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

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

Plaintiffs,

v.

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

Defendants,

and

Civil Action

No. 20-cv-00457

BRIEF IN SUPPORT OF LEGISLATIVE DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' JULY 2ND DECLARATIONS

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

Legislative Defendant-Intervenors.

INTRODUCTION

Plaintiffs had ample opportunity to assemble evidence in support of their motion for a preliminary injunction. Indeed, in mid-March the organizational Plaintiffs and their counsel wrote a lengthy letter to the State Board of Elections "urging expansive and first-step reforms to ease the burden of voting during a global pandemic," Decl. of Tomas Lopez, Doc. 11-1 ¶ 32 (June 5, 2020) ("Lopez Decl."), yet Plaintiffs did not file their preliminary injunction motion until early June, two-and-a-half months later. And assemble evidence Plaintiffs did, submitting sixteen substantive declarations spanning more than 230 pages in support of their preliminary injunction motion.

Despite taking the opportunity to assemble such a massive preliminary injunction record, Plaintiffs were not satisfied. Instead, they submitted *nine* additional declarations with their reply, totaling an additional *160-plus* pages. This is wholly inappropriate. Federal Rule of Civil Procedure 6(c)(2) requires litigants to serve evidence supporting a motion along with the

motion. Sandbagging for the reply is not allowed—particularly where, as here, much of the evidence Plaintiffs have submitted with their reply could have been submitted with their motion.

Plaintiffs' reply evidence is particularly inappropriate because there is insufficient time for Legislative Defendants to respond to that evidence before the preliminary injunction hearing that is scheduled to take place in three days—and it would be inequitable to allow the evidence in without a fair opportunity to respond. Indeed, to the extent the Court even considers allowing any part of Plaintiffs' new evidence into the record, it should put Plaintiffs to a choice: *either* they can submit that new evidence *or* they can keep the scheduled July 9 hearing date. And if the choice is the former, Legislative Defendants must at a minimum be able to depose the authors of any new declarations between now and the end of the week of July 13 and submit a 5,000-word surreply supported by rebuttal evidence by July 21. The hearing could then be rescheduled for later in the week of July 20.

Legislative Defendants believe that time is of the essence in this matter. Indeed, Plaintiffs have waited too long to file this case as it is. Our primary submission therefore is that Plaintiffs reply evidence be stricken entirely and the parties move forward with the agreed-to oral argument on July 9. But if Plaintiffs' new evidence is going to come in, it must be done in a fair manner

that presents Legislative Defendants an adequate opportunity to test that evidence.

STATEMENT OF FACTS

Plaintiffs initiated this action on May 22, 2020, challenging an array of North Carolina election laws. And on June 5, 2020, they moved for a preliminary injunction. Plaintiffs submitted sixteen substantive declarations totaling approximately 240 pages and twenty-three additional exhibits amounting to 135 more pages.

On July 11, 2020, North Carolina legislators passed, and on July 12 Governor Cooper signed into law, House Bill 1169 ("HB1169"), which revised several of the laws challenged by Plaintiffs. Plaintiffs made only slight amendments to their complaint and motion for preliminary injunction to account for HB1169. And they made *zero* changes to the 15,000-word brief they had submitted in support of that motion and submitted *no* additional declarations or evidence.

On June 26, 2020, both the State and Legislative Defendants filed their responses in opposition to Plaintiffs' motion. On July 1, 2020, the Court held a status conference, after which it ordered that Plaintiffs were to file their reply brief in support of their motion on or before July 3, 2020 but had to file any declarations in support by July 2. The Court also calendared oral argument for the preliminary-injunction motion for July 9.

On July 2, Plaintiffs submitted nine declarations to the Court, seven of which came from individuals (Lopez, Nicholas, Bentley, Murray, Gronke, Bartlett, and Ketchie) who had already submitted declarations and two from individuals (Myers and Quinn) who had not. These new declarations alone added another nearly 170 pages to the record and would bring Plaintiffs' grand total of supporting evidence to more than 500 pages.

Plaintiffs filed their reply brief on July 3, 2020.

QUESTION PRESENTED

Whether the declarations submitted by Plaintiffs on July 2, 2020 should be stricken from the record.

ARGUMENT

I. All of Plaintiffs' July 2nd Declarations Must Be Stricken Under Rule 6(c)(2).

Federal Rule of Civil Procedure 6(c)(2) requires that "[a]ny affidavit supporting a motion must be served with the motion." Fed. R. Civ. P. 6(c)(2); *see also* Local R. 7.3(e); *Kaiser-Flores v. Lowe's Home Centers, Inc.*, No. CIV. 5:08-CV45-V, 2009 WL 762198, at *8 (W.D.N.C. Mar. 19, 2009). Courts therefore have widely refused to consider "declarations [that] address issues which should have been addressed in the opening brief" because "new evidence is inappropriate for Reply." *Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006); *see also Cal. Expanded Metal Prod. Co. v. Klein*, 426 F. Supp. 3d 730, 743 (W.D.

Wash. 2019) ("The court sees no reason why [the declarant] could not have included those factual assertions in his sparsely supported first declaration, especially considering the central role his attestations played in Defendants' opening brief, and declines to give Defendants a second bite at the apple on reply."); *Paz Sys., Inc. v. Dakota Grp. Corp.*, No. CV054763LDWWDW, 2006 WL 8430241, at *4 (E.D.N.Y. June 16, 2006) ("Where a plaintiff has had ample opportunity to present evidence in its initial motion and did not do so, the court may decline to address that evidence.").

Particularly instructive is the district court's analysis in *Semper/exeter Paper Co. LLC v. Henderson Specialty Paper LLC*, No. SACV090672AGMLGX, 2009 WL 10670619 (C.D. Cal. Sept. 21, 2009). As the court explained:

> Plaintiff submitted moving papers to make its case that a preliminary injunction should issue. Defendants attacked the sufficiency of Plaintiff's case with arguments and evidentiary objections. If Defendants' attacks disprove parts of Plaintiff's case, Plaintiff should not be allowed to make a different case with different evidence in reply. A system that tolerated this would invite endless rounds of new evidentiary submissions and new attacks on those submissions.

Id. at *3.

Plaintiffs here submitted a preliminary injunction motion supported by a 15,000-word brief and accompanied by sixteen substantive declarations totaling approximately 240 pages. Like the defendants in *Semper/exeter Paper*, Defendants "attacked the

sufficiency of Plaintiff's case with arguments and evidentiary objections." *Id.* And Plaintiffs—like the plaintiffs in *Semper/exeter Paper*—assert in their reply declarations "for the first time, information that should have been presented in [their] opening papers." *Id.* at *2. Likewise, Plaintiffs cannot "argue that the evidence submitted with [their] Reply was unavailable when [they] submitted [their] opening brief," *id.*, nor explain "why the evidence submitted with [their] reply could not have been submitted with [their] moving papers," *id.* at *3.

To the extent that Plaintiffs perceived a need to respond to Defendants' opposition, that perception alone cannot justify the July 2nd declarations. That is because the Defendants' arguments in opposition—that Plaintiffs lacked standing; that their suit presented nonjusticiable political questions; that it failed on the merits; and that the injunction they seek is too intrusive of the State's regulatory authority and too late to implement—are not "unanticipated issues" for which supplemental evidence in reply might be appropriate. *Id.* at *2. Rather, it was entirely "foreseeable" to Plaintiffs that Defendants would attack their preliminary-injunction motion on these bases. *Id.* at *3. Indeed, Plaintiffs' earlier declarations clearly anticipated many of Legislative Defendants' own arguments in opposition. Take, for instance, the issue of standing. The initial Lopez and Nicholas declarations discussed resource diversion no less than five times.

See Lopez Decl. ¶¶18, 27, 34; Decl. of Jo Nicholas, Doc. 11-2 ¶¶15, 20 (June 5, 2020) ("Nicholas Decl."). Surely Plaintiffs were trying to preemptively build their case for organizational standing and they had every reason to believe that Legislative Defendants would challenge them on this ground.

For these reasons, Plaintiffs reply declarations should be stricken in their entirety.

II. Plaintiffs' July 2nd Declarations Are Not Confined to Addressing Defendants' Responses.

A close examination of Plaintiffs' reply declarations reinforces the conclusion that they are wholly inappropriate. Rule 6(c)(2) permits, *at most*, a movant to make supplemental record submissions with a reply brief "to rebut specific arguments raised by the non-movant's opposition brief." *Hammons v. Computer Programs & Systems, Inc.*, No. 05-0613-WS-C, 2006 WL 3627117, at *14 (S.D. Ala. Dec. 12, 2006); *see also Kisaka v. Univ. of S. Cal.*, No. CV1101942MMMMANX, 2012 WL 12951434, at *3 n.39 (C.D. Cal. Aug. 3, 2012); *Tishcon Corp. v. Soundview Commc'ns, Inc.*, No. CIV.A. 104CV524-JEC, 2005 WL 6038743, at *8 (N.D. Ga. Feb. 15, 2005).

Therefore, "[c]ourts generally refuse to consider affidavits served in a reply that support facts referenced in the opening brief." *Mattress Safe, Inc. v. J.T. Eaton & Co.*, No. 1:18-CV-2915-MHC, 2019 WL 2714498, at *3 (N.D. Ga. Jan. 15, 2019); *see also Carlisle v. Nat'l Commercial Servs., Inc.*, No. 1:14-CV-515-TWT,

2015 WL 4092817, at *1 (N.D. Ga. July 7, 2015); 1 *Moore's Federal Practice - Civil* § 6.08 (2020).

When a declaration "clarifies and elaborates" on a subject "not initiated by the [non-movant] in its response," it should not be admitted. *Exceptional Mktg. Grp., Inc. v. Jones*, 749 F. Supp. 2d 1352, 1359 (N.D. Ga. 2010). Thus, reply declarations that "merely embellish facts presented in" the movant's earlier filings should not be considered because if the earlier declarations "were insufficient, the [movants] may not later file reply declarations as a supplement or substitute." *Id.* at 1360.

Plaintiffs' July 2nd declarations for the most part either elaborate on subjects first raised by Plaintiffs themselves or embellish facts already presented by Plaintiffs, and they therefore are inadmissible.

(1) & (2) The two declarations by Kenya Myers and Jake Quinn, *see* Decl. of Kenya Myers, Doc. 73-8 (July 2, 2020); Decl. of Jake Quinn, Doc. 73-9 (July 2, 2020); do not even purport to be "reply" declarations because neither declarant filed a declaration with Plaintiffs' opening brief. Neither is responsive to any specific argument raised by Defendants in their responses. Indeed, neither references Defendants' arguments or declarations. And both declarations could easily have been submitted with Plaintiffs' amended motion. Myers's declaration largely concerns her experience with multipartisan assistance teams (MATs) during the

March 2020 primary election, along with a follow-up communication in late May. And Quinn's declaration primarily concerns the alleged effect of the Uniform Hours Requirement on one-stop early voting in Buncombe County during the 2018 General Election and early voting patterns in Buncombe during the March 2020 Primary Election. Both declarations merely embellish Plaintiffs' prior insistence that the availability of MATs has been inadequate in certain parts of the State, *see* Second Am. Compl. ¶62, and that the Uniform Hours Requirement causes precinct consolidation, *see id.* ¶83.

(3) Lopez's second declaration, Second Decl. of Tomas Lopez, Doc. 73-1 (July 2, 2020), does not respond to Defendants, although it purports to do so. *Id.* ¶1. Rather, it merely embellishes facts already in Lopez's first declaration, particularly those concerning Democracy North Carolina's (DemNC's) mission; the alleged diversion of DemNC's resources because of various North Carolina election laws; DemNC's interactions with voters; and DemNC's perceptions regarding deficiencies with various elections procedures, such as absentee ballot curing and one-stop early voting.

Lopez consistently makes reference throughout the reply declaration to his earlier one. *See, e.g.*, *id.* ¶¶2.a, 2.c, 2.c.iii, 3.a, 4. In fact, at points in the declaration, Lopez all but admits that he is doing nothing more than elaborating upon and embellishing his earlier assertions. *See id.* ¶2.c ("I believe that

I made this point in my first declaration, but to further buttress that claim . . . ."). Indeed, Lopez's reply declaration largely repeats the same points he made in his opening declaration, albeit with a few additional details and a more emphatic tone.

(4) Nicholas's reply declaration, Reply Decl. of Jo Nicholas, Doc. 73-2 (July 2, 2020) ("Nicholas Reply Decl."), also purports to "address the contentions raised in the responses to [Plaintiffs'] motion," *id.* ¶2, but it fails to accomplish more than repeating with emphasis the same points made in her initial declaration. She repeats the League of Women Voters of North Carolina's (LWVNC's) core mission and how the challenged provisions of North Carolina law purportedly frustrate that mission. *Compare id.* ¶3–8 (concerning LWVNC's mission and voter registration), *with* Nicholas Decl., Doc. 11-2 ¶1–10 (same). She does the same with the Witness Requirement, *compare* Nicholas Reply Decl., Doc. 73-2 ¶9, *with* Nicholas Decl., Doc. 11-2 ¶15; drop boxes, *compare* Nicholas Reply Decl., Doc. 73-2 ¶10, *with* Nicholas Decl., Doc. 11-2 ¶16; opportunities to cure, *compare* Nicholas Reply Decl., Doc. 73-2 ¶11, *with* Nicholas Decl., Doc. 11-2 ¶¶17–18; and restrictions on poll workers and hours for early voting sites, *compare* Nicholas Reply Decl., Doc. 73-2 ¶¶12–13, *with* Nicholas Decl., Doc. 11-2 ¶¶20–21.

(5) Bentley's reply declaration, Reply Decl. of Lelia Bentley, Doc. 73-3 (July 2, 2020) ("Bentley Reply Decl."), repeats

portions of the first declaration verbatim. *Compare id.* ¶¶1-4, *with* Decl. of Lelia Bentley Doc. 11-6 ¶¶1-4(June 5, 2020) ("Bentley Decl."). Where Bentley does add new allegations, they are either entirely unresponsive or contradict her earlier declaration without explanation. For example, Bentley now declares that since mid-April, the only times she has left her home have been in her own neighborhood and not inside anyone else's home. *See* Bentley Reply Decl., Doc. 73-3 ¶4. This is in no way responsive to Legislative Defendants, whose arguments in opposition never depended on Bentley leaving her neighborhood or entering another's home. And Bentley could have easily declared as much when Plaintiffs' filed their motion in early June.

Bentley now also declares that "[a]ccessing an online ballot request form" would "be very difficult." *Id.* ¶7. This is perplexing, given that Plaintiffs' complaint never once alleges that Bentley had raised a challenge to the State's absentee ballot request procedures and Bentley had previously declared that she ordered her groceries online. *See* Bentley Decl., Doc. 11-6 ¶4. Because Bentley never identified any concern with accessing an online ballot request anywhere in her prior declaration, Defendants had no reason to raise the issue in their responses.

(6) Much of Gronke's reply declaration, Reply Decl. of Dr. Paul Gronke, Doc. 73-5 (July 2, 2020) ("Gronke Reply Decl."), is unresponsive. Particularly remarkable is Gronke's extended

discussion regarding poll worker shortages, the conclusion of which is that North Carolina will face such a shortage in November unless it "remov[es] the requirement that poll workers are registered in the county where they are working." *Id.* ¶12; *see id.* ¶¶7–13. Gronke's prior declaration did not address the Home County Requirement because before HB1169, there was no such requirement; the prior law required a majority of poll workers at any site to be from the precinct. And yet, when Plaintiffs' amended their complaint and preliminary injunction motion in mid-June, they did not make a single change to their brief, nor did they submit any declaration from Gronke or anyone else discussing the Home County Requirement. While some of the studies and articles Gronke cites post-date the amended motion, many of them do not and one can only wonder why Plaintiffs did not submit any relevant evidence before Defendants filed their responses in opposition.

Put simply, Plaintiffs cannot all but abandon an argument by failing to address it their opening brief only to resurrect it through a reply declaration. Plaintiffs had every opportunity to amend their opening brief and secure a follow-up declaration from Gronke addressing the Home County Requirement long before July 2nd. They cannot now attempt to do so.

Other parts of Gronke's reply declaration merely embellish his earlier declaration and are not responsive to specific arguments raised by the Defendants. Those include his repetitive

discussion of the impact of precinct consolidation on in-person voting and turnout, *compare id.* ¶¶2–6, *with* Decl. of Paul Gronke, Doc. 12-2, ¶¶22–27 (June 5, 2020), and his lengthy discourse on mail-in absentee voting, *see* Gronke Reply Decl., Doc. 73-5 ¶¶25–35, including his opinions regarding drop boxes and curing absentee ballots. Although Gronke frames the latter analysis as one prompted by Defendants, *see id.* ¶25, in truth, virtually that entire portion of his declaration is simply support for Plaintiffs' initial motion, not some specific reply to an issue raised by Defendants.

The only portions of Gronke's reply declaration that are responsive are those portions where he addresses specific claims made by Declarant Callanan regarding on-site early voting, *see id.* ¶¶15–22, and specific claims by Declarant Block regarding voter fraud, *see id.* ¶¶36–37.

(7) Although Bartlett's reply declaration, Reply Decl. of Gary Bartlett, Doc. 73-6 (July 2, 2020), does not proffer any argument or evidence not previously available to Plaintiffs, it does respond to the declarations made by Defendant Bell and the other election-official declarants.

(8) Murray's reply declaration, Reply Decl. of Dr. Megan Murray, Doc. 73-4 (July 2, 2020), for the most part responds to the declaration of Dr. Plush.

(9) Ketchie's reply declaration, Reply Decl. of Christopher Ketchie, Doc. 73-7 (July 2, 2020), explains how Plaintiffs' calculated certain figures appearing in their reply.

III. If the July 2nd Declarations Are Not Stricken In Their Entirety, Legislative Defendants Are Entitled To Depose the Witnesses and File a Surreply Before Any Hearing on Plaintiffs' Motion.

To the extent the Court allows Plaintiffs' July 2nd Declarations into the record but nevertheless maintains the July 9th oral argument date, it will put Defendants in an untenable position. Generally, "[t]he filing of an additional affidavit introducing new factual assertions in a reply brief leaves the opposing side no opportunity to respond." *Ctr. Dev. Venture v. Kinney Shoe Corp.*, 757 F. Supp. 34, 36 (E.D. Wis. 1991); *see also Gametech Int'l, Inc. v. Trend Gaming Sys., LLC*, 380 F. Supp. 2d 1084, 1092 (D. Ariz. 2005) ("Usually a movant should not be permitted to submit an affidavit or other evidence after the response has been filed because such a late submission would preclude respondent from addressing the evidence.").

Because Rule 6(c)(2) is designed "to insure that the party opposing a motion for [a preliminary injunction] be given sufficient time to respond to the affidavits filed by the moving party, thereby avoiding any undue prejudice," *Tishcon Corp.*, 2005 WL 6038743, at *8, as a practical matter this Court has two options before it. It can strike Plaintiffs' July 2nd declarations, as

Legislative Defendants argue above. *See Springs Indus., Inc. v. Am. Motorists Ins. Co.*, 137 F.R.D. 238, 240 (N.D. Tex. 1991) ("[W]here a movant has injected new evidentiary materials in a reply without affording the nonmovant an opportunity for further response, the court still retains the discretion to decline to consider them."). Or the Court can, at the very least, "permit[] the defendants to reply to plaintiff's reply" and therefore give defendants an "opportunity to respond to the evidence that plaintiff contends to be pivotal in deciding the motion[] at issue." *Tishcon Corp.*, 2005 WL 6038743, at *9.

To the extent Plaintiffs' declarations are not stricken, then, the Court should provide Defendants with the opportunity to file a surreply brief and rebuttal evidence to address the new evidence introduced in the July 2nd declarations. *See Gametech Int'l, Inc.*, 380 F. Supp. 2d at 1092. Given the sheer amount of testimony provided in the July 2nd declarations and the need for adversarial testing of several of the declarants, Legislative Defendants would need more time than the three days before the July 9th oral argument to take depositions and prepare a surreply. If Plaintiffs want to insist on having these declarations before the Court, they cannot also demand that Defendants adhere to the accelerated briefing schedule. No litigant should be able to have his cake and eat it too. Legislative Defendants respectfully propose that should the Court admit any of the July 2nd

declarations, they be granted leave to take depositions between now and the end of the week of July 13, 2020 and file a surreply of no more than 5,000 words on July 21. The Court could then schedule oral argument for July 23 or 24.

That said, Legislative Defendants reiterate that the best course here is for the Court to strike Plaintiffs' July 2nd declarations and proceed according to the current schedule. Indeed, when presented with the option of striking or granting leave for a surreply, courts in the preliminary-injunction posture err on the side of striking. As one district court explained, permission to file a surreply is generally appropriate in the context of a summary-judgment motion because "[w]here the relief sought is dispositive, courts have taken further steps to ensure that all arguments are properly before them prior to rendering a final decision." *Paz Sys., Inc.*, 2006 WL 8430241, at *4. But if "the relief sought is not dispositive, and the parties will have the opportunity, through discovery and trial or future motion practice, to prove their respective cases," under those circumstances "where plaintiff was in possession of its evidence and simply chose not to use it to support its motion for the extraordinary relief of a preliminary injunction, the court recommends that the more appropriate result is to grant the motion to strike." *Id.* So it is here.

CONCLUSION

For the foregoing reasons, the Court should strike Plaintiffs' July 2nd declarations; direct Plaintiffs to file a new reply brief that does not rely on those declarations by July 7th; and proceed with the scheduled oral argument on July 9th based on the evidentiary record as it stood on July 1st. But if the Court admits any part of any of the July 2nd declarations, Legislative Defendants are entitled to a fair opportunity to respond under Rule 6(c)(2) and request that the Court grant them leave to (1) take depositions of Plaintiffs' July 2nd declarants through the week of July 13th; and (2) file a surreply of no more than 5,000 words by July 21st, supported if necessary by declarations solely rebutting Plaintiffs' new July 2nd evidence.

Dated: July 6, 2020

Respectfully submitted,

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**Notice of Appearance Forthcoming*

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Brief in Support of Legislative Defendants' Motion To Strike Plaintiffs' July 2nd Declarations, including body, headings, and footnotes, contains 3,657 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 6th day of July, 2020, she electronically filed the foregoing Brief in Support of Legislative Defendants' Motion To Strike Plaintiffs' July 2nd Declarations with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
Nicole J. Moss