivery are proven by recent elections in other states. Gronke Reply Decl. ¶¶ 25–27, 29, 31. It is also revealing that, while Defendants acknowledge no issues with USPS here, they express concern about mail verifications when it concerns voter registration. Doc. 58 at 15. The purported

logistical issues presented by Intervenor-Defendants, Doc. 51 at 31–32, are disproven by Director Bell's mandating a secure lock-box for the Republican second primary. Doc. 58-1 ¶ 8; *see also* Bartlett Reply Decl. ¶¶ 10-11. There is no legitimate state interest in failing to provide secure drop boxes during the Covid-19 pandemic when, by the Defendants' admission, providing them would relieve the burden on voters by alleviating issues with USPS delivery and providing a safe method of ensuring absentee ballots are securely delivered.

iii. Restrictions on In-Person Voting

The pandemic has caused a shortage of poll-workers, leading to precinct consolidation and lack of accessible early voting, which will result in excessively long lines and large increases in voting-by-mail, as shown in Wisconsin, Pennsylvania, and Georgia. Gronke Reply Decl. ¶¶ 7–13. To protect North Carolina from a similar fate, this Court must enjoin the uniform hours requirement for early voting sites and home county residency requirement, which requires poll-workers to reside in the county in which they serve, because each requirement will individually and collectively lead to precinct consolidation and less one-stop voting sites,

burdening in-person voters such as Plaintiff Permar. Permar Decl. ¶¶ 7–8; Gronke Reply Decl. ¶¶ 12–13, 24.

In response to these claims, Defendants state no justification for the home county residency requirement, nor do they assert any interest in the uniform hours requirement. The purported interests in the uniform hours requirement stated by the county board of election declarants ignore that (1) counties will keep the *option* of uniform hours to further these interests, and (2) polling site locations, not hours, are a much a more pressing source of voter confusion. Bartlett Decl. ¶¶ 21–22; Quinn Decl. ¶¶ 5, 7–9, 14. Therefore, the home county and uniform hours requirement serve no legitimate state interest and fail *Anderson-Burdick.*

Even if they did serve legitimate interests, Plaintiffs have shown that these restrictions will present severe burdens to in-person voting if enforced during the pandemic by causing reduced early voting sites and election-day precincts, resulting in long lines and crowds that contravene social distancing directives, as well as increased travel time and other burdens to voters. Director Bell's declaration supports this finding, as she discusses the State Board's efforts to recruit poll-workers and notes

that she had to permit voters to transfer to non-adjacent precincts for the June 23 primary in Congressional District 11, a measure that undoubtedly caused over 9,000 voters in this district to travel unusually long distances to vote. Bell Decl. ¶¶ 8, 14; *see also* Gronke Reply Decl. ¶ 5 (greater distances equate to less probability of voting); Quinn Decl. ¶¶ 18–19 (counties need flexibility in site times). Lifting these requirements will greatly further the State Board's poll worker recruitment efforts and reduce any further non-adjacent voter transfers. Gronke Reply Decl. ¶¶ 12–13.

The recent election in Georgia, where there was precinct consolidation due to insufficient numbers of poll-workers—causing long lines—further shows how limiting in-person voting sites severely threatens the right to vote. Gronke Reply Decl. ¶ 11. Georgia had a similar requirement to North Carolina's home county restriction, and thus the provision in HB 1169 lifting the precinct requirement to county-wide does not resolve this threat. *Id.* Voters in North Carolina, such as Plaintiff Permar, need not suffer the same fate while trying to vote in-person.

B. Unconstitutional Conditions Doctrine

Intervenor-Defendants apply incorrect standards in assessing this claim and incorrectly assert that the doctrine applies only when the government conditions a government-created benefit on the forfeiture of a constitutional right. They ignore precedent cited by Plaintiffs even though those cases are undeniably relevant. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) ("Durational residence laws *impermissibly condition* and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote." (emphasis added)).

Intervenor-Defendants also fail to explain how it could be unconstitutional for the government to require someone to give up a constitutional right in order to obtain a *statutory benefit*, but not to exercise a *constitutional right*. They cannot, because "[c]onstitutional rights would be of little value if they could be . . . indirectly denied," regardless of whether that denial occurs through the imposition of an unlawful condition on a government-created benefit or a

constitutional right. *Dunn*, 405 U.S. at 341 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)); *see also Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) ("This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right—freedom from unreasonable searches and seizures—not merely to receive a discretionary benefit but to exercise two other fundamental rights—freedom of speech and assembly.").[7]

Intervenor-Defendants also contend that the Defendants cannot be held liable because Plaintiffs' injuries flow from the Covid-19 pandemic. This argument also fails. First, Plaintiffs' injuries flow from Defendants' enforcement of the witness requirement *during* the Covid-19 pandemic. Laws are not enforced in a vacuum; what may be legal in one context may not be legal in another. Enforcing the witness requirement implicates voters' right to bodily integrity by subjecting them to the risk of contact with a harmful substance, SARS-

[7] Intervenor-Defendants' reliance on *Miller v. Smith*, 115 F.3d 1136 (4th Cir. 1997) is misplaced because the habeas petitioner did not allege that the state had forced him to choose between two constitutional rights.

CoV-2, the virus that causes Covid-19. Second, although Plaintiffs have not invoked the state-created danger theory, Intervenor-Defendants are incorrect that the enforcement of the witness requirement would not constitute affirmative state action. If election officials receive a completed absentee ballot without a witness signature, they will reject it. That is an affirmative state action.

Third, Intervenor-Defendants mischaracterize the right invoked by Plaintiffs, claiming that Plaintiffs articulate a new substantive due process right "to physical safety while voting." Doc. 51 at 44. Plaintiffs do not assert a new substantive due process right—the right to bodily integrity is well-established. Intervenor-Defendants next claim that the right to bodily integrity applies only in cases involving violence and forced medical procedures. *Id.* at 45. Faced with a Sixth Circuit case, *Guertin v. Michigan*, 912 F.3d 907 (6th Cir. 2010), that undermines their argument, Intervenor-Defendants conclude without explanation that the majority, Judges Griffin and White, and the concurring judge, Judge McKeague, were simply wrong to find the plaintiffs had stated a bodily integrity substantive due process claim based on the Flint water crisis. Doc. 51 at 45. But the right to bodily

integrity extends beyond simply protecting individuals against assault and unwanted medical procedures. "It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions about . . . bodily integrity." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992). By making voters come into potential contact with Covid-19 in order to vote, Defendants violate their right to bodily integrity by forcing them to make unwanted contact with a harmful substance. *Cf. Guertin*, 912 F.3d at 921.

State Defendants do not try to disclaim state officials' role in violating Plaintiffs' right to bodily integrity. Instead, they claim that forcing voters to risk their health or lives to vote does not "shock the conscience." Doc. 58, at 29. Plaintiffs respectfully disagree, given the unprecedented risks Covid-19 presents to all voters, especially to vulnerable voters like Plaintiffs. Regardless, Plaintiffs have still shown a likelihood to succeed under the applicable standard, which does not require a "shocks the conscience" finding. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1997) ("[T]he substantive component of the Due Process Clause is violated by executive action" that is "arbitrary,

or conscience shocking." (emphasis added, quotation marks omitted)); *United States v. Salerno*, 481 U.S. 739, 746 (1987) (government may not "engag[e] in conduct that 'shocks the conscience,' . . . *or interferes with rights 'implicit in the concept of ordered liberty'. . .*" (emphasis added, citations omitted)). Enforcing the witness requirement during the Covid-19 pandemic is arbitrary and interferes with rights implicit in the concept of ordered liberty, meeting this standard.

As stated in Plaintiffs' opening brief, the correct standard in this case is strict scrutiny: "[W]hen a condition on a government benefit burdens a constitutional right, it generally triggers the same scrutiny as a direct penalty would." *McCabe v. Sharrett*, 12 F.3d 1558, 1562 (11th Cir. 1994). Thus, laws that burden the right to bodily integrity must be "narrowly drawn" to serve a "compelling state interest." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998). The Witness Requirement fails strict scrutiny because it does not further the government's interest in preventing ballot fraud, and Defendants have failed to show otherwise. Indeed, as Intervenor-Defendants concede, the Witness Requirement could be satisfied by a

complete stranger, *see* Doc. 51 at 28 (proposing a "food-delivery person" witness a ballot) —someone who could hardly prevent ballot fraud. Even Defendant Brinson Bell observed that the witness requirement "increases the risk of transmission or exposure to disease" and that "[m]ost voters, under current law, would have to invite another adult into the voter's home to complete the voting process since most voters do not live with two other individuals age 18 or older." Doc. 1, Ex.2 at 3. Voters should not have to risk life-threatening illness to fulfill a rote procedure that does not meaningfully advance the state's interest.

C. First Amendment

Plaintiffs' expressive association and conduct are political expression, "at the core of our electoral process and of the First Amendment freedoms," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), so the Organization Assistance Ban in HB 1169 is subject to strict scrutiny. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

The Assistance Ban prevents Organizational Plaintiffs from associating with their members and both Organizational Plaintiffs and Plaintiff Schaffer from associating with other

voters. Nicholas Decl. ¶¶ 12-13; Lopez Decl. ¶ 22; Schaffer Decl. ¶¶ 5-9.

Intervenor-Defendants assert that the only activities implicated by the challenged provisions are those related to "completing," "signing" and "delivering" absentee ballots and that these acts do not implicate protected conduct. Doc. 51 at 47. But this narrow view ignores the ambiguity in what constitutes "completing" a request form, Nicholas Reply Decl. ¶ 14, an ambiguity that will inevitably "chill" Plaintiffs' expressive conduct, as "[people] of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Defendants also fail to appreciate that assisting voters is an expression of Plaintiffs' view that the act of voting and helping others to vote promotes democracy, Nicholas Decl. ¶ 3; Lopez Decl. ¶ 2, and that "completing," "signing," and "delivering" request forms are but a part of their assistance with *all* aspects of voting, including education, registering voters, and assisting with mail-in ballots. Courts have recognized that such voter assistance activities are political expression manifested through conduct. In *Am. Ass'n*

of People with Disabilities v. Herrera, the court found that plaintiffs' "endeavors to assist people with voter registration are intended to convey a message that voting is important, that the Plaintiffs believe in civic participation, and that the Plaintiffs are willing to expend the resources to broaden the electorate to include allegedly under-served communities," and thus the plaintiffs sufficiently stated a First-Amendment expressive-conduct claim. 690 F. Supp. 2d 1183, 1215-16 (D.N.M. 2010), *on reconsideration in part*, 2010 WL 3834049 (D.N.M. July 28, 2010). Here, the Organizational Plaintiffs and Plaintiff Schaffer are involved in voter registration and other activities—such as assisting with mail-in voting—that are just as expressive and "of necessity involve[] both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

The *Herrera* court also rejected similar contentions by Intervenor-Defendants that Plaintiffs can still "say anything," Doc. 51 at 47, to registered voters notwithstanding the restriction, recognizing that "[t]he First Amendment protects not only the Plaintiffs' right to

engage in incidental speech with prospective voters, but also their right to do so *while engaging in the act of registration*." 690 F. Supp. 2d at 1217 (emphasis added). This reasoning applies with equal force here, and the Court should find that Plaintiffs' voter assistance is expressive conduct protected by the First Amendment. Furthermore, assisting with all aspects of requesting mail-in ballots, including "completing," "signing," and "delivering" them, has educational and communicative aspects, and restricting the Organizational Plaintiffs' ability to do so harms the effectiveness of their message. Nicholas Decl. ¶¶ 13–14; Lopez Decl. ¶¶ 16, 22–24. And "ministerial conduct" that facilitates voting (such as "delivering" ballots) "acquire[s] First-Amendment protection when done in a setting or manner in which the message becomes apparent," *i.e.*, that the act of voting and helping others to vote promotes democracy. *Herrera*, 690 F. Supp. 2d at 1216.

Finally, Intervenor-Defendants' reliance on *Voting for America, Inc. v. Steen* is misplaced. In *Voting for America*, the law at issue limited voter registration volunteers by geography and thus "neither regulate[d] nor limit[ed] . . . constitutionally protected speech," which the court found to

include "'urging' citizens to register; 'distributing' voter registration forms; 'helping' voters to fill out their forms; and 'asking' for information to verify that registrations were processed successfully," 732 F.3d 382, 389 (5th Cir. 2013), *i.e.* conduct like that at issue here.

D. Procedural Due Process

As to Plaintiffs Clark, Cates, Edwards, Priddy, Hutchins, and Bentley's procedural due process claim, Defendants do not invoke any state interest that could outweigh the risk of erroneous disenfranchisement. *See Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (holding that to assess a due process claim, a court "evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.").

State Defendants do not dispute that Plaintiffs have a liberty interest in casting an absentee ballot, and their purported administrative interests concerns with providing this cure process are directly contradicted by their asserted, though not detailed or effectuated, intent to develop a standardized, statewide cure process. Doc. 58 at 35-36. In any event, that it may be easier for election

officials to simply reject these ballots than to offer voters the opportunity to fix disqualifying errors cannot justify depriving Plaintiffs of the right "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

Intervenor-Defendants mischaracterize Plaintiffs' request as requiring county board of elections to conduct *hearings* on each ballot flagged for disqualifying deficiencies. Doc. 51 at 52–53. Accordingly, their assertion that the requested relief is "overly burdensome," *id.*, is irrelevant because Plaintiffs have requested only that voters have the opportunity to "cure," or correct, errors following notice. Their assertion that North Carolina law does not create an interest in casting an absentee ballot is similarly misplaced, as this interest is quite clearly created by state law. Plaintiffs have a statutory right to vote by mail. *See* N.C. Gen. Stat. § 163-226(a). North Carolina has rejected absentee ballots at exceptionally high rates from 2012-2018, Gronke Decl. ¶¶ 17, 37, as well as in the March 3, 2020 primary, in which of the 15% rejected absentee ballots at least 48% and as many as 78% could have been cured. Ketchie Reply Decl. ¶ 7, Ex. 3. Standardized curing procedures could

be helpful in preventing erroneous deprivation. Gronke Reply Decl. ¶¶ 32–35. Other courts have recognized that these rejections violate due process and required election officials to provide voters with the opportunity to cure deficiencies in their mail-in absentee ballots. *See, e.g.*, *Self Advocacy Sols. N.D. v. Jaeger*, 2020 WL 3068160 (D.N.D. June 5, 2020); Stip. & Order Granting Prelim. Inj., *League of Women Voters of N.J. v. Way*, No. 3:20-cv-05990, ECF No. 34 (D.N.J. June 16, 2020) (Ex. 1).

Finally, Intervenor-Defendants do not explain how offering voters the opportunity to cure deficiencies in their mail-in ballots would burden election officials. The responsive declarations of county board members from Wake (Hawkins) and Cumberland (Devore) counties,[8] discuss their respective counties' existing cure processes, *see* Hawkins Decl. ¶ 8; Devore Decl. ¶ 11, without identifying any hardship in implementing these procedures. Secretary Devore even

---

[8] Only Plaintiff Clark lives in Wake County. None of the individual Plaintiffs live in Cumberland County. Ms. Hawkins does not describe Wake County's cure process in her declaration, nor did the Intervenor-Defendants attach a copy of the procedures as an exhibit to their brief, thus preventing the Court from assessing the procedures' constitutional adequacy.

describes how, under Cumberland County's procedures, election officials recently contacted some 3,000 voters, providing them with the proper absentee ballot request forms after the board received pre-populated forms submitted in these voters' names. Devore Decl. ¶ 11. If, as Intervenor-Defendants claim, Wake and Cumberland Counties have already successfully implemented ballot cure procedures that comport with constitutional requirements with little or no burden, it is unclear why other counties would be unable to do the same, especially if, as Intervenor-Defendants note, "millions of citizens every year are able to successfully cast absentee ballots across the country." Doc. 51 at 11.

E. ADA /Rehabilitation Act

Under the ADA and RA, Plaintiffs Clark, Edwards, and Priddy must be allowed to complete FWABs in the event their absentee ballots are not delivered on time. Second Am. Compl., Doc. 30 ¶¶ 144–49. Defendant-Intervenors argue that these Plaintiffs have "suffered no injury-in-fact and do not have a ripe claim" under the ADA or the RA because it is speculative whether they will receive their absentee ballots in time. Doc. 51, at 53. However, a plaintiff need not wait for "the consummation of threatened injury to obtain

prospective relief." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (quotation marks omitted). Rather, a plaintiff seeking prospective relief must establish that the "perceived threat . . . is sufficiently real and immediate to show an existing controversy." *Blum v. Yaretsky*, 457 U.S. 991, 1000 (1982) (quotation marks omitted). The recent evidence from Ohio, Pennsylvania, Georgia, Wisconsin, and Florida show that state and local election officials, as well as the USPS, have failed to timely deliver thousands of absentee ballots to voters in the mail because of the significant increase in voting-by-mail. Gronke Reply Decl. ¶¶ 25–27. This experience shows that delayed ballots present a real and immediate threat. And due to the pandemic, Plaintiffs Clark, Edwards, and Priddy cannot vote in person. As a result, they will be denied their right to vote without the option to use FWABs—an option that is already available to overseas citizens and military personnel.

Intervenor-Defendants assert that Plaintiff Hutchins—a 91-year-old, blind and hard-of-hearing veteran who is under lockdown in a nursing home—has no standing or a ripe claim under the ADA and RA. But the Fourth Circuit has held that the ADA prohibits voting barriers even where one has a

"choice" of other voting methods. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016) (ADA challenge to "inaccessible" absentee voting not barred by availability of "accessible" in-person voting). Moreover, Intervenor-Defendants' proposed alternatives are unreasonable in light of the COVID-19 pandemic. They propose that Plaintiff Hutchins (1) wait to see if the nursing home will lift lockdown—which is unlikely, especially since Governor Cooper postponed North Carolina's entrance into Phase 3 as a result of growing COVID-19 cases, Murray Decl. ¶¶ 33–44; *see also Latest Coronavirus Updates*, The Davis Community (July 2, 2020) (nursing home will operate in "restricted mode" through "Phase 2 or Phase 3")[9]; (2) rely on MAT members—who will not be allowed into the nursing home due to the lockdown, Hutchins Decl. ¶ 6; *see also Latest Coronavirus Updates*, The Davis

---

[9] *Available at* https://www.thedaviscommunity.org/latest-coronavirus-updates/ (last accessed July 3, 2020). Plaintiff Hutchins' nursing home has experienced a low number of cases of COVID-19, and no deaths. *See COVID-19 Ongoing Outbreaks in Congregate Living Settings* (July 2, 2020), NC Dept. of Health and Human Services, *available at* https://files.nc.gov/covid/documents/dashboard/Weekly-COVID19-Ongoing-Outbreaks.pdf (last accessed July 3, 2020) (showing only 3 cases and 0 deaths for Davis Health Care Center, versus, *e.g.*, 130 cases and 22 deaths at Peak Resources Charlotte).

Community (July 2, 2020) (restricting "visitation of ALL visitors until further notice") (emphasis in original)[10] and will likely be unavailable regardless, *see* Myers Decl. ¶¶ 3, 6, Ex. A, at 1, or (3) obtain assistance from a nursing home resident to fill out his ballot—but residents have been instructed to maintain social distancing.

More fundamentally, the ADA and RA do not require Plaintiffs to prove that they are completely unable to enjoy a service, program, or activity—only that such participation is not readily accessible. *See Lamone*, 813 F.3d at 503. By refusing to make reasonable accommodations for ADA/RA Plaintiffs in light of the global pandemic, ADA/RA Plaintiffs do not have "meaningful access" to the opportunity to cast an absentee ballot and will be unable to exercise their constitutional right to vote. *See id.*

Finally, *amici* Republican Committees argue that the accommodations the ADA/RA Plaintiffs seek would "fundamentally alter the nature of North Carolina's elections" by eliminating voter fraud protections. Doc. 52-3 at 25. But the Witness Requirement does little to prevent

---

[10] *Available at* https://www.thedaviscommunity.org/latest-coronavirus-updates/ (last accessed July 3, 2020).

fraud or preserve the integrity of elections, *see supra* at 19, and the Republican Committees offer no reason why allowing nursing home staff to assist Plaintiff Hutchins implicates those concerns, or how FWABs, which are already used by overseas civilians and military personnel, fundamentally alter the elections. Further, numerous other states do not have a witness requirement, and in other contexts, courts have stricken similar laws restricting who may assist the voter. *See, e.g.*, *Priorities USA v. Nessel*, 2020 WL 2615766, at *14 (E.D. Mich. May 22, 2020) (plaintiffs "stated a claim for preemption" of Michigan law that restricted voters to seeking assistance from "a member of the voter's household or family" or "an elector registered in Michigan").

F. Section 208

Section 208 of the Voting Rights Act guarantees Plaintiff Hutchins and others who "require[] assistance to vote by reason of blindness, disability, or inability to read or write" to "assistance by a person of the voter's choice, other than … agent[s] of [the voter's] employer or … union." 52 U.S.C. § 10508. This right extends to "all action necessary to make a vote effective," including "registration" and other "prerequisite[s] to voting." *Id.* § 10310(c)(1). Hutchins'

claim is simple: Section 208 entitles him to the assistance of the staff at his nursing home in completing and submitting the ballot itself. By forbidding him from obtaining this assistance, several provisions of North Carolina law violate Section 208. *See* SAC at 76 (citing N.C. Gen. Stat. §§ 163-226.3(a)(4)-(6), 163-230.2(e)(4), 163-231(b)(1)). Defendants do not dispute that he is entitled to relief on this claim.

Intervenor-Defendants nonetheless contend that Hutchins is not "threatened with an injury that would provide standing to challenge" these restrictions because, in their view, he could "send the [ballot] request himself" or ask his wife to do so and could obtain assistance completing the ballot from his "wife," "a MAT member," or "other nursing home residents." Doc. 51 at 55–56. Factual inaccuracies aside, Intervenor-Defendants misapprehend the injury-in-fact requirement. Hutchins claims he is "legally entitled" to choose nursing home staff for assistance and that "the denial of" this right impedes his ability to vote. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017); *see* Doc. 11-9 at 3–4 (Hutchins Decl. ¶¶ 11–12). This interference with Hutchins' ability to vote constitutes "a 'real' harm with an adverse

effect" and thus suffices to establish his standing. *Dreher*, 856 F.3d at 345.

Intervenor-Defendants' arguments on the merits are foreclosed by the plain text of Section 208. Reasoning from the premise that the State may "narrow[] … a voter's choice" of assistors, Intervenor-Defendants defend the challenged provisions on the ground that "North Carolina law leaves Hutchins with many options" for assistance. Doc. 51 at 57. This argument fails with the premise. As numerous courts have held, Section 208 unambiguously entitles eligible voters to assistance from "a person of *the voter's choice*" and preempts state laws to the contrary. 52 U.S.C. 10508 (emphasis added); *see OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017) (Texas statute limiting eligible assistors "impermissibly narrow[ed] the right guaranteed by Section 208"); *Priorities USA*, 2020 WL 2615766, at *14 (plaintiffs "stated a claim for preemption" of Michigan law that restricted voters to seeking assistance from "a member of the voter's household or family" or "an elector registered in Michigan"); *United States v. Berks Cty.*, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (county cannot "deny Spanish-speaking voters . . . the right to … their assistor of choice").

Indeed, in *DiPietrae v. City of Philadelphia*, 666 A.2d 1132 (Pa. Commw. Ct. 1996), which Intervenor-Defendants cite, the court held that "the trial court properly allowed a disabled voter to appoint a person of his or her choice to obtain [and deliver] an absentee ballot application [and] completed ballot." *Id.* at 1135. Intervenor-Defendants' interpretation, in contrast, would rewrite the statute into a guarantee of assistance by a person of the *state's* choice.

In addition, because "[t]he expression of one thing implies the exclusion of others," *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018), Section 208's express limitation with respect to "agent[s] of [the voter's] employer or … union," confirms that the "voter's choice" remains otherwise unrestricted, 52 U.S.C. § 10508.

Even assuming that states may limit voter choice "to prevent fraud or undue influence," Doc. 51 at 57, Intervenor-Defendants offer no reason why allowing nursing home staff to assist Plaintiff Hutchins would implicate those concerns at all, let alone why such assistance is riskier than Intervenor-Defendants' preferred approach of having Plaintiff Hutchins rely on "any resident of [his] nursing home," *id.* Intervenor-Defendants concede as much by suggesting that a nursing home

"staff person … accompany him to vote absentee at a one-stop voting location," or "help Hutchins with his ballot at a polling place on election day." *Id.* at 58.

Finally, Intervenor-Defendants reimagine Section 208 as requiring only "one means by which [a voter] can cast his ballot with help from a person of his choice," such as in-person voting, leaving the State free to restrict assistance for all other modes of voting. Doc. 51 at 57–58. No court has adopted such a stingy reading of Section 208, and for good reason: Intervenor-Defendants' understanding of the statute is wholly atextual. Tellingly, they fail to point to any aspect of the statutory text that supports their *ipse dixit* interpretation of Section 208.

III. Other Equitable Factors Favor Issuance of an Injunction

Plaintiffs rest on their opening brief's discussion of the equitable factors and respond here only to the specific arguments they have not previously addressed.

A. Plaintiffs' requested injunction is not "overbroad."

Intervenor-Defendants suggest that Plaintiffs' requested injunction is "overbroad," and that any relief should be applied only to Plaintiffs to avoid "contraven[ing] Fourth

Circuit precedent on the appropriate scope of injunctive relief." This Court has directly rejected such narrow applications of injunctive relief. *See, e.g.*, *Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 397 (M.D.N.C. 2019) ("However, 'an injunction is not necessarily made overbroad by extending the benefit of protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled.'" (citation omitted))." In other words, "[t]here is no general requirement that an injunction affect only the parties in the suit." *Id.* Without the full scope of requested relief, Plaintiffs face a high likelihood of disenfranchisement during the November 2020 election, and Organizational Plaintiffs will be harmed in advancing their core mission in helping voters' participation. That others across the state may benefit from a ruling in favor of the Plaintiffs is no bar to the injunctive relief requested.

B. *Purcell* Does Not Preclude Relief.

Contrary to Intervenor-Defendants' contentions, *Purcell v. Gonzalez* does not create a *per se* rule that courts must reject any request for injunctive relief as to voting rules brought within a certain timeframe before an election.

Rather, *Purcell* directs federal courts to weigh "considerations specific to election cases"—namely the risks of voter of confusion, increased administrative burdens, and suppressed turnout—amongst the normal equitable factors for issuance of an injunction. 549 U.S. 1, 4-5 (2006).

The *Purcell* factors "demand[ ] 'careful consideration' of any legal challenge that involves 'the possibility that qualified voters might be turned away from the polls.'" *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 387 (6th Cir. 2008) (quoting *Purcell*, 549 U.S. at 4). Accordingly, injunctions are appropriate where, as here, the challenged law or rule would have the effect of disenfranchising voters. *See League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (approving injunction related to voter registration form less than two weeks before relevant registration deadlines); *Obama for Am. v. Husted*, 697 F.3d 423, 436-37 (6th Cir. 2012); *Land*, 546 F.3d at 387 (denying defendants' motion to stay district court's order granting preliminary injunction, issued twenty-two days before Election Day).

For the same reasons, *Purcell* does not bar relief here. The relief requested will facilitate and increase voter

turnout, is required to prevent voter suppression, and will not cause voter confusion. Furthermore, many aspects of the requested relief will alleviate administrative burdens, such as lifting the geographical restriction on poll worker recruitment, reducing the processing time for absentee ballot requests and ballots by lifting the witness requirement, providing counties with flexibility in their early voting hours, and eliminating the need to review witness certification. Even if this were not true, the Supreme Court has soundly rejected arguments that increased administrative burdens override First Amendment rights, *see Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1985); the same principle should apply with even greater force in a case that concerns voters' rights to cast their ballots in the face of a deadly pandemic.

Finally, Intervenor-Defendants' contentions that this lawsuit was not timely filed are disingenuous given their own failure to enact HB 1169 until June—months before a presidential election, months after Executive Director Bell's March 26, 2020 letter, and without any apparent concerns for voter confusion and the time left to administer these changes. If the Legislature's ameliorative legislation is not too

late, then neither is this ameliorative litigation. Finally, these arguments directly contradict their previous statements criticizing Plaintiffs for not *waiting* to sue until after HB 1169 was enacted. Doc. 64 at 2.

For the reasons stated above, Plaintiffs' Amended Motion for Preliminary Injunction should be granted.

Dated: July 3, 2020.

Respectfully submitted,

/s/ Jon Sherman
Jon Sherman
D.C. Bar No. 998271
Michelle Kanter Cohen
D.C. Bar No. 989164
Cecilia Aguilera
D.C. Bar No. 1617884
FAIR ELECTIONS CENTER
1825 K St. NW, Ste. 450
Washington, D.C. 20006
Telephone: (202) 331-0114
Email:
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org

/s/ Hilary Harris Klein
Allison J. Riggs (State Bar #40028)
Jeffrey Loperfido (State Bar #52939)
Hilary Klein (State Bar #53711)
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942
Email:
Allison@southerncoalition.org
jeff@southerncoalition.org

/s/ George P. Varghese
George P. Varghese (Pa. Bar No. 94329)
Joseph J. Yu (NY Bar No. 4765392)
Stephanie Lin (MA Bar No. 690909)
Rebecca Lee (DC Bar No. 229651)
Richard A. Ingram (DC Bar

No. 1657532)
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
Telephone: (617) 526-6000
Facsimile: (617) 526-5000
Email:
george.varghese@wilmerhale.com
joseph.yu@wilmerhale.com
stephanie.lin@wilmerhale.com
rebecca.lee@wilmerhale.com
rick.ingram@wilmerhale.com

WORD CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for Plaintiffs' Reply in Support of Their Amended Motion for Preliminary Injunction is 9995 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/ Hilary Harris Klein
Hilary Harris Klein