

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

Civil Action No. 1:20-cv-457

DEMOCRACY NORTH CAROLINA, *et al.*,
Plaintiffs,
v.
THE NORTH CAROLINA STATE
BOARD OF ELECTIONS; *et al.*,
Defendants,
and
PHILIP E. BERGER, etc., *et al.*,
Intervenors.

**STATE DEFENDANTS’ RESPONSE
TO PLAINTIFFS’ MOTION FOR
RECONSIDERATION**

INTRODUCTION

On August 4, after a three-day evidentiary hearing beginning on July 21, this Court entered an order enjoining the State Defendants from enforcing N.C. Gen. Stat. §§ 163-226.3(a)(4) and (6) against one of the plaintiffs in this action, Walter Hutchins, to ensure that he can receive assistance in marking and completing his absentee ballot from an employee or staff member of the nursing home in which he resides. DE 124 at 187-88. In entering this order, this Court observed that Hutchins “will be unable to vote by absentee ballot under the current North Carolina absentee ballot framework” because “his nursing home is locked down; thus, he cannot receive in-person assistance from his wife or from a MAT.” *Id.* at 60. In addition, this Court found that the statute “preventing the

employees of the nursing home in which he resides from helping him” “has the effect of depriving Plaintiff Hutchins of ‘meaningful access’ to absentee voting due to his disability.” *Id.* at 167. But the Court did not extend this relief to all residents in nursing homes because Hutchins was the “only Plaintiff put forth as having suffered an injury under the VRA.” *Id.* at 53.

Since the evidentiary hearing before this Court, the landscape of rules governing access to residents in nursing homes or skilled nursing facilities (including combination skilled nursing/adult care assisted living facilities) (referred to generically as “nursing homes”) has changed. On July 24, the Secretary of the North Carolina Department of Health and Human Services issued a secretarial order “restrict[ing] visitation of all visitors and non-essential healthcare personnel, except for certain compassionate care situations, including end-of-life situations.” Declaration of K. Bell, ¶ 6. On September 1, the DHHS Secretary published a second order that replaced the July 24 Order. *Id.*, ¶ 7. The September 1 Order restricts “visitation of all visitors and non-essential health care personnel except (1) certain compassionate care situations, such as an end-of-life situation or (2) outdoor visits” that meet certain specific requirements, including that there are no more than two cases of COVID-19 in the facility and that persons showing any sign of respiratory illness cannot participate in visits. *Id.*, ¶¶ 8–10.

North Carolinians like Hutchins, who live in nursing homes, may have limited to no opportunity to have access to assistance and a witness for their ballot, given that these nursing homes may be continue to be closed off to outdoor visitation depending on the prevalence of outbreaks in those facilities, the physical conditions of those facilities’

residents, and the changing seasons. *Id.*, ¶ 10. These restrictions may disenfranchise residents of these long-term facilities if the facilities' employees, staff members, and managers continue to be prohibited from assisting with or witnessing absentee ballots during the ongoing COVID-19 pandemic. *Id.*, ¶ 12.

In light of the new evidence and change in facts that demonstrate the likelihood that North Carolina's restrictions on who can assist with and witness absentee ballots could have the unintended consequences of disenfranchising residents of nursing homes, the State Defendants respectfully request that the Court modify its injunction enjoining the prohibition on employees of the nursing facility where Hutchins lives from assisting with or witnessing his absentee ballot by enjoining the enforcement of this provision as to *all* residents and employees of nursing facilities for the November 2020 general elections. In addition, to ensure that the injunction is effective, the State Defendants respectfully request the Court to enjoin, as applied to nursing home employee-witnesses, the provision on the absentee ballot envelope that requires the witness to attest, under threat of criminal prosecution, that the voter is not a resident at a nursing home in which the witness is an employee for the November 2020 general elections.

STATEMENT OF FACTS

When Plaintiffs filed their amended motion for preliminary injunction on June 18, 2020, the DHHS Secretary had not yet implemented statewide restrictions on visitation in nursing homes. Until July 24, nursing homes were implementing, individually, their own restrictions and regulations for outside visitation in accordance with internal policies. On July 24—the day after this Court held a hearing on plaintiffs' amended motion for

preliminary injunction—the DHHS Secretary issued her first order, restricting all visitation for nursing homes or skilled nursing facilities (including combination skilled nursing/adult care assisted living facilities), except for certain compassionate care situations, including end-of-life situations. Bell Dec., ¶ 6. Facilities were no longer able to fashion their own guidelines—the Secretary’s order applied to all nursing homes or skilled nursing facilities. Accordingly, every resident of a nursing home was likely affected by the July 24 order.

On September 1, the Secretary issued another order, replacing the July 24 order. *Id.*, ¶ 7. This order restricted visitation for nursing homes and skilled nursing facilities to outdoor visitation, subject to certain restrictions, and compassionate care situations. *Id.*, ¶ 8. The order also placed several minimum requirements for a facility covered by the order to permit outdoor visitation, including that the facility must not be experiencing an ongoing outbreak (defined as two or more cases), the facility must have designated locations conducive to outdoor visitation that allow for social distancing, the facility must prohibit residents showing any signs of respiratory illness from participating in outdoor visitations, and the facility must prioritize visitation for residents with emotional distress. *Id.*, ¶ 9.

ARGUMENT

Motions to reconsider interlocutory orders are “not subject to the strict standards applicable to motions for reconsideration of a final judgment.” *Am. Canoe Ass’n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir. 2003). This Court typically will reconsider an interlocutory order only when: “(1) there has been an intervening change in

controlling law; (2) there is additional evidence that was not previously available; or (3) the prior decision was based on clear error or would work manifest injustice.” *Akeva, LLC v. Adidas Am., Inc.*, 385 F. Supp. 2d 559, 565-66 (M.D.N.C. 2005).

The issuance of the secretarial orders that sharply limit, statewide, access to nursing homes is new evidence that this Court should consider in reconsidering the scope of the injunction entered in this case. The secretarial orders were issued on July 24 and September 1 respectively. Because the orders were issued only after the Court held the hearing on Plaintiffs’ motion for preliminary injunction, none of the parties were aware of or could raise the restrictions in these orders in their papers or at the hearing.

Substantively, the orders present relevant evidence that the Court should consider. During the time when Plaintiffs’ motion was being briefed and heard, nursing homes—individually—set their own policies for restrictions on visitation. Accordingly, it was not clear at the time whether residents of nursing homes would be affected on a widespread basis by nursing home lockdowns. The July 24 and September 1 orders have changed that. The September 1 order, in particular, sets stringent standards for whether nursing homes will be open at all to outdoor visitation. And even if they are open, given the prevalence of outbreaks in nursing homes, the physical conditions of those facilities’ residents, and the changing seasons, some voters may not be able to receive assistance from multipartisan assistance teams. Bell Dec., ¶ 10.

North Carolina state law prohibits employees of nursing homes from assisting with or witnessing absentee ballots of their residents. N.C. Gen. Stat. §§ 163-226.3(a)(4) and (6). If voters cannot receive assistance from multipartisan assistance teams and their

near relatives cannot visit voters in nursing homes, that voter may be unintentionally disenfranchised during the ongoing COVID-19 pandemic. Bell Dec., ¶ 12.

This Court recognized this conundrum when it enjoined the application of these statutes to Hutchins. DE 124 at 60, 167, 187-88. But it did not apply the injunction to other residents of nursing homes as there was insufficient evidence to support a finding that residents other than Hutchins lived in nursing homes with restricted access and therefore would be similarly disenfranchised. *Id.* at 53. The statewide application of the September 1 secretarial order, however, presents a situation different from that previously considered by the Court. Now, there is evidence sufficient to find that the order, by enjoining enforcement of the provision only as to Hutchins, may tend to unintentionally cause the disenfranchisement of voters in nursing homes by leaving in place the prohibition on employees of their nursing homes from assisting with or witnessing ballots. The State Defendants therefore urge the Court to modify its injunction to enjoin the enforcement of N.C. Gen. Stat. §§ 163-226.3(a)(4) and (6) to the extent that the provisions prohibit residents of nursing homes from receiving assistance from employees of the facility to witness their absentee ballots during the ongoing COVID-19 pandemic.

In addition, if this Court were inclined to extend its injunction and enjoin the enforcement of these provisions, the State Defendants respectfully request that the Court simultaneously enjoin enforcement of the provision on the absentee ballot envelope that requires the nursing home employee-witness to attest, under threat of criminal prosecution, that the witness is not an employee of the nursing home in which the voter is a resident. Without enjoining this provision, nursing home employees would risk a

felony conviction for the false attestation. In the alternative, if nursing home employee-witnesses simply decline to sign this attestation, the voter's ballot may be rejected and not counted for failure to comply with the witness requirement.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that the Court modify its injunction so that, for the November 2020 general election, the injunction applies to all nursing home residents covered by the DHHS Secretary's September 1 order. In addition, to ensure the effectiveness of the Court's injunction, the State Defendants respectfully request that the Court enjoin enforcement of the witness-signature attestation requirement on absentee ballot envelopes as to nursing home employee-witnesses for the November 2020 general elections.

This the 8th day of September, 2020.

JOSHUA H. STEIN
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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.2(f)(4), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 1,634 words as measured by Microsoft Word.

Respectfully submitted this the 8th day of September, 2020.

/s/ Alexander McC. Peters
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