CASE NO. 20-2062

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,
Plaintiffs – Appellees,

—v.—

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina Board of Elections, *et al.*,
Defendants – Appellants.

On Appeal from the United States District Court for the Middle District of North Carolina

Case No. 1:20-cv-00911-WO-JLW

EMERGENCY MOTION FOR INTERVENTION BY NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, BARKER FOWLER, BECKY JOHNSON, JADE JUREK, ROSALYN KOCIEMBA, TOM KOCIEMBA, SANDRA MALONE, AND CAREN RABINOWITZ

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, the North Carolina Alliance for Retired Americans certifies that it is not publicly traded and have no parent corporations and that no publicly held corporation owns more than 10% of their stock. No other publicly held corporation has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement.

LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), Counsel for Proposed Intervenors informed the parties of their intent to file this motion. Counsel for Appellants consents to the granting of this motion. Counsel for Appellees did not indicate their consent or opposition prior to filing.

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Proposed Intervenor-Defendants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz (collectively, "the "Alliance Parties") move to intervene as defendants.

This case presents the exceptional circumstance in which intervention in an appeal is justified. The Alliance Parties have indisputable interests at stake: the federal court order that is the subject of this appeal impermissibly stayed a North Carolina State Court judgment approving a consent decree in a case in which the Alliance Parties were the plaintiffs. That Consent Judgment ordered relief from the North Carolina State Board of Elections ("State Board") to safeguard the Alliance Parties' rights, including rights guaranteed to them by the North Carolina Constitution, in the upcoming general election.

Many of the Appellees in this federal case were granted intervention in the Alliance Parties' State Court action, but rather than litigate these issues there (as was proper), they brought this collateral attack in federal court. They did so, moreover, before the State Court had even held its hearing to consider objections to the proposed Consent Judgment. The federal court stayed its hand only long enough for that hearing to take place. Within hours of the State Court's approval of the Consent Judgment, the federal district court held a hearing on the Appellees' motion and the

following day issued its Temporary Restraining Order suspending the State Court's judgment (the "TRO"). The Alliance Parties had previously moved to intervene in that federal case, but the district court did not act on that motion before granting the TRO, and that motion remains pending even following the transfer of the case. The result is that the Alliance Parties have been barred from addressing the merits in the district court action below which has suspended the enforcement of their State Court Consent Judgment through the TRO, and—unless intervention is granted now—are also severely limited in their ability to appeal the federal district court's erroneous ruling (despite its immediate and irreparable harm to the Alliance Parties' rights).

This is an extraordinary set of facts that would seem to imply that the State Court must have clearly and grievously overstepped its bounds as to justify such swift and imperious federal court intervention. But, in fact, the opposite is true. The State Court's judgment was well considered and well founded. It followed considerable briefing supported by extensive evidence that would have supported the State Court's entry of equitable relief that would have gone further than that the parties agreed to in the Consent Judgment. The State Court held a six-hour hearing to consider the fairness of a proposed Consent Judgment, in which it considered and rejected the same arguments that Appellees then made to the federal court that would shortly thereafter grant them their TRO. The State Court explained why Appellees' equal protection and vote dilution arguments are baseless in its findings of fact and

conclusions of law regarding the Consent Judgment, which it considered in substantially more depth than the federal district court. As noted above, many of those same Appellees are parties in the State Court action and have a right to appeal the State Court's judgment in the North Carolina state courts. Indeed, Appellees Berger and Moore filed a petition for a write of supersedeas and motion for temporary stay in the North Carolina Court of Appeals on the afternoon of October 5. *That* is the correct forum for litigating these issues, not federal court.

But because of Appellees' collateral attack, this case is now before this Federal Circuit, and the Alliance Parties should be granted leave to intervene to protect themselves against the irreparable injury that will result if the impermissible federal TRO remains in place. As noted above, the Alliance Parties sought intervention in the federal district court below, but the district court has not yet acted on that motion. The lower court usurped its authority in issuing a TRO to enjoin the enforcement of the State Court judgment, and its failure to grant intervention to the Alliance Parties prior to doing so compounds their injury because it strips them of any forum to appeal that erroneous decision absent a grant of intervention here. These unique circumstances provide more than appropriate justification for this Court to permit the Alliance Parties intervention on appeal.

The Alliance Parties also meet the requirements for intervention as a matter of right under Rule 24(a)(2) and permissive intervention pursuant to Rule 24(b). In

accordance with Rule 24(c), an emergency motion to stay the lower court's temporary restraining order is attached hereto as Exhibit 1.[1]

II. BACKGROUND

On August 10, 2020, the Alliance Parties filed a complaint, which they amended on August 18, in the General Court of Justice, Superior Court Division, Wake County, challenging certain election laws and procedures that impose undue burdens on in-person and absentee voting for the November election, in light of the COVID-19 pandemic, under the Free Elections Clause, art. I, § 10, and the Equal Protection Clause, art. I, § 19, of the North Carolina Constitution. *See* IAA343-47. The State Court Lawsuit names the State Board as defendants. The President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives successfully intervened in that lawsuit, as did the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc, and the North Carolina Republican Party (collectively, the "Republican Committees").

The Alliance Parties moved for a preliminary injunction on August 18, seeking an order that would protect voting rights of them, their members, and

[1] Pursuant to Local Rule 8, Alliance Parties note that they have not first moved for a stay in the district court because the district court has not acted on their motion for intervention.

countless other North Carolinians in the present pandemic. Specifically, the Alliance Parties sought to enjoin the enforcement of:

- the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the November general election, and ordering the State Board to count as otherwise eligible ballots postmarked by Election Day and received by county boards up to nine days afterward;

- the witness requirements for absentee ballots set forth in N.C.G.S. § 163-231(a), as applied to voters residing in single person or single-adult households;

- N.C.G.S. § 163-231(b)(1) to the extent that it requires voters to pay for postage to mail their ballots, and ordering the State Board to provide postage for ballots submitted by mail in the November election;

- N.C.G.S. §§ 162-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; and

- N.C.G.S. § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering the State Board to allow county election officials to expand early voting by up to an additional 21 days for the November election.

In support of their motion, the Alliance Parties filed detailed briefing supported by over 500 pages of evidence in the form of expert reports, voter and other witness affidavits, and official documents.

On September 21, the State Court announced that a hearing on the preliminary injunction would occur on October 2. Before the preliminary injunction hearing, the Alliance Parties and the State Board reached an agreement to resolve the Alliance

Parties' claims and filed a Joint Motion for Entry of a Consent Judgment, along with the proposed Consent Judgment and three exhibits thereto (Numbered Memos 2020-19, 2020-22, and 2020-23). The express objective of the Consent Judgment was:

> to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

IAA041. On September 23, the Court announced that the preliminary injunction hearing on October 2 would be converted into a hearing to evaluate the Consent Judgement.

Pursuant to the Consent Judgment, the State Board agreed to: (1) count ballots postmarked by Election Day, if they are otherwise eligible and received up to nine days after Election Day (the same deadline imposed for military and overseas voters under North Carolina law), *see* N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b); (2) maintain a cure process for certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate separate, *manned* absentee ballot drop-off stations at all one-stop early voting locations and county board offices, at which voters and authorized persons may return absentee ballots in person; and (4) take reasonable steps to inform the public of these changes. IAA041-043. The Alliance Parties

agreed to withdraw their preliminary injunction motion, and to dismiss all of their remaining claims upon entry of the Consent Judgment. *Id.*

Four days after the Alliance Parties and the State Board filed the Joint Motion for Entry of a Consent Judgment, but *before* the state court's scheduled October 2nd hearing on that motion, Appellees filed their complaint in federal district court. The Alliance Parties immediately sought to intervene. The State Court then proceeded with its hearing to consider the proposed Consent Judgment on October 2nd. The State Court asked extensive questions of all parties concerning the hundreds of pages of briefing and supporting evidence in the record before it, carefully evaluating the proposed Consent Judgment's fairness. The State Court heard not just the original parties to the action, but also from counsel for the Appellees in this case, who extensively briefed all of the same arguments they raised in the district court in previous briefing before the State Court and raised them during that hearing. At the end of that *six-hour* hearing, the State Court entered its order finding that (1) the State Board had legal authority to settle the case with the Alliance Parties, and the North Carolina courts have a strong preference for settlement; (2) the terms of the Consent Judgment are "fair, adequate, and reasonable" and not illegal or a product of collusion; and (3) the settlement is consistent with state and federal constitutional requirements, and in the public interest. IAA503. The State Court's findings of fact and conclusions of law explicitly held that Alliance Parties had a likelihood of

success on the merits, and rejected the very arguments Appellees seek to raise here. *See* IAA503, IAA506.

Less than two hours after the State Court's hearing on the Consent Judgment, the district court in this case held a short hearing on Appellees' TRO, did not consider the evidence the State Court spent six hours reviewing, and did not permit the Alliance Parties the opportunity to be heard as a party. *See* IAA532. The Court also did not rule on the Alliance Parties' pending motion to intervene. Saturday morning, the district court granted Appellees' TRO despite any authority to do so and in contravention of basic principles of federalism. *See* IAA533-552. It did not rule on the Alliance Parties' pending motion to intervene, and instead transferred all further proceedings to the Middle District of North Carolina. On the afternoon of October 5, the district court in the Middle District of North Carolina held a short scheduling conference in which it kept the TRO in place and did not rule on the pending motions to intervene. This emergency appeal from the State Board followed shortly after.

III. ARGUMENT

A. Legal Standard

The Supreme Court has held that parties may intervene in appellate proceedings. *See Automobile Workers v. Scofield*, 382 U.S. 205, 211 (1965). This Court has indicated that such intervention is appropriate in exceptional

circumstances. *See Spring Const. Co. v. Harris*, 614 F.2d 374, 377 n.1 (4th Cir. 1980). There is no generally applicable Rule of Federal Appellate Procedure governing motions to intervene. As a result, courts that have considered such motions have generally looked to the Federal Rules of Civil Procedure for guidance. Under those Rules, 24(a)(2) provides that "the court must permit anyone to intervene" as of right who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In the alternative, on timely motion, permissive intervention may be granted to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In applying these rules, this Court has endorsed a policy of "liberal intervention," which "is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v.*

Brock, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

B. The unique circumstances here justify intervention at the appellate level.

While intervention at the appellate level is admittedly not a frequent occurrence, this action provides a situation in which it is justified for at least two reasons.

First, multiple sister Circuits have held that permitting intervention on appeal is appropriate where the district court erred in denying or never ruling on intervention under Rule 24. *See Smartt v. Coca Cola Bottling Corp.*, 337 F.2d 950, 951 (6th Cir. 1964); *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988-89 (2d Cir. 1947). By granting the TRO while failing to rule on the Alliance Parties' motion for intervention, the district court effectuated the same result. The Alliance Parties are parties to a jointly agreed state court Consent Judgment with the Appellants in this action. The federal district court's disregard of federalism principles in granting the TRO below constrains their ability to enforce the terms of that Consent Judgment, while the district court's failure to grant their intervention motion denies them the right to have a higher court consider (and reverse) the district court's erroneous ruling. In the meantime, the Alliance Parties are suffering irreparable harm. In such a situation intervention on appeal is justified, as the Alliance Parties are left with

little recourse if it is not granted and the district court erred by not granting it prior to entry of the TRO.

This Court has used the phrase "exceptional circumstance" to describe when intervention on appeal should lie, and a federal court violating bedrock principles of federalism to interject confusion into an election while denying the Alliance Parties a forum for relief is just such a situation. To reiterate, the district court inserted itself into a State Court proceeding that had been pending for nearly two months a little over a week ago, reviewed none of the evidence before the State Court, held a cursory hearing two hours after a six-hour hearing at which the State Court granted a Consent Judgment, only briefly allowed the Alliance Parties (who are parties to that Consent Judgment) to state their interest at that cursory hearing, and then issued a TRO the next morning without addressing the Alliance Parties' pending motion to intervene. In so doing, it threw North Carolina's election system into disarray, the avoidance of which was one of the principle reasons why the Alliance Parties and the State Board entered into a Consent Judgment in the first place. None of these are common occurrences, and the variety of glaring mistakes made by the district court confronts the Alliance Parties with the prospect of a TRO from which they cannot appeal that has the potential to restrain enforcement of their Consent Judgment and impose irreparable harm on their fundamental rights over the next several weeks.

This would have the practical result of voiding much of the relief the Consent Judgment was meant to provide. Such a situation is an "exceptional circumstance."

C. The Alliance Parties satisfy Rule 24(a)(2)'s requirements for intervention as of right.

The Alliance Parties also easily satisfy the requirements to intervene in this action as of right as set forth under Federal Rule of Civil Procedure 24(a)(2). Specifically, (1) the motion is timely; (2) the Alliance Parties have substantial interests in the subject matter of the action; (3) denial of their motion would impair or impede their ability to protect their interests; and (4) their interests are not adequately represented by the existing parties to the litigation. Fed. R. Civ. P. 24(a)(2); *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991).

1. The motion to intervene is timely.

Filed shortly after the appeal in this action, the Alliance Parties' Motion is unquestionably timely. For this threshold requirement, courts must consider "first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. U.S. EPA*, 758 F.3d 588, 591 (4th Cir. 2014). Here, the Alliance Parties sought to intervene below at the earliest possible stage of the lawsuit, when no responsive pleadings had been filed by the Appellants in response to the Complaint; no further action had been taken on the merits of Appellees' claims; and there was no scheduling order. That motion to intervene has not been acted upon by

the district court, but the issuance of the TRO threatens their rights both in the State Court Litigation that gave rise to the federal collateral attack, as well as the fundamental rights that the Alliance Parties sought to protect in bringing the State Court case to begin with. Absent intervention in this appeal, the Alliance Parties will have no ability to protect those rights from the irreparable harm that the TRO will cause them. Their motion to intervene in this appeal comes shortly after the appeal was filed. Because there has been no delay at all, the Alliance Parties' motion to intervene is clearly timely.

2. The Alliance Parties have significant, legally cognizable interests in the substance of this litigation, the disposition of which may impair their ability to protect these interests.

The Alliance Parties also meet the second and third factors for intervention as of right because the disposition of Appellees' collateral attack against the Consent Judgment in the pending State Court action directly threaten the Alliance Parties' interests in the State Action as well as the constitutional rights that the Consent Judgment was entered to protect. *Virginia v. Westinghouse Elec. Corp*, 542 F.2d 214, 216 (4th Cir. 1976); *see* Fed. R. Civ. P. 24(a)(2); *Teague*, 931 F.2d at 260–61 ("This court has interpreted Rule 24(a)(2) to entitle an applicant to intervention of right if the applicant can demonstrate . . . that the protection of this interest would be impaired because of the action."); *see also id*. at 261 (explaining a party has "a significantly protectable interest" in the outcome of the lawsuit when the applicant

"stand[s] to gain or lose" from the "legal operation" of the judgment of that action) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). This Court has specifically found that litigants that obtained a judgment in a prior action are entitled to intervene as of right in a later action that threatens the relief awarded under the prior judgment. *See id.* (finding intervenors' "ability to protect their interest would be impaired or impeded" by a judgment that would put the intervenors' ability to satisfy a prior judgment at risk).

Because Appellees' lawsuit effectively seeks to—and the TRO as entered, effectively does—block the Consent Judgment that the State Court granted in an ongoing action in which the Alliance Parties, the State Board, and the Republican Committees are parties, the TRO indisputably impedes the ability of the Alliance Parties to enforce their constitutional rights through the Consent Judgment. *See Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081–82 (8th Cir. 1999) (finding interest requirement "easily satisfie[d]" where "[t]he disposition of the lawsuit . . . may require resolution of legal and factual issues bearing on the validity of [] agreements" in which proposed intervenor had interests).

Beyond the Alliance Parties' interests in enforcing the proposed Consent Judgment, they also risk infringement of their constitutional right to vote as a result of the TRO. As the Alliance Parties argued in the state court action, the absentee ballot receipt deadline (which was addressed as part of the relief provided by the

Consent Judgment) imposes a severe burden on voters in the November election who will encounter extended mail delivery timelines which are incompatible with the State's deadlines for the receipt of absentee ballots postmarked by Election Day, all during a global pandemic that imposes health risks on those who seek to vote in person.

The Alliance Parties—which include both individual voters who risk disenfranchisement and the North Carolina Alliance for Retired Americans, an organization dedicated to promoting the franchise and ensuring the full constitutional rights of its members—have a cognizable interest in protecting the constitutional rights that form the basis of their State Court Lawsuit and the rights of their members who might lose the ability to have their votes counted. *See, e.g.*, *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 726 (S.D. Ohio 2016) (finding organization "established an injury in fact" where "the challenged provisions will make it more difficult for its members and constituents to vote"), *rev'd on other grounds sub nom. Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). Moreover, the disruptive and disenfranchising effects of Appellees' lawsuit and the TRO specifically require the Alliance to divert resources to protect the rights of their members. Intervenors therefore satisfy the second and third requirements of Rule 24(a)(2).

3. The Alliance Parties' interests are not adequately represented by the Appellants.

The last factor that courts look to in determining whether a movant is entitled to intervene as of right also is satisfied here. The Appellants in this case consist of the same parties who are adverse to the Alliance Parties in the State Court Lawsuit. Under these circumstances, the Alliance Parties clearly satisfy the "minimal" burden of "demonstrating lack of adequate representation." *Teague*, 931 at 262. That the State Board is adverse to the Alliance Parties in ongoing, related litigation is sufficient by itself to demonstrate a lack of adequate representation. *See*, *e.g.*, *Maxum Indem. Co. v. Biddle Law Firm, PA*, 329 F.R.D. 550, 556 (D.S.C. 2019) (finding intervenors interests were not adequately represented where parties seeking intervention were adverse to defendants in a related state-court action brought by the intervenors); *Hartford Acc. & Indem. Co. v. Crider*, 58 F.R.D. 15, 18 (N.D. Ill. 1973) (same).

Although the Alliance Parties and the State Board were ultimately able to reach an agreement in state court, the Alliance Parties have specific interests implicated by the litigation which they cannot rely on the State Board to adequately protect. Not only were the Alliance Parties *forced to sue* the State Board to obtain any relief, the Consent Judgment was the product of negotiation and compromise, requiring the Alliance Parties to forego several of their claims. Accordingly, "there is no assurance that the state will continue to support all the positions taken" by the

Alliance Parties. To the contrary, "what the state perceives as being in its interest may diverge substantially from" the interests of the Alliance Parties. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993).

As one court recently explained while granting intervention under similar circumstances,

> Although Defendants and the Proposed Intervenors fall on the same side of the dispute, Defendants' interests in the implementation of the [challenged law] differ from those of the Proposed Intervenors. While Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election . . . and allocating their limited resources to inform voters about the election procedures. As a result, the parties' interests are neither "identical" nor "the same."

Issa v. Newsom, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (citation omitted).

Here, too, the State Board has an undeniable interest in defending both its plans for the November election and its inherent powers as a state agency. The Alliance Parties have different interests: ensuring that they and their members will have meaningful and safe opportunities to cast ballots and ensuring that their limited resources are not diverted. *See Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *3 (D. Nev. Apr. 28, 2020) (concluding "Proposed Intervenors . . . have demonstrated entitlement to intervene as a matter of right" where they "may present arguments about the need to safeguard [the] right to vote that are distinct

from Defendants' arguments"). Because the Alliance Parties cannot rely on the State Board (or anyone in this litigation) to protect their distinct interests, they have satisfied the fourth requirement and are entitled to intervention as of right under Rule 24(a)(2). *See id.*; *Issa*, 2020 WL 3074351, at *4.

D. In the alternative, the Alliance Parties have satisfied Rule 24(b)'s requirements for permissive intervention.

"On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). In applying Rule 24(b)(1), federal district courts consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights," Fed. R. Civ. P. 24(b)(3), as well as other factors, including "the nature and extent of the intervener's interest, the intervener's standing to raise relevant legal issues, the legal position the intervener seeks to advance, and its probable relation to the merits of the case." *L.S. ex rel. Ron S. v. Cansler*, No. 5:11-CV-354-FL, 2011 WL 6030075, at *2 (E.D.N.C. Dec. 5, 2011) (citing *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). They may also consider "whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly

contribute to full development of the underlying factual issues in the suit." *Id.* (citing *Spangler*, 552 F.2d at 1329).

For the reasons set forth above, the motion is timely, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, and the Alliance Parties are not adequately represented by the existing appellants. The Alliance Parties will undoubtedly raise common questions of law and fact in defending this lawsuit and the Consent Judgment, including the district court's authority to enjoin the Consent Judgment. Beyond that, the interests of the Alliance Parties are constitutional in nature and extend to some of the most fundamental rights protected by the North Carolina Constitution: the right to free elections and to equal protection under the law. Their participation in this action will contribute to the full development of the factual and legal issues in this action and will aid the Court in the adjudication of this matter.

IV. CONCLUSION

For the reasons stated above, Alliance Parties respectfully request that the Court grant their motion to intervene in this appeal.

DATED: October 6, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), 32(a)(5), and 32(g)(1), I certify that this motion has 4,610 words and was prepared using Times New Roman, 14-point font.

s/ Marc E. Elias

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of October, 2020, I caused this *Emergency Motion for Intervention* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record.

I also hereby certify that on this 6th day of October, 2020, I caused this *Emergency Motion for Intervention* to be emailed to counsel for appellants and appellees, addressed as follows:

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This the 6th day of October, 2020.

s/ Marc E. Elias
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Exhibit 1

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PROPOSED INTERVENOR-APPELLANTS' MOTION FOR EMERGENCY STAY PENDING APPEAL

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Pursuant to Local Rule 27(a), Counsel for Proposed Intervenors informed the parties of their intent to file this motion. Counsel for Appellants consents to the grant of this motion. Counsel for Appellees did not indicate their consent or opposition prior to filing.

INTRODUCTION

Proposed Intervenors North Carolina Alliance for Retired Americans and seven individual voters (together, the "Alliance") request an emergency stay of the district court's temporary restraining order ("TRO") enjoining enforcement of a North Carolina state court judgment regarding the November election.

On October 2, the Wake County Superior Court (the "State Court") entered a consent judgment resolving the Alliance's challenges under the North Carolina Constitution to restrictions on absentee and in-person voting in the upcoming election. After extensive briefing and argument from the Alliance, Defendant State Board of Elections ("NCSBE"), and Intervenors Timothy Moore, Philip Berger, and several Republican Party entities, the State Court ruled that the Alliance had established a likelihood of success on its claims and that the Alliance and NCSBE's Consent Judgment is consistent with the state and federal constitutions. Less than 24 hours later, the federal district court usurped the State Court's authority and granted Appellees' requested TRO, enjoining enforcement of the State Court's judgment.

In seeking immediate recourse in federal court to overturn an unfavorable state court judgment, Appellees flouted well-established rules of procedure and comity, not to mention the Alliance's constitutional rights. By endorsing Appellees' impermissible collateral attack on the Consent Judgment, the district court violated fundamental principles of abstention and standing and is likely to be reversed on the

merits. Meanwhile, with each passing day, the Alliance and thousands of North Carolinians stand to be irreparably harmed by their eligible votes not being counted. An emergency stay is not only justified but necessary to protect voters' rights under the North Carolina Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

The COVID-19 pandemic has caused significant casualties and disruptions to day-to-day life. North Carolina has over 217,600 confirmed COVID-19 cases and 3,653 reported deaths, with cases rapidly increasing. Since March, North Carolina has been under a series of "Safer at Home" Orders, the latest of which "very strongly encourage[s] . . . people 65 years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes." IAA010. Meanwhile, the Centers for Disease Control and Prevention is warning the country to brace for "the worst fall from a public health perspective, we've ever had." IAA030.

In response, voters are casting absentee ballots at record-breaking levels. Over 1.1 million North Carolinians have requested absentee ballots, with many more expected before the October 27 request deadline. *See* N.C.G.S. § 163-230.1(a). Most are new to voting absentee, and thus more susceptible to making immaterial errors that cause rejection. *See* IAA283.

North Carolina's ballot receipt deadline further threatens to disenfranchise thousands of voters during the pandemic. Ballots submitted through the U.S. Postal Service ("USPS") and received after 5:00 p.m. three days after Election Day are rejected, even if they are postmarked by Election Day. *See* N.C.G.S. § 163-231(b)(1), (2). But USPS mail delays persist across the country. In a letter to North Carolina's Secretary of State on July 30, 2020, USPS's General Counsel warned that North Carolina's receipt deadline is "incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted." IAA307-09.

Against this backdrop, the Alliance sued NCSBE and its Chair in the State Court, challenging election laws and procedures that, in light of the pandemic, impose undue burdens on the right to vote in violation of the North Carolina Constitution. IAA343-47. Speaker of the North Carolina House of Representatives Timothy Moore, President Pro Tempore of the North Carolina Senate Philip Berger, the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc., and the North Carolina Republican Party were granted intervention. On August 18, the Alliance moved for a preliminary injunction. *See* IAA243-48. The Alliance

submitted over 500 pages of supporting evidence, including four expert reports, 17 affidavits, and numerous official documents.[1]

Before the preliminary injunction hearing, the Alliance and NCSBE reached an agreement to resolve the Alliance's claims and filed a Joint Motion for Entry of a Consent Judgment, along with the proposed Consent Judgment and Numbered Memos 2020-19, 2020-22, and 2020-23. *See* IAA023-242. Under the Consent Judgment, NCSBE agreed to: (1) count eligible ballots postmarked by Election Day, if received within nine days (deadline for military and overseas voters), *see* N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b); (2) implement a cure process for minor ballot deficiencies, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate manned ballot drop-off stations at early voting locations and county board offices for in-person ballot return; and (4) inform the public of these changes. IAA041-043. In exchange, the Alliance agreed to withdraw the preliminary injunction motion and dismiss all claims upon entry of the Consent Judgment. The State Court scheduled a hearing for October 2.

Rather than wait for that hearing, Appellees Berger and Moore, with a handful of individuals, preemptively filed this federal suit to enjoin enforcement of the Consent Judgment before the State Court could act. IAA352-74. The Alliance

[1] The Alliance can make available the exhibits to its Memorandum in Support of Motion for Preliminary Injunction at the Court's request.

immediately moved to intervene, but that motion remains pending. *See* IAA375-497. On October 2, the State Court held a six-hour hearing, considered evidence and arguments, and ultimately entered the Consent Judgment, which implements the Numbered Memos. *See* IAA498-508. In doing so, it found that (1) NCSBE had legal authority to settle the case, IAA504-06; (2) the Alliance was likely to succeed on the merits, IAA503; (3) the terms of the Consent Judgment are "fair, adequate, and reasonable" and not illegal or collusive, *id.*; (4) the settlement is consistent with the state and federal constitutions, IAA506, and (5) the settlement serves "a strong public interest in having certainty in our election procedures and rules," IAA504; *see* IAA509-31.

Less than two hours later, the district court held a short hearing on Appellees' TRO. The court neither allowed the Alliance to present its case nor mentioned the extensive evidence upon which the State Court relied. *See* IAA532. The following morning, the district court granted Appellees' TRO. *See* IAA533-52. Without ruling on the Alliance's motion to intervene, it transferred the case to the Middle District. *Id.*

As of this filing, the Middle District has not ruled on the Alliance's motion to intervene and has instead set a hearing for October 8. In the meantime, on October 5, the State Court issued its Findings of Fact and Conclusions of Law, and Appellees

Moore and Berger immediately filed a writ of supersedeas and motion for temporary stay of the Consent Judgment in the North Carolina Court of Appeals.

LEGAL STANDARD

To merit a stay pending appeal, appellants must show that they are likely to succeed on the merits, they will be irreparably injured absent a stay, the equitable balance favors a stay, and a stay benefits the public. *Nken v. Holder*, 556 U.S. 418, 434 (2009).[2]

ARGUMENT

I. The district court abused its discretion in exercising jurisdiction in this case.

Appellees' attempt to use a federal court action to bypass unfavorable rulings in ongoing state court proceedings implicates fundamental principles of federalism and calls for abstention. Collateral attacks on state court proceedings are precisely what federal abstention doctrines seek to avoid, particularly where, as here,

[2] Review of a TRO is warranted here where a hearing was held before the TRO was entered, and its practical effects are like a preliminary injunction. *Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1030 (4th Cir. 1976). By October 16, when the TRO expires, many thousands of North Carolinians will have voted. It may be too late to change course and the TRO will have "effectively granted the plaintiff[s] all of the relief which [they] sought." *Id.*; *see Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) ("[T]he requirement of finality is to be given a 'practical rather than a technical construction.'") (citation omitted). Other Circuits have exercised their discretion to review TROs under similar circumstances. *See Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 161 (3d Cir. 2020) (recently hearing TRO appeal given "serious, perhaps irreparable consequence[s]" that "can be effectually challenged only by immediate appeal") (citing cases from four other Circuits).

Appellees have *explicitly* turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987); *see* IAA554-55 (inviting federal court to "enter [a TRO] immediately—before the state court acts"). The district court should have abstained under multiple well-established doctrines; issuing the TRO was a clear abuse of discretion.

First, Appellees' claims are precluded under *Pennzoil*. *See* 481 U.S. 1. In *Pennzoil*, the losing party in a state court proceeding sued in federal court to enjoin enforcement of the state court judgment, alleging that the state's process for compelling compliance violated the U.S. Constitution. *Id*. at 13. The U.S. Supreme Court, citing "the importance to the States of enforcing the orders and judgments of their courts," held that the federal court could not entertain the suit:

> Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Id. at 13-14; *see also Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989) (applying *Pennzoil* to hold "it would be inappropriate for the federal court to proceed on an injunctive claim to render the state judgment nugatory").

Such is the case here. Appellees' federal lawsuit seeks to render the State Court's adjudication nugatory by enjoining enforcement of the Consent Judgment.

But the state courts provide the proper avenue for Appellees' challenge. Indeed, Appellees are well aware that they can press their federal constitutional claims through the state appellate process, as they appealed the State Court's judgment after securing the federal TRO. This Court should therefore "defer[] on principles of comity to the pending state proceedings." *Pennzoil*, 481 U.S. at 17.

Second, the *Pullman* doctrine also warrants abstention. Under *Pullman*, "[f]ederal courts should abstain . . . where a case involves an open question of state law that is potentially dispositive inasmuch as its resolution may moot the federal constitutional issue." *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839-40 (4th Cir. 2012) (internal quotation marks omitted). This is particularly so when a federal court must evaluate a legislature's allegedly ambiguous delegation of power to other actors. *Cf. K Hope, Inc. v. Onslow Cnty.*, 107 F.3d 866, Nos. 95-3126, 95-3195, 95-3127, 95-3196, 95-3153, 95-3197, 1997 WL 76936, at *1 (4th Cir. 1997) (requiring abstention when constitutional questions could be avoided by state court's resolution of whether a "County's enactment of the ordinance constituted a valid exercise of the power granted to counties by the North Carolina legislature"). State delegation of authority is at the center of Appellees' challenges here. Specifically, Appellees asked the federal court to determine whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos submitted therewith. These arguments—

premised on misinterpretations of state (and federal) law—were raised by Appellees Berger and Moore in the State Court, which rejected them after careful consideration. IAA504-06.

Rather than first appealing the State Court's conclusions to a reviewing state court, Appellees improperly sought a second opinion in federal court, which then overstepped by temporarily enjoining enforcement of the State Court's judgment. But if the reviewing state court were to agree with Appellees, there would be nothing left for the federal court to decide; neither the Consent Judgment nor the Numbered Memos would survive. Thus, Appellees' claims plainly raise "unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question." *Meredith v. Talbot Cnty., Md.*, 828 F.2d 228, 231 (4th Cir. 1987).[3]

Third, Appellees' claims run afoul of *Rooker-Feldman*. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). With the entry of the Consent Judgment, Moore and Berger are "[t]he losing party in state court" who have "filed suit in a U.S. District Court," "complaining of an injury caused by the state-court judgment and seeking federal-court review and rejection of that judgment." *Skinner v. Switzer*, 562 U.S. 521, 531 (2011). Contrary to the district court's TRO, "lower federal courts

[3] Appellees' federal constitutional claims can be *and already have been* raised in state court.

possess no power whatever to sit in direct review of state court decisions." *Feldman*, 460 U.S. at 482 n.16; *see* 28 U.S.C. § 1257.

Finally, *Colorado River* also counsels abstention to permit resolution of parallel state court proceedings. *See Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 248 (4th Cir. 2013). Notwithstanding that additional parties without standing joined the federal action, these are parallel proceedings that demand abstention. *Cf. Lumen Constr., Inc. v. Brant Constr. Co., Inc.*, 780 F.2d 691, 695 (7th Cir. 1985) ("If the rule were otherwise, the *Colorado River* doctrine could be entirely avoided by the simple expedient of naming additional parties."). The relevant factors—including avoiding piecemeal litigation, the order and relative progress of the cases, the critical issues of state law at stake, and the adequacy of the state court to continue addressing these issues—weigh heavily in favor of abstention. *See Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463-64 (4th Cir. 2005).

This Circuit has recognized that "[t]he list of areas in which federal judicial interference would 'disregard the comity' that Our Federalism requires is lengthy" and specifically includes states' interest in "enforcing state court judgments," which "cuts to the state's ability to operate its own judicial system." *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005). Appellees cannot turn to federal court in a transparent effort to relitigate the *same* claims that failed before the State Court. This blatant "attempt to . . . avoid adverse rulings by the state

court . . . weighs strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). Appellees' end-run fares no better merely because they have joined additional parties that lack standing and raise meritless claims. *See infra* Section II. If any case demands abstention, it is this one.

II. The district court erred in adjudicating Appellees' claims because they lack standing.

The district court also erred in issuing the TRO because, as a threshold matter, it lacked jurisdiction. *See* IAA587-91, IAA621-27. At its "irreducible constitutional minimum," standing requires: (1) an injury-in-fact, that is (2) fairly traceable to the defendant's conduct, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish injury, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Appellees' claims fail to meet this baseline.

Though raised by both NCSBE and the Alliance, the court failed to confront Appellees' lack of standing. The court limited its analysis of the TRO to the Equal Protection Clause claims of individual voters ("Voter Appellees"), which the court found to "raise profound questions concerning arbitrariness and vote dilution[]" because the Numbered Memos purportedly "created multiple, disparate regimes under which North Carolina Voters cast absentee ballots[.]" IAA546-47. The district

court's unspoken conclusion that Appellees somehow had standing for such claims is flawed for at least three reasons.

First, Voter Appellees fail to allege a theory of vote dilution that is particularized to them, as opposed to a generalized grievance that could be raised by any voter in North Carolina. Voter Appellees' claims are entirely based on the notion that the power of their votes will be diluted by the casting of unlawful ballots as a result of the Consent Judgment or Numbered Memos. But courts have repeatedly rejected this identical theory as a basis for standing, both because it is unduly speculative and impermissibly generalized. *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other '[g]enerally available grievance[s] about the government,' plaintiffs seek relief on behalf of their member voters that 'no more directly and tangibly benefits [them] than it does the public at large.'" (quoting *Lujan*, 504 U.S. at 573-74)); *Martel v. Condos*, No. 5:20-cv-131, slip op. at 9 (D. Vt. Sept. 16, 2020), IAA679 ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *Am. Civil Rights Union v. Martinez-*

Rivera, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). The same is true here. Because Appellees fail to allege a "concrete and particularized" injury, *Spokeo*, 136 S. Ct. at 1548, the district court erred by entering any relief in Appellees' case at all.

Second, the relief ordered by the State Court does not personally injure Voter Appellees in any way. They elected to vote well before Election Day and have not alleged any injury or burden in connection with casting their ballots. To the contrary, Voter Appellees' ballots have already been accepted. *See* IAA355. Allowing other lawful voters to cure immaterial issues with their ballots (e.g., an incomplete address for the observer) does not infringe on Voter Appellees' right to vote or have their vote counted. Nor does the fact that voters who prefer to submit their ballots in person can do so at manned drop-off stations without unnecessarily risking their health. The same is true of the State's acceptance of ballots postmarked by Election Day that arrive before the canvass, the same deadline established for military and overseas voters' ballots. N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b). The Numbered Memos simply ensure that these lawful voters are not disenfranchised as a result of curable mistakes and USPS delivery delays outside of their control. Voter Appellees have no legitimate interest in invoking the power of the federal judiciary to prohibit other lawful voters from having their ballots counted.

Third, Voter Appellees failed to plead any facts that could establish causation as to their Equal Protection claims. Voter Appellees' theory of harm requires an attenuated chain of causation based entirely on conjecture about "ballot harvesting" by non-party actors. Because such speculation is not "fairly . . . trace[able]" to NCSBE, the Consent Judgment, or anything else implicated in these lawsuits, but rather is "th[e] result [of] the independent action of some third party not before the court,'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)), this purported injury does not confer standing for Voter Appellees' Equal Protection claims.

III. Appellees are not likely to succeed on the merits of their claims.

Even if the federal court action were not barred under abstention or standing doctrines, the TRO should still be stayed because Appellees are unlikely to succeed on the merits of their claims.[4] *See* IAA503.

A. Appellees' unequal evaluation of ballots claim is meritless.

The district court erred in finding that the Numbered Memos would lead to "the unequal evaluation of ballots." IAA663; *see* IAA546-47. The Numbered

[4] The TRO was not based on Appellees' Elections Clause arguments, and for good reason: those arguments are patently unlikely to succeed. Per the U.S. Supreme Court, the Elections Clause permits state legislatures to delegate their authority to state officials like NCSBE. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015). As the State Court held, the Legislature delegated to NCSBE the authority to enter the Consent Judgment and promulgate these Numbered Memos. *See* IAA504-06.

Memos apply equally to all voters. Numbered Memo 2020-22 allows all otherwise eligible ballots that are mailed by Election Day to count if received within nine days of the election—including Appellees Heath's and Whitley's ballots. To the extent Numbered Memo 2020-22 introduces a new deadline, it affects only the counting of ballots for election officials after Election Day has passed—not when voters themselves must submit their ballots. All North Carolina absentee voters still must mail their ballots by Election Day.

The same is true of Numbered Memo 2020-23, which affects the drop-off procedure for absentee ballots at early voting locations. Early voting begins on October 15, and all voters who choose to return their ballots at early voting locations will be able to utilize the ballot drop-off stations that Numbered Memo 2020-23 implements. Finally, Numbered Memo 2020-19, which has been recently revised, expands the list of curable deficiencies for all voters, including those who made errors prior to its implementation on September 22, 2020.

Even operating under their misconstrued theory, Appellees have failed to articulate, let alone demonstrate, that their right to vote—or anyone else's for that matter—has been burdened or that their votes will be valued less than others'. *See Bush v. Gore*, 531 U.S. 98, 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote *over that of another*.") (emphasis added); *Short v. Brown*,

893 F.3d 671, 679 (9th Cir. 2018) (explaining the Equal Protection Clause "bars a state from burdening a fundamental right for some citizens *but not for others*") (emphasis added). Nor could they. Heath and Whitley have already successfully voted, and their ballots will count.[5]

At bottom, Appellees take issue with the fact that future voters may face fewer barriers to casting their ballots, even though Appellees have alleged no barriers to successfully casting their own. There is no authority to suggest that a law that makes exercise of a fundamental right easier for future actors is barred by the equal protection doctrine. *Cf. Short*, 893 F.3d at 677-78 ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution."). That position is especially troubling here, where the Alliance has shown, in the ongoing state court litigation, that the rules that preceded the Numbered Memos burdened their fundamental right to vote—and the State Court found it is likely to succeed on the merits of its claims. *See* IAA503. Taking Appellees' argument to its logical conclusion would lead to absurd results. For example, under Appellees' novel understanding of the Equal Protection Clause, someone who is already registered to vote could challenge the introduction of online

[5] Indeed, the State Board instructed county boards not to reject any ballots in mid-September in anticipation of the updated cure process. Appellees allege that their ballots were accepted on September 17 and 21, respectively. Had they made an error on their ballots, whether related to the witness requirement or otherwise, they would have been subject to the cure process formally announced on September 22.

voter registration in the State because that "easier" procedure was unavailable to them at the time of registration. Ultimately, Appellees' position would allow just about any voter to block any and all new procedures on the grounds that they benefit others, inviting the Court to adopt a limitless expansion of federal court jurisdiction to vindicate a previously unrecognized right to dictate how others vote.

Nor does the timing of the release of the Numbered Memos give rise to an equal protection claim. Election procedures are regularly changed after voting has started to ensure that the fundamental right to vote is protected. For example, in 2018, a federal court enjoined Florida's signature matching procedures and ordered a cure process *after* the election had already concluded. *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1031 (N.D. Fla. 2018), *appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790 (11th Cir. 2020). That same year, a Georgia federal court enjoined Georgia's signature matching scheme and ordered a cure process in the middle of the absentee and early voting periods. *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Ga.*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018). Two years earlier, following a hurricane in the final week of the voter registration period, a federal court extended Florida's voter registration deadline. *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *see also Ga. Coal. for the Peoples'*

Agenda, Inc., v. Deal, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (enforcing deadline during emergency "would categorically deny the right to vote" to thousands). In each case, the fact that some voters had already successfully voted or registered made no difference. The same reasoning applies here; to hold otherwise would effectively proscribe all constitutional protections once voting has started.

B. Appellees' vote dilution argument lacks merit.

Appellees' vote dilution claim is equally meritless, as federal courts simply do not recognize such a cause of action. Vote dilution is a viable basis for federal claims in certain contexts, such as when laws are crafted that structurally devalue one community's votes over another's. *See, e.g.*, *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406-07 (E.D. Pa. 2016); *see also Reynolds v. Sims*, 377 U.S. 533, 563-64, 568 (1964). In these equal protection cases, plaintiffs allege that their votes are devalued as compared to similarly-situated voters in other parts of the state. Appellees here, by contrast, have not alleged an equal protection claim suggesting that the Consent Judgment or Numbered Memos value some other group of votes over their own, and so they have failed at the most basic step of pleading a vote dilution claim.

Ultimately, "[t]he Constitution is not an election fraud statute." *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)). There is simply no authority for

transmogrifying the vote dilution line of cases into a weapon that voters may use to enlist the federal judiciary to make it more difficult for millions of their fellow citizens to vote, based on unfounded and speculative fears of voter fraud. *Cf. Short*, 893 F.3d at 677-78. To the contrary, courts have routinely—and appropriately—rejected such efforts. *See Minn. Voters All.*, 720 F.3d at 1031-32 (affirming Rule 12(b)(6) dismissal of vote dilution claim); *see also Cortés*, 218 F. Supp. 3d at 406-07 (rejecting claim of vote dilution "based on speculation that fraudulent voters may be casting ballots elsewhere in the" state on motion for preliminary injunction). Appellees have failed to allege facts that give rise to a plausible claim for relief, or even alleged a cognizable legal theory.

IV. The Alliance will be irreparably harmed absent a stay.

The Alliance and its members will indisputably be irreparably harmed absent a stay. The right to vote is protected under the First and Fourteenth Amendments, and the threatened "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1997)); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."). This injury is even more irreparable given the impending election; "once the election occurs, there can be no do-over and no redress." *See*

League of Women Voters of N.C. v. North Carolina, 769 F.3d at 224, 247 (4th Cir. 2014). In the State Court, the Alliance presented more than 500 pages of evidence, including four expert reports and 17 voter and other witness affidavits, of the unconstitutional burdens on the right to vote resulting from the ongoing enforcement of challenged North Carolina laws. The State Court found that the Alliance was likely to succeed on those claims, and rather than risk an adverse ruling, NCSBE agreed to a settlement that provided substantial and meaningful relief from these burdens for North Carolina voters. Now, the district court's TRO unconstitutionally encumbers the rights of the Alliance to the franchise without regard to this evidence. The Alliance's threatened injuries thus constitute textbook irreparable harm.

V. The equities and public interest favor a stay.

Finally, the last two factors strongly favor a stay. First, as a legal matter, the Fourth Circuit has found that both the balance of the equities and the public interest weigh in favor of a party likely to suffer a constitutional injury. *See Giovani Carandola*, 303 F.3d at 521 ("[U]pholding constitutional rights surely serves the public interest."). The Alliance has clearly demonstrated myriad constitutional injuries if the district court's ruling is not stayed, *see* IAA499-500, 503, and, for the reasons stated above, Appellees have articulated none; indeed, Voter Appellees have already successfully voted.

Second, these factors are particularly strong here. The Alliance and NCSBE negotiated a good-faith settlement in the State Court to reduce the burden on the right to vote and provide election administrators throughout the State with clear guidance to ensure access to the franchise during an unprecedented public health crisis. Now, Appellees (two of whom were parties to the state court litigation) seek to attack the State Court's judgment through a collateral federal proceeding. They have injected continued uncertainty into North Carolina's election for nothing more than policy disagreements with NCSBE, irreparably damaging the constitutional rights of the Alliance—as well as thousands of other North Carolina voters—in the process. Neither the equities nor the public interest is supported by upholding the district court's ruling.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that this Court stay the district court's TRO.

DATED: October 6, 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(C), 32(a)(5), and 32(g)(1), I certify that this motion has 5,051 words and was prepared using Times New Roman, 14-point font.

s/ Marc E. Elias

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of October, 2020, I caused this *Proposed Defendant-Intervenors' Motion for Emergency Stay Pending Appeal* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record.

I also hereby certify that on this 6th day of October, 2020, I caused this *Proposed Defendant-Intervenors' Motion for Emergency Stay Pending Appeal* to be emailed to counsel for appellants and appellees, addressed as follows:

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This the 6th day of October, 2020.

s/ Marc E. Elias
Marc E. Elias

INTERVENOR-APPELLANTS' APPENDIX

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State of North Carolina

ROY COOPER
GOVERNOR

September 30, 2020

EXECUTIVE ORDER NO. 169

RESTRICTIONS TO PROTECT LIVES DURING THE COVID-19 PANDEMIC: PHASE 3

The COVID-19 Public Health Emergency

WHEREAS, on March 10, 2020, the undersigned issued Executive Order No. 116 which declared a State of Emergency to coordinate the State's response and protective actions to address the Coronavirus Disease 2019 ("COVID-19") public health emergency and provide for the health, safety, and welfare of residents and visitors located in North Carolina; and

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 a global pandemic; and

WHEREAS, on March 13, 2020, the President of the United States issued an emergency declaration for all states, tribes, territories, and the District of Columbia, retroactive to March 1, 2020, and the President declared that the COVID-19 pandemic in the United States constitutes a national emergency; and

WHEREAS, on March 25, 2020, the President approved a Major Disaster Declaration, FEMA-4487-DR, for the State of North Carolina; and

WHEREAS, in responding to the COVID-19 pandemic, and for the purpose of protecting the health, safety, and welfare of the people of North Carolina, the undersigned has issued Executive Order Nos. 116-122, 124-125, 129-131, 133-136, 138-144, 146-153, 155-157, and 161-165; and

WHEREAS, more than 210,000 people in North Carolina have had COVID-19, and over 3,500 people in North Carolina have died from the disease; and

Current Metrics

WHEREAS, since the declaration of a state of emergency in Executive Order No. 116, North Carolina has accumulated increased PPE for health care workers and first responders, has developed health care protocols and procedures for the treatment of COVID-19, and has adopted measures to promote social distancing, the use of Face Coverings, and hygiene measures that reduce transmission of COVID-19; and

WHEREAS, slowing and controlling community spread of COVID-19 is critical to ensuring that the state's healthcare facilities remain able to accommodate those who require

medical assistance and remain able to reduce morbidity and mortality from COVID-19 in North Carolina; and

WHEREAS, so long as health care systems continue to be projected to have sufficient capacity for patient care, commerce and gatherings may resume and continue under reasonable restrictions; and

WHEREAS, there have been recent modest declines, compared to July levels, in the percent of emergency department visits that are for COVID-19-like illnesses, daily new case counts, the percent of COVID-19 tests that are positive, and COVID-19-associated hospitalizations; and

WHEREAS, the percent of emergency department visits that are for COVID-19-like illnesses, daily case counts, the percent of COVID-19 tests that are positive, and COVID-19-associated hospitalizations have shown stabilization, but remain elevated; and

WHEREAS, COVID-19 daily case counts and associated hospitalizations are above their levels on May 20, 2020, when the state announced Phase Two of COVID-19 restrictions and reopening; and

WHEREAS, these trends and considerations require the undersigned to continue certain public health restrictions to slow the spread of this virus during the pandemic; and

Need for a Phased, "Dimmer Switch" Approach to Loosening Restrictions

WHEREAS, the stabilization of North Carolina's key metrics is fragile, necessitating that the state exercise caution in loosening restrictions (particularly in high-risk settings); and

WHEREAS, to slow the spread of COVID-19 and reduce COVID-19 morbidity and mortality, it remains necessary to use a phased, "dimmer switch" approach to reducing restrictions on businesses and activities, with some businesses and activities that pose an increased risk for COVID-19 spread remaining closed, since the loosening of each restriction on businesses and activities adds incremental risk and thereby increases the aggregate risk of spread of COVID-19; and

WHEREAS, in this phased approach, the undersigned must factor into the analysis the risk from all activities in and affecting North Carolina, not only activities covered by the Executive Orders; and

WHEREAS, certain types of businesses by their very nature present greater risks of the spread of COVID-19 because of the nature of the activity, the way that people have traditionally acted and interacted with each other in that space, and the duration that people stay in the establishment; and

WHEREAS, the reopening of some K-5 schools for in-person learning under "Plan A" and the reopening of some entertainment facilities at reduced capacity will increase the state's COVID-19 risk; and

WHEREAS, to balance out this additional risk, it is necessary to continue to restrict certain kinds of businesses and operations to prevent COVID-19 morbidity and mortality and so that North Carolina's health care facilities continue to have sufficient capacity and resources to care for those who become sick; and

WHEREAS, to lower the risk of contracting and transmitting COVID-19, this Executive Order imposes restrictions on certain businesses designed to limit the number of contacts between people, particularly in settings in which people exert increased respiratory effort, that are indoors, that involve people being in close physical contact for an extended period of time (more than 15 minutes), or that involve a large number of people; and

Cautious Lifting of Certain Restrictions While Maintaining Other Restrictions

Amusement Parks

WHEREAS, amusement parks feature lower risks of spreading COVID-19 in their outdoor areas, so long as waiting lines remain socially distanced and high-touch areas are disinfected; and

WHEREAS, amusement parks and amusement-park-like transportation may therefore reopen, subject to capacity limitations, Face Covering requirements, measures to ensure that people remain socially distanced, signage requirements, and cleaning requirements; and

WHEREAS, indoor rides and attractions must remain closed, because indoor rides may bring large groups of people together, without the ability to social distance, and who may scream or shout, spreading respiratory droplets in a confined space without air circulation; and

Bars, Night Spots, and Arenas

WHEREAS, across the country, COVID-19 spread has been repeatedly linked to Bars (as defined below), and in many states, rises in case counts have been temporally associated with the reopening of Bars; and

WHEREAS, in Bars, people's risk of spreading COVID-19 is higher for many reasons, including because people traditionally engage in activities in Bars that result in increased respiratory effort, because people traditionally mingle in Bars and are in close physical contact for an extended period of time, and because people are less cautious when they drink alcoholic beverages; and

WHEREAS, these risks are mitigated, although not eliminated, in outdoor spaces where air circulates freely; and

WHEREAS, for these reasons and others, it is prudent to continue to limit Bar operation by requiring that all Guests be seated at tables and counters, separating Guests so that different groups are socially distanced, and by closing all indoor seating areas; and

WHEREAS, lounges, music halls, night clubs, adult entertainment facilities, and stadiums share many of the same risks of Bars, but these risks can be mitigated if capacity restrictions are put in place and if the facility is required to be seated, which will counteract the tendency of Guests in these facilities to mingle and spread COVID-19 among one another like they are in a Bar; and

WHEREAS, larger crowds in entertainment venues increase the likelihood of a super-spreading event, and therefore crowds must be limited to an overall maximum limit; and

WHEREAS, because COVID-19 spreads more easily in indoor settings, this overall maximum limit must be lower in indoor settings; and

WHEREAS, to reduce the risk of spread of COVID-19, these facilities should also operate under Face Covering requirements, signage requirements, and cleaning requirements; and

Movie Theaters, Meeting Spaces, and Entertainment Facilities

WHEREAS, the COVID-19 risks for movie theaters, hotels, conference centers, and other event spaces can be mitigated, although not entirely eliminated, if capacity restrictions are put in place and if Guests do not circulate around the establishment to socialize with each other; and

WHEREAS, to reduce the risk of spread of COVID-19, when movie theaters, meeting spaces, and entertainment facilities reopen or host larger events, they must be subject to capacity limitations, Face Covering requirements, measures to ensure that people remain socially distanced, signage requirements, and cleaning requirements; and

Outdoor Facilities With Capacity of At Least 10,000 Seats

WHEREAS, Guests at very large outdoor facilities (facilities with more than 10,000 seats) for entertainment and sporting events have a lower risk of contracting and transmitting COVID-19 because air circulates freely in outdoor spaces and because people can easily spread out in very large spaces by staying six (6) feet apart; and

WHEREAS, Guests at very large outdoor facilities for entertainment and sporting events also have a lower risk of contracting and transmitting COVID-19 because very large facilities have multiple entrances and exits and larger concourses, reducing crowding and allowing guests to maintain adequate social distance from one another as they move around the facility; and

WHEREAS, the risk at very large outdoor facilities is also lowered because these facilities have the resources, staff, and capability to design, implement, and enforce enhanced health and safety measures for Guests; and

WHEREAS, based on the state's currently improving COVID-19 metrics and the factors that lower risk of COVID-19 transmission for very large outdoor facilities, the undersigned has determined that such facilities may allow more guests that previously allowed, but because of the risks that continue to exist for any place where larger groups of people gather, the very large outdoor facilities that are reopening must be subject to capacity restrictions that will limit spectators to a small fraction of such facilities' capacity; and

WHEREAS, to reduce the risk of spread of COVID-19, when the very large outdoor facilities accommodate more Guests, they also must be subject to capacity limitations, Face Covering requirements, measures to ensure that people remain socially distanced, signage requirements, and cleaning requirements; and

Face Coverings

WHEREAS, Face Coverings over the mouth and nose can decrease the spread of respiratory droplets from people, and evidence in numerous recent studies has shown that the use of Face Coverings decreases the spread of COVID-19; and

WHEREAS, under Executive Order No. 147, Face Coverings are required in many types of businesses, but businesses have the discretion to accommodate people who cannot wear Face Coverings by serving them curbside, using home delivery, or using other means to protect against the spread of COVID-19; and

WHEREAS, guidance from the U.S. Centers for Disease Control and Prevention ("CDC") recommends that all employers encourage workers to wear a Face Covering at work; and

WHEREAS, guidance from the North Carolina Department of Health and Human Services ("NCDHHS") strongly recommends that all individuals wear a Face Covering when they may be less than six (6) feet from other people, and that businesses and organizations provide Face Coverings or Surgical Masks for workers, as appropriate; and

WHEREAS, based on this guidance, employers who have North Carolina workers who perform work outside of their home should make their best efforts to provide Face Coverings or Surgical Masks for workers, as appropriate; and

WHEREAS, the American Academy of Pediatrics recommends the use of Face Coverings for children above the age of two (2) to limit the spread of COVID-19; and

WHEREAS, all people above the age of two (2) years old in North Carolina should use a Face Covering to reduce the spread of COVID-19, but some populations may experience increased anxiety and fear of bias and being profiled if wearing Face Coverings in public spaces; and

WHEREAS, if someone is the target of ethnic or racial intimidation as the result of adhering to the Face Covering provision or as a result of the pandemic, they are encouraged to report the matter to law enforcement or another government entity; and

Late Night Service of Alcoholic Beverages

WHEREAS, some restaurants or Bars stay open until early morning hours with limited food service but with continued consumption of alcohol, and patrons frequenting those businesses during late hours often do not maintain social distancing; and

WHEREAS, the CDC and NCDHHS have stated that the consumption of alcohol lowers inhibitions and makes people more likely to engage in behaviors that increase the risk of spread of COVID-19; and

WHEREAS, the consumption of alcohol makes people less likely to practice social distancing or wear Face Coverings that are required by this Executive Order; and

WHEREAS, people who are drinking beverages cannot consistently wear Face Coverings; and

WHEREAS, when people gather to consume alcohol in public, they often speak loudly, laugh, yell, or sing, spreading respiratory droplets that may contain the COVID-19 virus; and

WHEREAS, national and international outbreaks of COVID-19 have been linked to places like bars, clubs, and restaurants where people consume alcohol in close proximity to one another, and to super-spreading events in which a single person infects a large number of people; and

WHEREAS, data reveals that there is an increase in the number of younger individuals who are being infected by COVID-19; and

WHEREAS, some, but not all, county and municipal governments have imposed restrictions on the sale of alcohol as part of their efforts to prevent the spread of COVID-19; and

WHEREAS, the undersigned, in consultation with the Secretary of Health and Human Services, the Secretary of the Department of Public Safety, and the Director of the Division of Emergency Management, has determined that limitations on the sale of alcohol in businesses and other establishments that serve alcohol to the public for on-premises consumption is necessary to counter the spread of COVID-19; and

The Need for Continued Vigilance

WHEREAS, should there be an increase in the percentage of emergency department visits that are due to COVID-19-like illness, a consistent increase in the number of laboratory-confirmed cases, an increase in the positive tests as a percent of total tests, an increase in COVID-19-related hospitalizations that threaten the ability of the health care system to properly respond, or should the state's ability to conduct testing and tracing be compromised, it may be necessary to reinstate certain restrictions eased by this Executive Order so as to protect the health, safety, and welfare of North Carolinians; and

WHEREAS, businesses that are open during the duration of this Executive Order are encouraged to follow the Guidelines for Businesses published by NCDHHS, as well as any other NCDHHS guidance applicable to their business model, available electronically on the NCDHHS website; and

Statutory Authority and Determinations

WHEREAS, Executive Order No. 116 invoked the Emergency Management Act, and authorizes the undersigned to exercise the powers and duties set forth therein to direct and aid in the response to, recovery from, and mitigation against emergencies; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.10(b)(2), the undersigned may make, amend, or rescind necessary orders, rules, and regulations within the limits of the authority conferred upon the Governor in the Emergency Management Act; and

WHEREAS, N.C. Gen. Stat. § 166A-19.10(b)(3) authorizes and empowers the undersigned to delegate Gubernatorial vested authority under the Emergency Management Act and to provide for the sub-delegation of that authority; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.12(3)(e), the Division of Emergency Management must coordinate with the State Health Director to revise the North Carolina Emergency Operations Plan as conditions change, including making revisions to set "the appropriate conditions for quarantine and isolation in order to prevent the further transmission of disease," and following this coordination, the Emergency Management Director and the State Health Director have recommended that the Governor develop and order the plan and actions identified in this Executive Order; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.23 in conjunction with N.C. Gen. Stat. §§ 75-37 and 75-38, the undersigned may issue a declaration that shall trigger the prohibitions against excessive pricing during states of disaster, states of emergency or abnormal market disruptions; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(1), the undersigned may utilize all available state resources as reasonably necessary to cope with an emergency, including the transfer and direction of personnel or functions of state agencies or units thereof for the purpose of performing or facilitating emergency services; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), the undersigned may take such action and give such directions to state and local law enforcement officers and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of the Emergency Management Act and with the orders, rules, and regulations made thereunder; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(i), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians because not all local authorities have enacted such appropriate ordinances or issued such appropriate declarations restricting the operation of businesses and limiting person-to-person contact, thus needed control cannot be imposed locally; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(ii), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians because some but not all local authorities have taken implementing steps under such ordinances or declarations, if enacted or declared, in order to effectuate control over the emergency that has arisen; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(iii), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection for lives and property of North Carolinians because the area in which the emergency exists spreads across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(iv), the undersigned has determined that local control of the emergency is insufficient to assure adequate protection of lives and property of North Carolinians because the scale of the emergency is so great that it exceeds the capability of local authorities to cope with it; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(1) authorizes the undersigned to prohibit and restrict the movement of people in public places; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(2) authorizes the undersigned to prohibit and restrict the operation of offices, business establishments, and other places to and from which people may travel or at which they may congregate; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(3) authorizes the undersigned to restrict the possession, transportation, sale, purchase, and consumption of alcoholic beverages; and

WHEREAS, N.C. Gen. Stat. § 166A-19.30(c) in conjunction with N.C. Gen. Stat. § 166A-19.31(b)(5) authorizes the undersigned to prohibit and restrict other activities or conditions, the control of which may be reasonably necessary to maintain order and protect lives or property during a state of emergency; and

WHEREAS, pursuant to N.C. Gen. Stat. § 166A-19.30(c)(1), when the undersigned imposes the prohibitions and restrictions enumerated in N.C. Gen. Stat. § 166A-19.31(b), the undersigned may amend or rescind the prohibitions and restrictions imposed by local authorities.

NOW, THEREFORE, by the authority vested in me as Governor by the Constitution and the laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Introduction.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

1.1. Definitions.

a. "Amusement Park" has the definition at N.C. Gen. Stat. § 95-111.3, except that it does not include waterslides as defined by N.C. Gen. Stat. § 95-111.3(h).

b. "Amusement Transportation" means tour buses, tour trains, or other scenic and sightseeing transportation that is principally offered and used for amusement, regardless of whether such transportation is located in an Amusement Park.

c. "Bars" means establishments that are not eating establishments or restaurants as defined in N.C. Gen. Stat. §§ 18B-1000(2) and 18B-1000(6), that have a permit to sell alcoholic beverages for onsite consumption under N.C. Gen. Stat. § 18B-1001, and that are principally engaged in the business of selling alcoholic beverages for onsite consumption.

d. "Core Signage, Screening and Sanitation Requirements" are the following actions which establishments open to the public under the terms of this Executive Order must follow, namely:
   1. Post the Emergency Maximum Occupancy in a noticeable place.
   2. Post signage reminding Guests and workers about social distancing (staying at least six (6) feet away from others) and requesting that people who have been symptomatic with fever and/or cough not enter.
   3. Conduct daily symptom screening of workers, using a standard interview questionnaire of symptoms before workers enter the workplace.
   4. Immediately isolate and remove sick workers.
   5. Perform frequent and routine environmental cleaning and disinfection of high-touch areas with an EPA-approved disinfectant for SARS-CoV-2 (the virus that causes COVID-19).

e. "Emergency Maximum Occupancy" means the maximum occupancy for a facility (or room within a facility, as applicable) under this Executive Order.

f. "Face Covering" means a covering of the nose and mouth that is secured to the head with ties, straps, or loops over the ears and fits snugly against the side of a person's face. A Face Covering can be made of a variety of synthetic and natural fabrics, including cotton, silk, or linen. Ideally, a Face Covering has two (2) or more layers. A Face Covering may be factory-made, sewn by hand, or can be improvised from household items such as scarfs, bandanas, t-shirts, sweatshirts, or towels. These Face Coverings are not intended for use by healthcare providers in the care of patients.

Based on recommendations from the CDC, face shields do not meet the requirements for Face Coverings.

g. "Guest" means any attendee, customer, guest, member, patron, spectator, or other person lawfully on the property of another that does not own the property or work at the property.

h. "N95 Respirator" means a Face Covering approved by the National Institute for Occupational Safety and Health ("NIOSH") or a respirator from another country allowed by the Occupational Safety & Health Administration, the Food & Drug Administration, or the CDC. N95 respirators are not recommended for general public use or use in public settings, as they should be reserved for healthcare providers and other medical first responders in a health care setting. However, if worn, N95 respirators would meet both the Face Covering and Surgical Mask requirements of this Executive Order.

i. "Personal Care, Grooming, and Tattoo Businesses" means businesses that (i) do not provide health care services; and (ii) either (1) have workers directly touch Guests or (2) have a piece of equipment (other than a touchscreen) repeatedly come into contact directly with Guests' skin. This includes, but is not limited to, barber shops, beauty salons (including but not limited to waxing and hair removal centers), hair salons, nail salons, manicure or pedicure providers, tattoo businesses, tanning salons, and massage therapists.

j. "Playground" means a recreation area for children equipped with playground equipment, including but not limited to soft contained play equipment, swings, seesaws, slides, stationary spring-mounted animal features, jungle gyms, rider-propelled merry-go-rounds, and trampolines.

k. "Recommendations to Promote Social Distancing and Reduce Transmission" are defined in Subsection 1.4 below.

l. "Restaurants" means permitted food establishments, under N.C. Gen. Stat. § 130A-248, and other establishments that both prepare and serve food. This includes, but is not limited to, restaurants, cafeterias, food halls, dining halls, food courts, and food kiosks. This includes not only free-standing locations but also locations within other businesses or facilities, including, but not limited to airports, shopping centers, educational institutions, or private or members-only clubs where food and beverages are permitted to be consumed on premises.

m. "Retail Business" means any business in which Guests enter a space to purchase goods or services, including but not limited to grocery stores, convenience stores, large-format retail stores, pharmacies, banks, and ABC stores. This also includes, but is not limited to, (i) retail establishments operated by the state, its political subdivisions, or agencies thereof, and (ii) state agencies under the jurisdiction of the undersigned which have a public-facing component offering a service, such as the Division of Motor Vehicles, the North Carolina Department of Revenue, and shops in North Carolina Department of Natural and Cultural Resources facilities.

n. "Surgical Mask" means American Society for Testing and Materials ("ASTM") Level 1, 2, or 3 approved procedural and surgical masks.

o. "Very Large Outdoor Facilities" are defined in Subsection 6.1 below.

1.2. **Exemptions**.

Worship, religious, and spiritual gatherings, funeral ceremonies, wedding ceremonies, and other activities constituting the exercise of First Amendment rights are exempt from all the requirements of this Executive Order, notwithstanding any other provision of this Executive Order.

The undersigned strongly urges that entities and individuals engaging in these exempted activities follow the Recommendations to Promote Social Distancing and Reduce Transmission, wear and require Face Coverings, and avoid exceeding Emergency Maximum Occupancy in the places where they meet.

1.3. **Structure of This Executive Order**.

To control the spread of COVID-19 and protect lives during the State of Emergency, this Section lists restrictions on the operations of business establishments and other places to or from which people may travel or at which they may congregate. Businesses or operations within the scope of Sections 2 to 6 are prohibited from operating unless they follow all applicable restrictions stated in these sections.

1.4. **General Recommendations**.

a. **High-Risk Individuals Encouraged to Stay at Home**. People who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes. The Centers for Disease Control and Prevention ("CDC") defines high-risk individuals as people 65 years or older **and people of any age who have serious underlying medical conditions**, including people who are immunocompromised or who have cancer, chronic lung disease, serious heart conditions, severe obesity, diabetes, chronic kidney disease, sickle cell disease, or Type 2 diabetes mellitus.

b. **Follow the Recommendations to Promote Social Distancing and Reduce Transmission**. When people are outside their homes, they are strongly encouraged to follow the following Recommendations to Promote Social Distancing and Reduce Transmission:
   1. Maintain at least six (6) feet social distancing from other individuals, with the exception of family or household members.
   2. Wear a Face Covering over the nose and mouth when leaving home and wear it inside all public settings such as grocery stores, pharmacies, or other retail or public-serving businesses. A Face Covering should also be worn outdoors when you cannot maintain at least six (6) feet distancing from other people with the exception of family or household members.
   3. Carry hand sanitizer with you when leaving home, and use it frequently.
   4. Wash hands using soap and water for at least twenty (20) seconds as frequently as possible.
   5. Regularly clean high-touch surfaces such as steering wheels, wallets, and phones.
   6. Avoid large gatherings.
   7. Stay at home if sick.

Section 2. Face Coverings.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

2.1. **Face Coverings Required In Public Places.** The undersigned enacts the following restriction on the movement of people in public places and restriction on the operation of offices, business establishments, and other places where people may travel or congregate. Face Coverings must be worn in any public place, business or establishment, indoor or outdoor, where it is not possible to consistently be physically distant by more than six (6) feet from non-household members.

2.2. **Restrictions in Section 3.** In this Executive Order, Section 3 states a series of specific Face Covering requirements that implement the general Face Covering requirement stated above in customized ways for certain types of businesses and establishments.

2.3. **Employer Good Faith Obligation to Provide Face Coverings**. Employers who have workers who perform work outside of their home in North Carolina and have not already

provided Face Coverings for their workers shall make good-faith efforts to provide a one-week supply of reusable Face Coverings or a new disposable Face Covering daily as soon as possible for workers to use at their place of employment. New Face Coverings should be provided during the work day if the worker's Face Covering becomes soiled, torn, or wet.

2.4. **Exceptions**. This Executive Order does not require Face Coverings for—and a Face Covering does not need to be worn by—a worker or Guest who:

a. Should not wear a Face Covering due to any medical or behavioral condition or disability (including, but not limited to, any person who has trouble breathing, or is unconscious or incapacitated, or is otherwise unable to put on or remove the Face Covering without assistance);
b. Is under five (5) years of age;
c. Is actively eating or drinking;
d. Is strenuously exercising;
e. Is seeking to communicate with someone who is hearing-impaired in a way that requires the mouth to be visible;
f. Is giving a speech for a broadcast or to an audience;
g. Is working at home or is in a personal vehicle;
h. Is temporarily removing his or her Face Covering to secure government or medical services or for identification purposes;
i. Would be at risk from wearing a Face Covering at work, as determined by local, state, or federal regulations or workplace safety guidelines;
j. Has found that his or her Face Covering is impeding visibility to operate equipment or a vehicle; or
k. Is a child whose parent, guardian, or responsible person has been unable to place the Face Covering safely on the child's face.

Anyone who declines to wear a Face Covering for these reasons should not be required to produce documentation or any other proof of a condition.

Children under two (2) years of age should not wear a Face Covering.

2.5. **Application of Exceptions**. Under this Executive Order, all North Carolinians will be on the honor system about whether or not there is a reason why they cannot wear a Face Covering. Everyone in this state is asked to tell the truth and—if they are healthy and able to wear a mask—to wear a Face Covering so that they do not put other people at risk of serious illness and death.

2.6. **How Businesses May Accommodate Exceptions**. If a Guest states that an exception applies, a business may choose to offer curbside service, provide home delivery, or use some other reasonable measure to deliver its goods or services.

2.7. **Enforcement of Face Covering Requirements**.

a. Citations under this Section shall be written only to businesses or organizations that fail to enforce the requirement to wear Face Coverings. Operators of businesses and organizations are entitled to rely on their Guests' representations about whether or not they are excepted from the Face Covering requirements, and businesses and organizations do not violate this Executive Order if they rely on Guests' compliance.

b. Law enforcement personnel are not authorized to criminally enforce the Face Covering requirements of this Executive Order against individual workers or people.

c. However, if a business or organization does not allow entry to a worker or Guest because that person refuses to wear a Face Covering, and if that worker or Guest enters the premises or refuses to leave the premises, law enforcement personnel may enforce the trespassing laws and any other laws (other than N.C. Gen. Stat. § 14-288.20A) that the worker or Guest may violate.

Section 3. Restrictions on Certain Businesses and Operations.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

3.1. **Amusement Parks**. Amusement Parks and Amusement Transportation may reopen and operate under the following restrictions:

a. Indoor Rides and Attractions Closed.

1. In an Amusement Park, any ride or attraction that is located indoors must remain closed. The Amusement Park may open indoor Restaurants, concessions, gifts shops or retail spaces, and restrooms.

2. Museums, playgrounds, or other establishments that are open may not operate any indoor motion simulator.

b. Restrictions.

1. Face Coverings. All workers and Guests must wear Face Coverings when they are or may be on premises or on transportation operated by the establishment.

2. Capacity Restrictions.

a. For the Facility As A Whole. The operator must limit the total number of Guests in the establishment to thirty percent (30%) of the park's normal maximum occupancy.

b. On each Ride or Amusement Transportation. The operator must limit the number of Guests within each vehicle or car to either:

- Have all the Guests within a vehicle or car be people who came into the ride loading area together as part of the same group of friends or family; or
- Ensure six feet of social distancing between each group of friends or family within the vehicle or car.

c. All other group activities, such as tours, receptions, or parties, are subject to the Mass Gathering limit stated in Section 5 of this Executive Order.

3. Other Requirements. The operator must:

a. Spread out waiting lines for rides, amusements, and other areas where people may congregate or wait, with each group separated by six (6) feet.
b. The operator must mark six (6) feet of spacing along the line and in waiting areas for rides and amusements and other areas where people may congregate or wait.
c. Establish a Guest flow plan that limits people massing together throughout the park and when they are entering or exiting the park.
d. Increase disinfection during high customer density times.
e. Provide alcohol-based hand sanitizer (with at least 60% alcohol) at the entrance and at other areas throughout the premises as needed. Promote frequent use of handwashing and hand sanitizer for workers and Guests.
f. Disinfect shared objects and surfaces (such as game surfaces, safety bars, or harnesses) between uses.
g. Follow the restrictions set out in Subsections 3.13, 3.14, and 4 of this Executive Order for any food, beverage, and retail service.
h. Follow the Core Signage, Screening and Sanitation Requirements as defined in this Executive Order.

3.2. **Bars, Night Spots, and Arenas**.

a. This Subsection applies to the following:
- Bars
- Lounges (such as cigar bars and hookah lounges) in which tobacco or related products are consumed on premises
- Auditoriums, amphitheaters, arenas, and other venues for live performances
- Music halls, night clubs, or dance halls
- Adult entertainment facilities
- Spectator stands and viewing areas at a sporting facility, stadium, sporting complex, or speedway

b. Must be Seated. A facility covered by this Subsection is closed unless it is or becomes a seated establishment for Guests.

c. Indoor Restrictions.
1. Bars.
   - Bars' indoor seating areas and indoor amenities (such as pool and billiards tables) must be closed.
   - Bars must not serve alcoholic beverages for on-site consumption in any indoor area on their premises.
2. Non-Bar Night Spots and Arenas.
   - Indoor seating areas at all other facilities covered by this Subsection may be open, but are restricted to 25 Guests per facility.
   - All facilities covered by this Subsection must not serve alcoholic beverages for on-site consumption in any indoor area on their premises.

d. Outdoor Restrictions.
1. Bars, Night Spots, and Arenas.
   - Outdoor seating areas may be open at Bars and all other facilities covered by this Subsection. Guests in outdoor areas must be limited to the lesser of:
     - 100 people for the total seating area (or, if there are multiple fields of play or stages, per field of play or per stage); or
     - Thirty percent (30%) of the facility's stated outdoor occupancy before reductions under this Executive Order (or, for spaces without a stated outdoor occupancy, no more than seven (7) Guests for every one thousand (1000) square feet of the outdoor area's square footage).
   - A facility covered by this Subsection may serve alcoholic beverages for on-site consumption in outdoor seating areas on its premises, subject to applicable local and state regulations.

e. Interpretation of Capacity Restrictions in this Subsection.
1. Workers, entertainers, athletes, and any other support staff do not count toward the capacity limits stated in Subsections 3.2(c) and 3.2(d) immediately above.
2. Any facility that meets the definition of "Restaurant" in this Executive Order is covered by Subsection 3.13 of this Executive Order and not this Subsection.
3. A facility is excepted from the limits stated in this Subsection if it is a Very Large Outdoor Facility covered by Section 6 of this Executive Order.
4. Outdoor amenities may be open at Bars and other facilities covered by this Subsection.
5. Nothing in this Executive Order prevents establishments from opening up or expanding outdoor seating areas, subject to applicable local and state regulations.

f. Social Distancing Requirements.

1. Space Out Guests. Each group of Guests must be seated so that they are spaced out by six (6) feet in all directions from other groups of Guests. Each group of Guests sitting at a counter should be separated from other groups by six (6) feet. Entertainers also must stay at least six (6) feet away from any Guest.

2. Ordering Area. Bars not using waitstaff must designate an ordering area at the bar. This area must allow each Guest to wait six (6) feet apart from other Guests. If necessary, Guests may place their orders by coming inside the Bar's building; however, Guests must consume their beverages in outdoor seating areas only.

g. Face Coverings. All workers and Guests must wear Face Coverings when they are or may be within the facility.

h. Other Requirements. Facilities covered by this Subsection must:
1. Restrict late night service of alcoholic beverages as stated in Section 4 of this Executive Order.
2. Follow the restrictions set out in Sections 3.13 of this Executive Order for any food or beverage service.
3. Mark six (6) feet of spacing in lines at high-traffic areas for Guests.
4. Promote frequent use of hand-washing and hand sanitizer for wait staff and food service staff throughout the shift and upon reporting to work. Hand washing must at least meet the requirements specified in the North Carolina Food Code Manual.
5. Provide alcohol-based hand sanitizer (with at least 60% alcohol) at the entrance and at other areas throughout the premises as needed. Promote frequent use of handwashing and hand sanitizer for workers and Guests.
6. Increase disinfection during peak times or high Guest density times, and disinfect all shared objects (e.g., payment terminals, tables, countertops/bars, receipt trays, and reusable menus) between use.
7. Follow all applicable requirements in NCDHHS guidelines.
8. Follow the Core Signage, Screening and Sanitation Requirements as defined in this Executive Order.

i. Miscellaneous Provisions on Bars.

1. Clarifications. People sitting at a table need not be members of the same household and do not need to stay six (6) feet apart. Moreover, this Executive Order does not require waitstaff to stay six (6) feet away from Guests.

2. Off-Site Consumption. This Executive Order does not direct the closure of retail beverage venues that provide for the sale of beer, wine, and liquor for off-site consumption only. It also does not require the closure of production operations at breweries, wineries, or distilleries.

3.3. **Child Care Facilities**. Subsections 3.2(d) and 6.6 of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

3.4. **Children's Day or Overnight Camps**. Subsections 3.2(d) and 6.7 of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

3.5. **Fitness and Physical Activity Facilities**.

a. This Subsection applies to "Fitness and Physical Activity Facilities," defined as any of the following:
- Exercise facilities (e.g., yoga studios, dance studios, ballrooms for dancing, martial arts facilities, gymnastics, indoor trampoline and rock climbing facilities)
- Gyms

- Fields of play, including but not limited to basketball courts, baseball fields, volleyball courts, racquetball courts, squash courts, hockey rinks, soccer fields, and tennis courts (with spectators, if any, limited as stated in Subsection 3.2 of this Executive Order)
- Health clubs and fitness centers
- Boxing clubs
- Skating rinks
- Bowling alleys
- Golf courses and driving ranges
- Golf ball hitting bays
- Mini-golf courses
- Go-cart tracks
- The track for any speedway or raceway (with spectators, if any, limited as stated in Subsection 3.2 of this Executive Order)
- Paintball, laser tag, and similar fields and arenas
- Indoor Playgrounds

b. Face Coverings. All workers must wear Face Coverings when they are or may be within six (6) feet of another person, unless the worker is strenuously exercising. All Guests must wear Face Coverings when they are inside the establishment and not strenuously exercising.

c. Capacity Restrictions.

1. Indoor Areas. Fitness and Physical Activity Facilities must limit Guests in indoor areas to the lowest number produced by applying the following two tests:

a. Overall. Limit the number of Guests in the facility to thirty percent (30%) of stated fire capacity (or, for spaces without a stated fire capacity, no more than seven (7) Guests for every one thousand (1000) square feet of the location's total square footage, including the parts of the location that are not accessible to Guests).

b. In Any Room. Limit the number of Guests in any given room of the facility so that everyone can stay six (6) feet apart.

2. Outdoor Areas. Fitness and Physical Activity Facilities must limit Guests in outdoor areas to twelve (12) Guests for every one thousand (1000) square feet.

3. Games or Events With Spectators. The capacity restrictions for facilities in Subsection 3.2 above, not the capacity restrictions in Subsections 3.5(c)(1)-(2) above, apply to Fitness and Physical Activity Facilities whenever they host a game with spectators.

4. A Fitness and Physical Activity Facility is excepted from the limits stated in this section if it is a Very Large Outdoor Facility covered by Section 6 of this Executive Order.

d. Social Distancing Measures.

1. Spread Out Guests and Equipment. Operators of Fitness and Physical Activity Facilities must:

a. For activities involving Guests spread out among fixed equipment or lanes, tape off or move the equipment, or restrict access to lanes, so that the Guests conducting the exercise activity are at least six (6) feet apart.

b. For group classes or group activities, ensure that all Guests are spaced at least six (6) feet apart. Instructors may come within six (6) feet of students for brief periods of time (less than 15 minutes).

2. Seating in Waiting Areas. For Guests waiting to take their turn in the activity, operators must space out any seating so that Guests can be socially distanced and stay six (6) feet apart from each other.

e. Other Requirements. Operators of Fitness and Physical Activity Facilities must:

1. Promote frequent use of hand washing and hand sanitizer for workers and Guests. Require workers to wash hands immediately upon reporting to work, after contact with Guests, after performing cleaning and disinfecting activities, and frequently throughout the day.
2. Disinfect all shared equipment between users with an EPA-approved disinfectant for SARS-CoV-2 (the virus that causes COVID-19). Allow the disinfectant to sit for the adequate amount of time stated by the manufacturer. If Guests are to clean equipment, the establishment must provide instructions on how to properly disinfect equipment and on the adequate amount of time that the disinfectant must sit to be effective.
3. Increase disinfection during peak times or high-population-density times.
4. Mark six (6) feet of spacing in lines at point of sale and in other high-traffic areas for Guests.
5. Post the Emergency Maximum Occupancy of any room or other enclosed space at the door to that space.
6. Follow the restrictions set out in Sections 3.13 and 4 of this Executive Order for any food and beverage service.
7. Follow the Core Signage, Screening and Sanitation Requirements as defined in this Executive Order.

3.6. **Government Operations**. Subsection 3.2(e) of Executive Order No. 163 is incorporated into this Section is if it were stated herein.

3.7. **Health Care Settings**.

a. Surgical Masks in Long Term Care Facilities. All workers in Long Term Care ("LTC") Facilities, including skilled nursing facilities ("SNF"), adult care homes ("ACH"), family care homes ("FCH"), mental health group homes, and intermediate care facilities for individuals with intellectual disabilities ("ICF-IID"), must wear Face Coverings while in the facility, and those Face Coverings must be Surgical Masks, as long as Surgical Mask supplies are available.

b. Other Health Care Settings. Health care facilities other than LTC facilities must follow the Face Covering requirements in the CDC Infection Control Guidance for Healthcare Professionals about Coronavirus (COVID-19).

c. Other Requirements. Additional requirements in health care settings can be found in Executive Order Nos. 130 and 139 and in the Secretarial Orders issued under Executive Order Nos. 152 and 165.

3.8. **Movie Theaters, Meeting Spaces, and Entertainment Facilities**.

a. This Subsection applies to meeting spaces, meeting or reception venues, and any entertainment facilities that are not covered by another provision of this Section of this Executive Order, such as Subsection 3.2 (entitled "Bars, Night Spots, and Arenas") or Subsection 3.5 (entitled "Fitness and Physical Activity Facilities"). Facilities covered by this Subsection include, but are not limited to, the following types of businesses:

- Movie theaters
- Private rooms or other private meeting spaces in a hotel, conference center, meeting hall, or reception venue

- Bingo parlors, including bingo sites operated by charitable organizations
- Facilities where the purpose is to engage in games of cards, such as bridge
- Gaming and business establishments which allow gaming activities (e.g., video games, arcade games, pinball machines or other computer, electronic or mechanical devices played for amusement)

b. Social Distancing Requirements. The following measures limit the degree to which Guests at the facility may come into contact with one another and spread COVID-19.

1. Must be Seated to Be Open. A facility covered by this Subsection is closed unless it is or becomes a seated establishment for Guests. Guests must be in seats except to enter, leave, visit the restroom, and obtain food or drink. Facilities should avoid scheduling a standing reception, cocktail hour, or similar event where Guests are encouraged to mingle.

2. Space Out Guests. Each group of Guests must be seated so that they are spaced out by six (6) feet in all directions from other groups of Guests. Each group of Guests sitting at a counter should be separated from other groups by six (6) feet.

c. Face Coverings. All workers and Guests must wear Face Coverings when they are or may be within the facility.

d. Capacity. Facilities covered by this Subsection must limit Guests in the facility (whether indoor or outdoor) to the lesser of:

- 100 people per cinema screen or room; or
- Thirty percent (30%) of stated fire capacity in each cinema screen or room (or, for areas without a stated fire capacity, no more than seven (7) Guests for every one thousand (1000) square feet of the Guest area's square footage).

Workers and support staff do not count toward these capacity limits. For hotels or other facilities where private meeting spaces are a portion of a larger facility that is not restricted by this Section of this Executive Order, the limits stated above are measured only for the portion of the facility that is a private meeting space.

e. Other Requirements. Facilities covered by this Subsection must:

1. Restrict late night service of alcoholic beverages as stated in Section 4 of this Executive Order.
2. Follow the restrictions set out in Sections 3.13 of this Executive Order for any food or beverage service.
3. Mark six (6) feet of spacing in lines at point of sale and in other high-traffic areas for Guests.
4. Provide alcohol-based hand sanitizer (with at least 60% alcohol) at the entrance and at other areas throughout the premises as needed. Promote frequent use of handwashing and hand sanitizer for workers and Guests.
5. Increase disinfection during peak times or high Guest density times, and disinfect all shared objects (e.g., payment terminals, tables, countertops/bars, receipt trays, condiment holders) between use.
6. Follow the Core Signage, Screening and Sanitation Requirements as defined in this Executive Order.

f. Gaming. This Executive Order does not order the closure of gaming establishments. However, nothing in this Executive Order shall be construed to authorize any gaming activity prohibited by Chapter 14 of the North Carolina General Statutes.

3.9. **Museums and Aquariums**. Subsections 3.2(*l*) and 6.9 of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

3.10. **Parks**. Parks must restrict each group of Guests to be no more than the Mass Gathering limit stated below in Subsection 5.1 of this Executive Order. Subsections 7.2(a)-(b) of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

3.11. **Personal Care, Grooming, and Tattoo Businesses**. Subsections 3.2(c) and 6.4 of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

3.12. **Pools**. Subsection 6.5 of Executive Order No. 163 is incorporated into this Section as if it were stated herein.

3.13. **Restaurants**.

a. Subsections 3.2(b) and 6.3 of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

b. Any meeting or function held in a private room in a Restaurant is covered by the capacity and other restrictions stated above in Subsection 3.8 of this Executive Order ("Movie Theaters, Meeting Spaces, and Entertainment Facilities").

3.14. **Retail Businesses**. Subsections 3.2(a) and 6.2 of Executive Order No. 163 are incorporated into this Section as if they were stated herein.

3.15. **Transportation**. Subsection 3.2(f) of Executive Order No. 163 is incorporated into this Section as if it were stated herein.

3.16. **Workplaces in Agriculture, Construction, and Manufacturing**. Subsection 3.2(g) of Executive Order No. 163 is incorporated into this Section as if it were stated herein.

Section 4. Restrictions on Late Night Service of Alcoholic Beverages.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

4.1. Any businesses or organizations that sell or serve alcoholic beverages for onsite consumption shall cease the sale and service of alcoholic beverages for onsite consumption between 11:00 pm and 7:00 am. The agents or employees of establishments that are permitted to sell or serve alcoholic beverages for onsite consumption shall likewise not sell or serve alcoholic beverages for onsite consumption between 11:00 pm and 7:00 am.

4.2. Businesses or organizations may not provide off-site table service, catering service or bartending service for the sale and consumption of alcoholic beverages between 11:00 pm and 7:00 am for the purposes of consumption at the premises where the alcoholic beverage is being served.

4.3. Businesses or organizations otherwise authorized to remain open after 11:00 pm under existing law may continue to do so under this Executive Order so long as there is no sale or service of alcohol for onsite consumption.

4.4. Nothing in this Executive Order shall be interpreted to change the laws regarding the hours of sales for alcoholic beverages for off-premises consumption or authorize sale, service, possession, transportation, or consumption of alcoholic beverages at times or places where not previously allowed before this Executive Order was issued. This Section 4 also does not provide authority to reopen any facilities (or areas of facilities) that are closed by another provision of this Executive Order.

Section 5. Mass Gatherings.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

5.1. **Prohibition**. Mass Gatherings are prohibited. "Mass Gathering" means an event or convening that brings together more than twenty-five (25) people indoors or more than fifty (50) people outdoors at the same time in a single confined indoor or outdoor space. This includes parades, fairs, and festivals. In publicly accessible indoor facilities, the Mass Gathering limit applies per room of the facility.

At a park, beach, or trail, the outdoor Mass Gathering limit of fifty (50) people applies to each group of people that may gather together.

5.2. **Exceptions from Prohibition on Mass Gatherings**. Notwithstanding the Mass Gathering limit above:

a. The prohibition on Mass Gatherings does not apply to any of the restricted businesses and operations identified in Section 3 of this Executive Order, except as specifically stated above, because in those situations, transmission of COVID-19 will be controlled through the measures specifically tailored for each situation that are listed in those Sections. The prohibition on Mass Gatherings and the capacity limits in Section 3 generally do not apply to educational institutions or government operations. The capacity limits in Sections 3.2 and 6 of this Executive Order, however, apply to educational institutions and government operations.

b. The prohibition on Mass Gatherings does not include gatherings for health and safety, to look for and obtain goods and services, for work, or for receiving governmental services. A Mass Gathering does not include normal operations at airports, bus and train stations or stops, medical facilities, libraries, shopping malls, and shopping centers. However, in those settings, people must follow the Recommendations to Promote Social Distancing and Reduce Transmission as much as possible, and they should circulate within the space so that there is minimal contact between people.

5.3. **Drive-Ins**. Events are not prohibited Mass Gatherings if the participants all stay within their vehicle, such as at a drive-in movie theater.

Section 6. Exception for Events at Very Large Outdoor Facilities.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

6.1. **Scope**. This Section applies only to venues ("Very Large Outdoor Facilities") which meet all of the following criteria:

a. Guests are seated with assigned seats; and
b. The event occurs outdoors and the majority of Guests are seated outdoors; and
c. There are at least two separate entrances and at least two exits to the facility; and
d. The total seating capacity of the facility, before reductions under this Executive Order, is ten thousand (10,000) or more.

These establishments may exceed the capacity restrictions stated in Section 3 of this Executive Order and the Mass Gathering limit stated in Section 5 of this Executive Order if they comply with all of the following restrictions.

6.2. **Capacity Restrictions at Very Large Outdoor Facilities**. The establishment must take all the following steps:

a. Overall. The operator must limit the total number of Guests in the facility to no more than seven percent (7%) of the facility's total seating capacity (measured before any reductions under this Executive Order).

b. Limiting Crowding in Concourses. The facility operator must also have staff direct or monitor the flow of Guests through common spaces to maintain social distancing as Guests enter the arena, leave the arena, or visit concession stands. The operator must also establish a guest flow plan that limits people massing together throughout the facility and when they are entering or exiting the facility.

c. Workers, entertainers, athletes, and any other support staff do not count toward these capacity limits. The capacity restrictions stated in this Section apply to sporting events held by educational or government institutions.

6.3. **Socially Distanced Seating Required**. The establishment must use assigned seats as follows:

- All events must be ticketed. No tickets shall be sold for "standing room only" or "general admission."
- The facility operator must, through the use of assigned seating, ensure that each group of Guests attending the event is actually physically separated by six (6) feet from each Guest in each other group.
- This includes not only separating each Guest group horizontally within a row, but also separating Guest groups vertically between rows so that no person has someone from another group within six (6) feet in front or behind them.
- The facility operator must have staff periodically monitor crowds to ensure that Guests do not take seats other than their assigned seats.

In this Subsection, a "group" of spectators means a set of friends or family members who bought tickets together and came into the event venue together. No group of spectators under this Section shall exceed ten (10) people.

6.4. **Face Coverings and Other Requirements Stated Above**. The Very Large Outdoor Facility must, in addition to the requirements stated in this Section, follow all applicable requirements stated in Subsection 3.2(f)-(h) of this Executive Order.

6.5. **Alcohol Sales**. Very Large Outdoor Facilities may serve alcoholic beverages for on-site consumption in outdoor or indoor seating areas on its premises, subject to applicable local and state regulations. If a Very Large Outdoor Facility has a distinct bar within its premises, consumption of alcohol must not occur within that bar area.

6.6. Very Large Outdoor Facility operators are encouraged to take their best efforts to avoid attendees gathering in areas around the facility before or after the event.

Section 7. Miscellaneous Provisions.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

7.1. **Statewide Standing Order for COVID-19 Testing**. In order to further protect the public health by providing greater access to COVID-19 testing, the undersigned orders the State Health Director, in addition to and in accordance with her powers set out in N.C. Gen. Stat. Chapter 130A, to issue any statewide standing order needed in her medical judgment that would allow individuals who meet NCDHHS criteria for testing to access and undergo testing for COVID-19, subject to the terms of the standing order. This standing order may continue for the duration of the State of Emergency.

7.2. **School and Health Officials to Continue Efforts**. NCDHHS, the North Carolina Department of Public Instruction, and the North Carolina State Board of Education are directed to continue to work together during this State of Emergency to maintain and implement measures to provide for the health, nutrition, safety, educational needs, and well-being of children being taught by remote learning.

7.3. **Effect on Local Emergency Management Orders**.

a. Most of the Restrictions in This Executive Order Are Minimum Requirements, And Local Governments Can Impose Greater Restrictions. The undersigned recognizes that the impact of COVID-19 has been and will likely continue to be different in different parts of North Carolina. Over the course of the COVID-19 emergency in North Carolina, COVID-19 outbreaks have occurred, at different times, in urban and rural areas; in coastal areas, the piedmont, and the mountains; and in a variety of employment and living settings. As such, the undersigned acknowledges that counties and cities may deem it necessary to adopt ordinances and issue state of emergency declarations which impose restrictions or prohibitions to the extent authorized under North Carolina law, such as on the activity of people and businesses, to a greater degree than in this Executive Order. To that end, nothing herein, except where specifically stated below in Subsections 7.3(b) and 7.3(c), is intended to limit or prohibit counties and cities in

North Carolina from enacting ordinances and issuing state of emergency declarations which impose greater restrictions or prohibitions to the extent authorized under North Carolina law.

b. Local Restrictions Cannot Restrict State or Federal Government Operations. Notwithstanding Subsection 7.3(a) above, no county or city ordinance or declaration shall have the effect of restricting or prohibiting governmental operations of the State or the United States.

c. Local Restrictions Cannot Set Different Retail Requirements. Notwithstanding Subsection 7.3(a) above, in an effort to create uniformity across the state for Retail Businesses that may continue to operate, the undersigned amends all local prohibitions and restrictions imposed under any local state of emergency declarations to remove any language that sets a different maximum occupancy standard for Retail Businesses or otherwise directly conflicts with Section 6.2(a)(i) of Executive Order No. 163, which is incorporated into this Executive Order by Subsection 3.14 above. The undersigned also hereby prohibits during the pendency of this Executive Order the adoption of any prohibitions and restrictions under any local state of emergency declarations that set a different maximum occupancy standard for Retail Businesses or otherwise directly conflict with Section 6.2(a)(i) of Executive Order No. 163.

7.4. **Previous Executive Orders**. This Executive Order amends, restates, and replaces Executive Order Nos. 141, 153, 162, and 163 in full, except where this Executive Order incorporates provisions of Executive Order No. 163 as if they were stated herein. Those incorporated provisions of Executive Order No. 163 are extended for the duration of this Executive Order, including any extensions or amendments of this Executive Order.

Section 8. Extension of Price Gouging Period.

For the reasons and pursuant to the authority set forth above, the undersigned orders as follows:

Pursuant to N.C. Gen. Stat. § 166A-19.23, the undersigned extends the prohibition against excessive pricing, as provided in N.C. Gen. Stat. §§ 75-37 and 75-38, from the issuance of Executive Order No. 116 through 5:00 pm on October 23, 2020.

The undersigned further hereby encourages the North Carolina Attorney General to use all resources available to monitor reports of abusive trade practices towards consumers and make readily available opportunities to report to the public any price gouging and unfair or deceptive trade practices under Chapter 75 of the North Carolina General Statutes.

Section 9. No Private Right of Action.

This Executive Order is not intended to create, and does not create, any individual right, privilege, or benefit, whether substantive or procedural, enforceable at law or in equity by any party against the State of North Carolina, its agencies, departments, political subdivisions, or other entities, or any officers, employees, or agents thereof, or any emergency management worker (as defined in N.C. Gen. Stat. § 166A-19.60) or any other person.

Section 10. Savings Clause.

If any provision of this Executive Order or its application to any person or circumstances is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Executive Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Executive Order are declared to be severable.

Section 11. Distribution.

I hereby order that this Executive Order be: (1) distributed to the news media and other organizations calculated to bring its contents to the attention of the general public; (2) promptly

filed with the Secretary of the North Carolina Department of Public Safety, the Secretary of State, and the superior court clerks in the counties to which it applies, unless the circumstances of the State of Emergency would prevent or impede such filing; and (3) distributed to others as necessary to ensure proper implementation of this Executive Order.

Section 12. Enforcement.

12.1. Pursuant to N.C. Gen. Stat. § 166A-19.30(a)(2), the provisions of this Executive Order shall be enforced by state and local law enforcement officers. Enforcement of Face Covering requirements shall be limited as stated in Subsection 2.7 of this Executive Order. Law enforcement and other public safety and emergency management personnel are strongly encouraged to educate and encourage voluntary compliance with all the provisions of this Executive Order.

12.2. A violation of this Executive Order may be subject to prosecution pursuant to N.C. Gen. Stat. § 166A-19.30(d), and is punishable as a Class 2 misdemeanor in accordance with N.C. Gen. Stat. § 14-288.20A.

12.3. Nothing in this Executive Order shall be construed to preempt or overrule a court order regarding an individual's conduct (e.g., a Domestic Violence Protection Order or similar orders limiting an individual's access to a particular place).

Section 13. Effective Date.

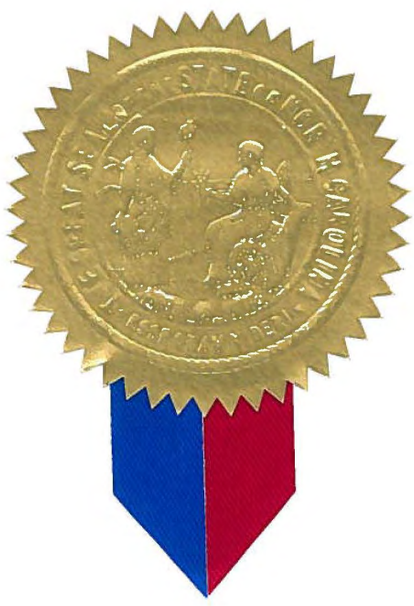
This Executive Order is effective October 2, 2020, at 5:00 pm. This Executive Order shall remain in effect through 5:00 pm on October 23, 2020 unless repealed, replaced, or rescinded by another applicable Executive Order. An Executive Order rescinding the Declaration of the State of Emergency will automatically rescind this Executive Order.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this 30th day of September in the year of our Lord two thousand and twenty.

Roy Cooper
Governor

ATTEST:

Elaine F. Marshall
Secretary of State



STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2020 SEP 22 A 11:10

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Defendants Damon Circosta and the North Carolina State Board of Elections ("Executive Defendants"), by and through counsel, respectfully move this Court pursuant to Local Rule 3.4 for entry of a Consent Judgment, filed concurrently with this Joint Motion. In support thereof, Parties show the Court as follows:

1. On August 18, 2020, Plaintiffs filed an Amended Complaint, seeking declaratory and injunctive relief to enjoin North Carolina laws related to in-person and absentee-by-mail voting in the remaining elections in 2020 that they alleged unconstitutionally burden the right to vote in light of the current public health crisis caused by the novel coronavirus ("COVID-19").

2. Also on August 18, Plaintiffs filed a Motion for Preliminary Injunction seeking to:

(i) enjoin the enforcement of the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the 2020 elections, and order Defendants to count all otherwise eligible ballots that are postmarked by Election Day and received by county boards of elections up to nine days after Election Day;

(ii) enjoin the enforcement of the witness requirements for absentee ballots set forth in N.C. Gen. Stat. § 163-231(a), as applied to voters residing in single-person or single-adult households;

(iii) enjoin the enforcement of N.C. Gen. Stat. § 163-231(b)(1) to the extent that it requires voters to pay for postage in order to mail their absentee ballots;

(iv) order Defendants to provide postage for absentee ballots submitted by mail in the November election;

(v) order Defendants to provide uniform guidance and training for election officials engaging in signature verification and instruct county election officials not to reject absentee ballots due to perceived non-matching signatures until the county officials receive such guidance and undergo training;

(vi) enjoin the enforcement of N.C. Gen. Stat. §§ 163-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; and

(vii) enjoin the enforcement of N.C. Gen. Stat. § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering Defendants to allow county election officials to expand early voting by up to an additional 21 days for the November election.

Plaintiffs filed a brief in support of their Motion on September 4, 2020.

3. Since Plaintiffs moved the Court for preliminary injunctive relief, Plaintiffs and Executive Defendants have engaged in substantial good-faith negotiations regarding a potential settlement of Plaintiffs' claims against Executive Defendants.

4. Following extensive negotiation, the Parties have reached a settlement to fully resolve Plaintiffs' claims, the terms of which are set forth in the proposed Consent Judgment filed concurrently with this Joint Motion.

5. As set forth in the Consent Judgment and in the exhibits thereto, (Numbered Memos 2020-19, 2020-22, and 2020-23), all ballots postmarked by Election Day shall be counted if otherwise eligible and received up to nine days after Election Day, pursuant to Numbered Memo 2020-22. Numbered Memo 2020-19 implements a procedure to cure certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses. Finally, Numbered Memo 2020-23 instructs county boards to designate separate absentee ballot drop-off stations at all one-stop early voting locations and county board offices, through which voters and authorized persons may return absentee ballots in person.

6. Plaintiffs and Executive Defendants further agree to each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Defendants, and all such claims Plaintiffs allege against the Executive Defendants in this action related to the conduct of the 2020 elections shall be dismissed.

WHEREFORE Plaintiffs and Executive Defendants respectfully request that this Court grant their Joint Motion and enter the proposed Consent Judgment, filed concurrently with this motion, as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections.

Dated: September 22, 2020

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document by email to counsel for defendants, addressed as follows:

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This the 22nd day of September, 2020.

_____
Narendra K. Ghosh

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

STIPULATION AND CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Executive Defendants Damon Circosta and the North Carolina State Board of Elections (collectively, "the Consent Parties") stipulate to the following and request that this Court approve this Consent Judgment. This Stipulation and Consent Judgment encompasses Plaintiffs' claims, which pertain to elections in 2020 ("2020 elections") and are premised upon the current public health crisis facing North Carolina caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on August 10, 2020, Plaintiffs filed a complaint, and, on August 18, 2020, Plaintiffs filed an amended complaint against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections, of: (1) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b); (2) its requirement that all absentee ballot envelopes must be signed by a witness during the pandemic, as applied to voters in single-person or single-adult households, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) its failure to provide pre-paid postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, as applied to voters who submit ballots through the United States Postal Service, *id*. § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C. Gen. Stat. § 163-226.3(a)(5) (the "Ballot Delivery Ban") (collectively, the "Challenged Provisions");

WHEREAS the Complaint seeks to enjoin enforcement of the Challenged Provisions during the 2020 elections due to the ongoing public health crisis caused by the spread of the novel coronavirus (COVID-19);

WHEREAS the COVID-19 public health crisis is ongoing, and North Carolina remains under Executive Order 163, which contemplates a phased reopening of North Carolina but strongly recommends social distancing, Exec. Order 163, § 2.2, mandates mask wearing in most business and government settings, *id.* § 3.2, imposes capacity limits in most public-facing business and government settings, *id.*, § 3.2(e), prohibits mass gatherings, *id.* § 7, and states that "[p]eople who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes," *id.* § 2.1;

WHEREAS North Carolina remains under a state of emergency, declared by the Governor, "based on the public health emergency posed by COVID-19," Exec. Order 116, and under a federal disaster declaration statewide, 85 Fed. Reg. 20701;

WHEREAS as of September 19, 2020, North Carolina has had more than 192,248 confirmed COVID-19 cases, with more than 3,235 fatalities;

WHEREAS COVID-19 case counts continue to grow across the country, and the director of the Center for Disease Control and Prevention recently warned that the country should brace for "the worst fall from a public health perspective, we've ever had"[1];

WHEREAS the Executive Director of the North Carolina State Board of Elections observed that COVID-19 infections in North Carolina are likely to continue into the fall, through at least Election Day;[2]

[1] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

WHEREAS, on June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[3] The CDC guidance encourages elections officials to:

- "Encourage voters to stay at least 6 feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained;
- Increase the number of polling locations available for early voting and extend hours of operation at early voting sites;
- Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance;
- Minimize lines as much as possible, especially in small, indoor spaces;
- "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility";
- Offer alternatives to in-person voting;
- Offer alternative voting options that minimize exposure between poll workers and voters;

[2] N.C. State Bd. of Elections, *Emergency Order*, *Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency* (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf.

[3] *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19),* CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

WHEREAS large crowds at early voting and long lines on Election Day may create public health risks and impose severe burdens on the right to vote, making absentee voting by mail essential to ameliorate these possibilities;

WHEREAS, as of September 18, 2020, more than 889,273 absentee ballots had already been requested by North Carolina voters, more than 14 times the number of absentee ballots that had been requested by this time in 2016;

WHEREAS the absentee voting period for the 2020 elections began on September 4, 2020, N.C. Gen. Stat. § 163-227.10(a), and, as of September 21, 2020, nearly 1,400 absentee ballots had been flagged for incomplete witness information, according to data from the State Board of Elections[4];

WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from "the disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-00457-WO-JLW (M.D.N.C. Aug. 4, 2020) (Osteen, J.), ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." *Id.*

WHEREAS courts in other states have enjoined those states from enforcing witness and notarization requirements, some of which are similar to North Carolina's Challenged Provisions,

[4] *North Carolina Early Voting Statistics*, U.S. Elections Project, https://electproject.github.io/Early-Vote-2020G/NC.html.

for elections occurring this year during the COVID-19 pandemic. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment suspending "notary or two-witness requirement" for mail ballots and finding that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" single-witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become 'both too restrictive and not restrictive enough to effectively prevent voter fraud.'"); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election);

WHEREAS the delivery standards for the Postal Service, even in ordinary times, contemplate at a minimum at least a week for ballots to be processed through the postal system and delivered to election officials[5];

WHEREAS the General Counsel of the Postal Service sent a letter on July 30, 2020 to North Carolina's Secretary of State warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[6] In particular, the Postal Service recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.*;

WHEREAS mail delivery conditions are already leading to greater delays: since mid-July there have been sharp decreases in the percentage of U.S. Postal Service mail, sent by any method, delivered on time;[7]

[5] *State and Local Election Mail—User's Guide*, U.S. Postal Serv. (Jan. 2020), https://about.usps.com/publications/pub632.pdf.

[6] Letter to North Carolina Secretary of State from USPS General Counsel, App'x to Compl., ECF No. 1-1 at 53-55, *Commonwealth of Pennsylvania v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

[7] *Service Performance Measurement PMG Briefing*, U.S. Postal Serv. (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

WHEREAS on August 21, 2020, the State of North Carolina, along with six other states filed a lawsuit challenging the Postal Service's procedural changes that the State alleges will likely delay election mail even further, creating a "significant risk" that North Carolina voters will be disenfranchised by the State's relevant deadlines governing absentee ballots;

WHEREAS increases in absentee voting, coupled with mail delays, threaten to slow down the process of mailing and returning absentee ballots, and appear likely to impact the 2020 elections;

WHEREAS pursuant to N.C. Gen. Stat. § 163-231(b)(2)(c), North Carolina already accepts military and overseas absentee ballots until the end of business on the business day before the canvass which occurs no earlier than the tenth day after the election, *see id.* § 163-182.5(b);

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also extended Election Day Receipt Deadlines in light of the current public health crisis. *See Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (extending ballot receipt deadline for November 2020 election); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (extending ballot receipt deadline for the November 2020 election); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR (N.D. Ga, Aug. 31, 2020) (granting motion for preliminary injunction in part and extending receipt deadline); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt

deadline and recognizing that enforcing the deadline was likely to disenfranchise thousands of voters); *LaRose v. Simon*, No. 62-CV-20-3149 at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's receipt deadline);

WHEREAS multiple courts have found that the enforcement of various other state election laws during the pandemic violate constitutional rights. *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App'x 170, 173 (6th Cir. 2020) (finding ballot-access provisions unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *Garbett v. Herbert*, No. 2:20-CV-245-RJS, 2020 WL 2064101, at *18 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witness requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3490216 (D. Idaho June 26, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560 (2020);

WHEREAS the State Board of Elections has broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c).

WHEREAS the Executive Director of the State Board, as the chief State elections official, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19;

WHEREAS the Consent Parties agree that an expeditious resolution of this matter for the 2020 elections, in the manner contemplated by the terms of this Stipulation and Consent Judgment, will limit confusion and increase certainty surrounding the 2020 elections and is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest;

WHEREAS the Executive Defendants believe that continued litigation over the Challenged Provisions will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina;

WHEREAS the Consent Parties wish to avoid uncertainty about the requirements and obligations of voting in the 2020 elections for State Board officials and non-parties including county board officials, staff, and election workers, and the voting public;

WHEREAS the Consent Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and the Consent Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, other courts across the country have approved similar consent judgments between parties, *see Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4460914 (D.R.I. July 30, 2020) (approving consent judgment to not enforce Witness Requirement in primary and November general elections); Stipulation and Partial Consent

Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election); *League of Women Voters of Va.*, 2020 WL 2158249 (approving consent judgment to not enforce Witness Requirement in primary election); *see also Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (denying motion to stay the consent judgment and judgment pending appeal) *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

WHEREAS the Executive Defendants do not waive any protections offered to them through federal or state law and do not make any representations regarding the merits of Plaintiffs' claims or potential defenses which could be raised in litigation;

WHEREAS the Consent Parties agree that the Consent Judgment promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs' claims regarding the 2020 elections against the Executive Branch Defendants;

WHEREAS Plaintiffs agree to a waiver to any entitlement to damages and fees, including attorneys' fees, expenses, and costs against the Executive Defendants with respect to any and all claims raised by Plaintiffs in this action relating to the 2020 elections;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Consent Parties, that: (i) the terms of this Consent Judgment constitute a fair and equitable settlement of the issues raised with respect to the 2020 elections, and (ii) the Consent Judgment is intended to and does resolve Plaintiffs' claims;

NOW, THEREFORE, upon consent of the Consent Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Consent Judgment, including relinquishment of certain legal rights, the Consent Parties agree as follows:

II.
JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Article 26 of Chapter 1 of the General Statutes, N.C. Gen. Stat. § 7A-245(a)(2), and N.C. Gen. Stat. § 1-493, and has jurisdiction over the Consent Parties herein. Venue for this action is proper in Wake County Superior Court because the Executive Defendants reside in Wake County. *Id.* § 1-82. The Court shall retain jurisdiction of this Stipulation and Consent Judgment for the duration of the term of this Stipulation and Consent Judgment for purposes of entering all orders and judgments that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Consent Judgment applies to and is binding upon the following parties:

A. Damon Circosta, in his capacity as Chair of the North Carolina State Board of Elections;

B. The North Carolina State Board of Elections; and

C. All Plaintiffs.

IV.
SCOPE OF CONSENT JUDGMENT

A. This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Consent Judgment, they are releasing any claims under the North Carolina Constitution that they might have against Executive Defendants with respect to the Challenged Provisions in the 2020 elections. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Consent Judgment.

B. The Consent Parties to this Stipulation and Consent Judgment acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Challenged Provisions for elections held after the 2020 elections.

C. The Consent Parties to this Stipulation and Consent Judgment further acknowledge that by signing this Stipulation and Consent Judgment, the Consent Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Consent Judgment, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Consent Judgment or defenses thereto.

D. By entering this Stipulation and Consent Judgment, Plaintiffs are fully settling a disputed matter between themselves and Executive Defendants. The Consent Parties are entering this Stipulation and Consent Judgment for the purpose of resolving disputed claims, avoiding the burdens and costs associated with the costs of litigating this matter through final judgment, and ensuring both safety and certainty in advance of the 2020 elections. Nothing in this Stipulation and Consent Judgment constitutes an admission by any party of liability or wrongdoing. The Consent Parties acknowledge that a court may seek to consider this Stipulation and Consent

Judgment, including the violations alleged in Plaintiffs' Amended Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT JUDGMENT OBJECTIVES

In addition to settling the claims of the Consent Parties, the objective of this Stipulation and Consent Judgment is to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

VI.
INJUNCTIVE RELIEF

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND JUDGED FOR THE REASONS STATED ABOVE THAT:

A. For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots, as set forth in N.C. Gen. Stat. § 163-231(b)(2), to the deadline set forth in paragraph VI.B below and in Numbered Memo 2020-22 (attached as Exhibit A).

B. Pursuant to Numbered Memo 2020-22, an absentee ballot shall be counted as timely in the 2020 elections if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m. For purposes of this Stipulation and Consent Judgment and as the Numbered Memo requires, a ballot shall be considered postmarked on or before Election Day if it has a postmark affixed to it or if there is information in the Postal Service tracking system (BallotTrax), or another tracking service

offered by the Postal Service or the commercial carrier, indicating that the ballot was in the custody of the Postal Service or a commercial carrier on or before Election Day.

C. For the 2020 elections, Executive Defendants shall institute a process to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19 (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature. If a county board office receives a container-return envelope with such a curable deficiency, it shall contact the voter in writing by mail and, if available, email, within one business day of identifying the deficiency, informing the voter that there is an issue with their absentee ballot and enclosing a cure certification. The written notice shall be sent to the address to which the voter requested their ballot be sent. The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier.

D. Pursuant to Numbered Memo 2020-23, (attached as Exhibit C) Executive Defendants shall institute a process for establishing a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices. Such drop-off stations may be located outdoors subject to the conditions set forth in Numbered Memo 2020-23. In addition, when a person returns a ballot in person, the county board intake staffer shall ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person returning the ballot in person indicates that they are not

the voter or the voter's near relative or legal guardian, the county board intake staffer will also require the person to provide their address and phone number.

E. Executive Defendants shall take additional reasonable steps to inform the public of the contents of Numbered Memos 2020-19, -22, -23 and shall encourage all county boards of elections to do the same.

F. Plaintiffs will withdraw their Motion for Preliminary Injunction, filed on August 18, 2020, and will not file any further motions for relief for the 2020 elections based on the claims raised in their Amended Complaint of August 18, 2020.

G. In accordance with the terms of this Stipulation and Consent Judgment, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to this lawsuit.

H. All remaining claims filed by Plaintiffs against the Executive Defendants related to the conduct of the 2020 elections in this action are hereby dismissed with prejudice. The Court will retain jurisdiction of these claims only as to enforcement of the Stipulation and Consent Judgment.

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The parties to this Stipulation and Consent Judgment may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Consent Judgment that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Consent Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Consent Judgment, or for granting any other relief not inconsistent with the terms of this Consent Judgment, until this Consent Judgment is terminated. The Consent Parties may apply to this Court for any orders or

other relief necessary to construe or effectuate this Stipulation and Consent Judgment or seek informal conferences for direction as may be appropriate. The Consent Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If any Party believes that another has not complied with the requirements of this Stipulation and Consent Judgment, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Consent Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Consent Judgment that requires any Party to file a motion with this Court for enforcement of this Stipulation and Consent Judgment.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Consent Parties acknowledge that no person has exerted undue pressure on them to enter into this Stipulation and Consent Judgment. Every Party is voluntarily choosing to enter into this Stipulation and Consent Judgment because of the benefits that are provided under the agreement. The Consent Parties acknowledge that they have read and understand the terms of this Stipulation and Consent Judgment; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Consent Judgment to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Consent Judgment shall be severable, and, should any provisions be declared by a court of competent jurisdiction to be

unenforceable, the remaining provisions of this Stipulation and Consent Judgment shall remain in full force and effect.

C. Agreement. This Stipulation and Consent Judgment is binding. The Consent Parties acknowledge that they have been advised that (i) no other Party has a duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Consent Judgment may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Consent Judgment if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Judgment constitutes the entire agreement between the Consent Parties relating to the constitutionality and enforcement of the Challenged Provisions as they pertain to the 2020 elections. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Consent Judgment are valid unless they are in writing, identified as an amendment to this Stipulation and Consent Judgment, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Consent Judgment except as herein explicitly contained.

E. Warranty. The persons signing this Stipulation and Consent Judgment warrant that they have full authority to enter this Stipulation and Consent Judgment on behalf of the Party each represents, and that this Stipulation and Consent Judgment is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Consent Judgment may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Consent Judgment is effective upon the date it is entered by the Court.

IX.
TERMINATION

This Stipulation and Consent Judgment shall remain in effect through the certification of ballots for the 2020 elections. The Court shall retain jurisdiction to enforce the terms of the Consent Judgment for the duration of this Consent Judgment. This Court's jurisdiction over this Stipulation and Consent Judgment shall automatically terminate after the certification of all ballots for the 2020 elections.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND CONSENT JUDGMENT AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT JUDGMENT TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA CHAIR, NORTH CAROLINA STATE BOARD OF ELECTIONS

Dated: September 22, 2020

By: /s/ Alexander McC. Peters
Alexander McC. Peters, N.C. Bar No. 13654
Terrance Steed
North Carolina Dept. of Justice
Post Office Box 629
Raleigh, N.C. 27602
apeters@ncdoj.gov
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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ

Dated: September 22, 2020

By: _____
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Molly Mitchell
PERKINS COIE LLP

IT IS SO ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT JUDGMENT.

Dated: _____ _____

Superior Court Judge

EXHIBIT A

Numbered Memo 2020-22

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Return Deadline for Mailed Civilian Absentee Ballots in 2020

DATE: September 22, 2020

The purpose of this numbered memo is to extend the return deadline for postmarked civilian absentee ballots that are returned by mail and to define the term "postmark." This numbered memo only applies to remaining elections in 2020.

Extension of Deadline

Due to current delays with mail sent with the U.S. Postal Service (USPS)—delays which may be exacerbated by the large number of absentee ballots being requested this election—the deadline for receipt of postmarked civilian absentee ballots is hereby extended to nine days after the election only for remaining elections in 2020.

An absentee ballot shall be counted as timely if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m.[1]

Postmark Requirement

The postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, the USPS does not always affix a postmark to a ballot return envelope. Because the agency now offers BallotTrax, a service that allows voters and county boards to track the status of a voter's absentee ballot, it is possible for county boards to determine when a ballot was mailed even if it does not have a postmark. Further, commercial carriers including DHL, FedEx, and UPS offer tracking services that allow voters and the county boards of elections to determine when a ballot was deposited with the commercial carrier for delivery.

[1] *Compare* G.S. § 163-231(b)(2)(b) (that a postmarked absentee ballot be received by three days after the election).

For remaining elections in 2020, a ballot shall be considered postmarked by Election Day if it has a postmark affixed to it or if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day. If a container-return envelope arrives after Election Day and does not have a postmark, county board staff shall conduct research to determine whether there is information in BallotTrax that indicates the date it was in the custody of the USPS. If the container-return envelope arrives in an outer mailing envelope with a tracking number after Election Day, county board staff shall conduct research with the USPS or commercial carrier to determine the date it was in the custody of USPS or the commercial carrier.

EXHIBIT B

Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

DATE: August 21, 2020 (revised on September 22, 2020)

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.[1]

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

[1] This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name[2]
- Witness or assistant did not print address[3]
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line

[2] If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

[3] Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure certification in accordance with Section 3.

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

If, prior to September 22, 2020, a county board reissued a ballot to a voter, and the updated memo now allows the deficiency to be cured by certification, the county board shall contact the voter in writing and by phone or email, if available, to explain that the procedure has changed and that the voter now has the option to submit a cure certification instead of a new ballot. A county board is not required to send a cure certification to a voter who already returned their second ballot if the second ballot is not deficient.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline, defined in Numbered Memo 2020-22 as (1) 5 p.m. on Election Day or (2) if postmarked on or before Election Day, 5 p.m. on Thursday, November 12, 2020. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.

COUNTY LETTERHEAD

DATE

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE

RE: Notice of a Problem with Your Absentee Ballot

The [County] Board of Elections received your returned absentee ballot. We were unable to approve the counting of your absentee ballot for the following reason or reasons:

- ☐ The absentee return envelope arrived at the county board of elections office unsealed.
- ☐ The absentee return envelope did not contain a ballot or contained the ballots of more than one voter.
- ☐ Other:
  _____

We have reissued a new absentee ballot. Please pay careful attention to ALL of the instructions on the back of the container-return envelope and complete and return your ballot so that your vote may be counted.

If time permits and you decide not to vote this reissued absentee ballot, you may vote in person at an early voting site in the county during the one-stop early voting period (October 15-31), or at the polling place of your proper precinct on Election Day, **November 3**. The hours for voting on Election Day are from **6:30 a.m.** to **7:30 p.m.** To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov.

Sincerely,

[NAME]
_____ County Board of Elections

VOTER'S NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
CIV Number

Absentee Cure Certification

There is a problem with your absentee ballot – please sign and return this form.

Instructions
You are receiving this affidavit because your absentee ballot envelope is missing information. For your absentee ballot to be counted, complete and return this affidavit as soon as possible. **The affidavit must be received by your county board of elections by no later than 5 p.m. on Thursday, November 12, 2020.** You, your near relative or legal guardian, or a multipartisan assistance team (MAT), can return the affidavit by:

- Email (add county email address if not in letterhead) (you can email a picture of the form)
- Fax (add county fax number if not in letterhead)
- Delivering it in person to the county board of elections office
- Mail or commercial carrier (add county mailing address)

If this affidavit is not returned to the county board of elections by the deadline, your absentee ballot will not count. If you decide not to return this affidavit, you may still vote in person during the early voting period (October 15-October 31) or on Election Day, November 3, 2020. To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov .

READ AND COMPLETE THE FOLLOWING:

I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Print name and sign below)

_____

Voter's Printed Name **(Required)**

_____

Voter's Signature* **(Required)**

EXHIBIT C

Numbered Memo 2020-23

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: In-Person Return of Absentee Ballots

DATE: September 22, 2020

Absentee by mail voters may choose to return their ballot by mail or in person. Voters who return their ballot in person may return it to the county board of elections office by 5 p.m. on Election Day or to any one-stop early voting site in the county during the one-stop early voting period. This numbered memo provides guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots.

General Information

Who May Return a Ballot

A significant portion of voters are choosing to return their absentee ballots in person for this election. Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot.[1] A multipartisan assistance team (MAT) or a third party may not take possession of an absentee ballot. **Because of this provision in the law, an absentee ballot may not be left in an unmanned drop box.**

The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it.

Intake of Container-Return Envelope

As outlined in Numbered Memo 2020-19, trained county board staff review each container-return envelope to determine if there are any deficiencies. Review of the container-return envelope

[1] It is a class I felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. G.S. § 163-223.6(a)(5).

does not occur at intake. Therefore, the staff member conducting intake should not conduct a review of the container envelope and should accept the ballot. If intake staff receive questions about whether the ballot is acceptable, they shall inform the voter that it will be reviewed at a later time and the voter will be contacted if there are any issues. Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot.

It is not recommended that county board staff serve as a witness for a voter while on duty. If a county board determines that it will allow staff to serve as a witness, the staff member who is a witness shall be one who is not involved in the review of absentee ballot envelopes.

Log Requirement

An administrative rule requires county boards to keep a written log when any person returns an absentee ballot in person.[2] **However, to limit the spread of COVID-19, the written log requirement has been adjusted for remaining elections in 2020.**

When a person returns the ballot in person, the intake staff will ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person indicates they are not the voter or the voter's near relative or legal guardian, the staffer will also require the person to provide their address and phone number.

Board Consideration of Delivery and Log Requirements

Failure to comply with the logging requirement, or delivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot.[3] A county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized

[2] 08 NCAC 18 .0102 requires that, upon delivery, the person delivering the ballot shall provide the following information in writing: (1) Name of voter; (2) Name of person delivering ballot; (3) Relationship to voter; (4) Phone number (if available) and current address of person delivering ballot; (5) Date and time of delivery of ballot; and (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative.

[3] *Id.* Compare G.S. § 163-230.2(3), as amended by Section 1.3.(a) of Session Law 2019-239, which states that an absentee request form returned to the county board by someone other than an unauthorized person is invalid.

to possess the ballot. The county board may, however, consider the delivery of a ballot in accordance with the rule, 08 NCAC 18 .0102, in conjunction with other evidence in determining whether the ballot is valid and should be counted.

Return at a County Board Office

A voter may return their absentee ballot to the county board of elections office any time the office is open. A county board must ensure its office is staffed during regular business hours to allow for return of absentee ballots. Even if your office is closed to the public, you must provide staff who are in the office during regular business hours to accept absentee ballots until the end of Election Day. You are not required to accept absentee ballots outside of regular business hours. Similar to procedures at the close of polls on Election Day, if an individual is in line at the time your office closes or at the absentee ballot return deadline (5 p.m. on Election Day), a county board shall accept receipt of the ballot.

If your site has a mail drop or drop box used for other purposes, you must affix a sign stating that voters may not place their ballots in the drop box. However, a county board may not disapprove a ballot solely because it is placed in a drop box.[4]

In determining the setup of your office for in-person return of absentee ballots, you should consider and plan for the following:

- Ensure adequate parking, especially if your county board office will be used as a one-stop site
- Arrange sufficient space for long lines and markings for social distancing
- Provide signage directing voters to the location to return their absentee ballot
- Ensure the security of absentee ballots. Use a locked or securable container for returned absentee ballots that cannot be readily removed by an unauthorized person.
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, it is not recommended you keep an outside return location open after dark or during inclement weather.

[4] *Id.*

Return at an Early Voting Site

Location to Return Absentee Ballots

Each early voting site shall have at least one designated, staffed station for the return of absentee ballots. Return of absentee ballots shall occur at that station. The station may be set up exclusively for absentee ballot returns or may provide other services, such as a help desk, provided the absentee ballots can be accounted for and secured separately from other ballots or processes. Similar to accepting absentee ballots at the county board of elections office, you should consider and plan for the following with the setup of an early voting location for in-person return of absentee ballots:

- Have a plan for how crowd control will occur and how voters will be directed to the appropriate location for in-person return of absentee ballots
- Provide signage directing voters and markings for social distancing
- Ensure adequate parking and sufficient space for long lines
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, ensure that there is adequate lighting as voting hours will continue past dark.

Because absentee ballots must be returned to a designated station, absentee ballots should not be returned in the curbside area.

Procedures

Absentee ballots that are hand-delivered must be placed in a secured container upon receipt, similar to how provisional ballots are securely stored at voting sites. Absentee by mail ballots delivered to an early voting site must be stored separately from all other ballots in a container designated only for absentee by mail ballots. County boards must also conduct regular reconciliation practices between the log and the absentee ballots. County boards are not required by the State to log returned ballots into SOSA; however, a county board may require their one-stop staff to complete SOSA logging.

If a voter brings in an absentee ballot and does not want to vote it, the ballot should be placed in the spoiled-ballot bag. It is recommended that voters who call the county board office and do not want to vote their absentee ballot be encouraged to discard the ballot at home.

Return at an Election Site

An absentee ballot may not be returned at an Election Day polling place. If a voter appears in person with their ballot at a polling place on Election Day, they shall be instructed that they may

(1) take their ballot to the county board office or mail it so it is postmarked that day and received by the deadline; or (2) have the absentee ballot spoiled and vote in-person at their polling place.

If someone other than the voter appears with the ballot, they shall be instructed to take it to the county board office or mail the ballot so it is postmarked the same day. If the person returning the ballot chooses to mail the ballot, they should be encouraged to take it to a post office to ensure the envelope is postmarked. Depositing the ballot in a USPS drop box on Election Day may result in ballot not being postmarked by Election Day and therefore not being counted.

STATE OF NORTH CAROLINA COUNTY OF WAKE

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants,
and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION

DOCKET NO. 20-CVS-8881

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION

With the November 3 election only weeks away, the country is in the throes of an unprecedented public health crisis with no end in sight. The Consent Judgment represents a fair and reasonable compromise between the North Carolina officials who have the responsibility for administering elections and the Plaintiffs (collectively, the "Consent Parties"), which will help to ensure that North Carolina's election officials, who are faced with immense and unprecedented challenges as they prepare to administer—indeed, are *already* administering—the first presidential election this country has held in the middle of a pandemic, are able to do so in a manner that will provide all eligible voters with the opportunity to safely cast a ballot and have it counted, with no threat to election integrity. The alternative is continued protracted, costly litigation that threatens both widespread disenfranchisement of lawful North Carolina voters and unnecessary risks to public health. North Carolina has now reported nearly 210,000 confirmed cases of the virus and over 3,500 deaths, and is averaging 1,284 new cases per day.

As a result of the ever-increasing, widespread community spread of the virus, unprecedented numbers of North Carolinians are expected to cast their ballots by mail this election. As of yesterday, 1,116,696 of the state's voters had already requested their absentee ballots, with 27 days remaining for voters to make that request.[1] The Consent Judgment—and the Numbered Memos attached thereto—represents a fairly negotiated and reasonable compromise to ensure that these and all North Carolina voters are not broadly threatened with disenfranchisement or the risk of needlessly exposing themselves to a dangerous virus, in order to cast and have their ballot counted in this unprecedented election. Even before the pandemic, North Carolina's requirement that a mailed absentee ballot must be postmarked by Election Day and received no later than three

[1] *See* N.C. State Bd. of Elections, https://www.ncsbe.gov/ (last visited Sept. 30, 2020).

days after Election Day to be counted, N.C.G.S. § 163-231(b)(2) (the "Receipt Deadline"), disenfranchised thousands of lawful voters. In the pandemic, ballots are taking longer to get to voters, and longer to be returned to election officials, in most cases due to no fault of the voters themselves. The Consent Judgment modestly extends this Deadline to allow for the counting of ballots postmarked by Election Day, if otherwise eligible, and received up until November 12, 2020, ensuring that the Deadline does not disenfranchise lawful, eligible voters, whose ballots are late arriving because of delays either from election officials in sending them out, or the U.S. Postal Service ("USPS") in delivering them. The Consent Judgment also implements a procedure to cure certain deficiencies on absentee ballot envelopes, including missing voter, witness, or assistant signatures and addresses—all problems that plagued the primary and resulted in larger numbers of lawful ballots (disproportionately from young and Black voters) being rejected. Finally, the Consent Judgment instructs county boards to designate separate absentee ballot drop-off stations at all one-stop early voting locations and county board offices, through which voters and authorized persons may return absentee ballots in person without having to wait in line with voters waiting to register and cast their ballots. In exchange for the agreements memorialized in the Consent Judgment, Plaintiffs have agreed to withdraw their motion for a preliminary injunction and dismiss all of their claims with prejudice.

In other words, the Consent Judgment would resolve Plaintiffs' lawsuit *in full* despite the fact that it would provide relief for only a portion of Plaintiffs' claims. It reflects sound public health judgment while giving election officials the tools they need to ensure that North Carolinians can exercise their constitutional right to vote notwithstanding the onset of a once-in-a-century pandemic. The Consent Parties therefore request that the Court enter this limited, fair, and

reasonable settlement agreement, and ensure that voters have safe, reliable, and reasonably accessible means of participating in the November election.[2]

II. FACTUAL BACKGROUND

The pandemic has wreaked havoc throughout the country, causing significant casualties and unforeseen disruptions to many aspects of day-to-day life. Known domestic infections have surpassed 6.8 million with more than 200,000 fatalities.[3] As of this filing, North Carolina has almost 210,00 confirmed cases and over 3,500 reported deaths from the virus, with cases continuing to rapidly increase.[4] There is no end in sight. The Director of the Centers for Disease Control and Prevention ("CDC") warned that the country should brace for "the worst fall from a public health perspective, we've ever had."[5]

[2] Plaintiffs request that the Court rule expeditiously. This past weekend, both Legislative Defendants and the Republican Committees filed federal lawsuits in an effort to end run the Consent Parties' agreement and this Court's authority to review and enter that agreement, as well as over this entire dispute. By filing those actions, Legislative Defendants and the Republican Committees ask federal courts to improperly sit in review of this proceeding, before it has even concluded. Not only are those lawsuits procedurally (and legally) improper, Legislative Defendants' and the Republican Committees' requested relief would deny Plaintiffs rights guaranteed under the North Carolina Constitution, including the ability to exercise the franchise safely and reliably in the midst of the coronavirus pandemic. Legislative Defendants and the Republican Committees' attempt to preemptively undermine this Court's judgment poses a clear and direct threat to Plaintiffs' rights and legal interests and represents a blatant disregard for this Court's authority to decide matters of state law properly before this Court. These tactics also make clear both sets of parties' intent to delay resolution of this case.

[3] *COVID-19 Data Tracker*, CDC (Sept. 24, 2020), https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#cases_casesinlast7days.

[4] *See* https://www.nytimes.com/interactive/2020/us/north-carolina-coronavirus-cases.html (last visited Sept. 30, 2020); *COVID-19 Cases*, N.C. Department of Health and Human Services (Sept. 30, 2020), https://covid19.ncdhhs.gov/dashboard/cases.

[5] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-incontext/video/robert-redfield.

As a result, North Carolina is currently under a state of emergency and a "Safer at Home" Order issued by the Governor as a result of the pandemic. *See* Exec. Order No. 141, Safer at Home Order, Pls.' Mot. Prelim Injunc., Ex. 3; Exec. Order No. 155, Ex. 4 (extending Order). The Order, which was extended last month, "very strongly encourage[s] . . . people 65 years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes."[6] Exec. Order No. 141, § 2 (emphasis in original). It also urges all North Carolinians to practice social distancing, wear cloth masks when leaving the home and "in all public settings," carry hand sanitizer, and wash hands frequently. *Id*. Though the Order permits the reopening of certain businesses, it also sets strict limitations for occupancy and social distancing. *See* Exec. Order No. 147 § 2, Ex. 5; Exec. Order No. 155 (extending the Order). "Mass gatherings" of more than ten people indoors and 25 people outdoors are prohibited with limited exceptions, including for receiving governmental services. Exec. Order No. 141, § 7. Members of state government agencies are required to wear masks. *See* Exec. Order No. 147 § 2.

Beyond posing a direct threat to individual and public health, the pandemic has upended elections. Earlier this year, the State Board sent letters to Governor Cooper, House Speaker Tim Moore, Senate President Pro Tempore Phil Berger, and several legislative committees, explaining the challenges of conducting an election during the pandemic. State Bd. Mar. 26, 2020 Letter, Ex. 18; State Board Apr. 22, 2020 Letter, Ex. 19. The State Board warned that to protect the franchise, various changes to North Carolina's voting laws and practices were urgently needed, including (1) altering early voting sites and hours requirements to allow counties to better accommodate in-person voters during the pandemic; (2) relaxing or eliminating the Witness Requirement and

[6] Unless otherwise noted, all numbered Exhibits cited herein refer to exhibits to Plaintiffs' memorandum of law in support of their motion for preliminary injunction, filed Sept. 4, 2020.

restrictions on third-party assistance of voters in care facilities; (3) establishing a fund to pay for absentee ballot postage; (4) creating an online option for requesting absentee ballots, and allowing them to be submitted by fax and email; and (5) enabling county boards of elections to assist voters by prefilling their information on absentee ballot request forms. State Bd. Mar. 26, 2020 Letter.

Though the General Assembly adopted *some* of the actions requested by the Board, it fell far short of taking the necessary steps to protect the right to vote. Through recent emergency legislation, the General Assembly, for example, reduced the Witness Requirement from two to one witness. HB 1169, § 1.(a). But this makes little difference for the 1.1 million North Carolinians who live alone and will still need to look outside their homes or invite outsiders in to complete the requirement.[7] Governor Cooper put it best: "[m]aking sure elections are safe and secure is more important than ever during this pandemic," and "[t]his legislation makes some [ ] positive changes, but much more work is needed to ensure everyone's right to vote is protected."[8]

On top of the ongoing pandemic, mail delays threaten to disenfranchise voters. The State itself acknowledged this when it joined six other states in filing a lawsuit against USPS last month.[9] The General Counsel of USPS also sent a letter to North Carolina's Secretary of State on July 30, 2020, warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your

[7] Table DP02, 2014-2018 American Community Survey, https://data.census.gov/cedsci/table?g=0400000US37&y=2018&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2018.DP02&hidePreview=true.

[8] Press Release, *Governor Cooper Signs Five Bills into Law*, (June 12, 2020), https://governor.nc.gov/news/governor-cooper-signs-five-bills-law.

[9] Compl., ECF No. 1, *Commonwealth of Pa. v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

election rules and returned promptly, and yet not be returned in time to be counted."[10] In particular, USPS recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are both postmarked by Election Day and received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials."[11]

In recognition of the unprecedented challenges facing North Carolina voters under these circumstances, Plaintiffs' suit challenges various North Carolina laws that impose significant burdens on the right to vote in the November election which will be conducted during the COVID-19 pandemic: (1) the requirement that an absentee ballot must be postmarked by Election Day and received no later than three days after Election Day to be counted, as applied to voters who submit their ballots through USPS, N.C.G.S. § 163-231(b)(2) (the "Receipt Deadline"); (2) the requirement that voters who live alone or in single-adult households must find a qualified adult witness from outside their home and complete and sign their absentee ballots in the physical presence of that individual, N.C.G.S. § 163-231(a) (the "Witness Requirement"); (3) the requirements that absentee ballots be returned only by the voter or the voter's near relative or verifiable legal guardian, N.C.G.S. § 163-231(b); HB 1169 § 1.(a) (the "Ballot Delivery Ban"); (4) the requirement that voters provide their own postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (5) prohibitions against voters receiving assistance from the vast majority of individuals and organizations in completing

[10] Letter from USPS General Counsel to N.C. Sec'y of State, App'x to Compl., ECF No. 1-1 at 53-55, *DeJoy*, No. 2:20-cv-04096-GAM.
[11] *Id.*

or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683") (the "Application Assistance Ban"); and (6) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b) (collectively, the "Challenged Provisions").

While North Carolinians have historically relied on in-person voting as their primary means of exercising the franchise, the pandemic has ushered an unprecedented transition to absentee-by-mail voting. For many, casting a ballot by mail is not merely a choice, but a necessity without which they would not be able to participate in the electoral process without risking their health. But as these voters—many of whom will cast a ballot by mail for the first time in November—attempt to acquaint themselves with a new method of voting, the Challenged Laws, when combined with the disrupting effects of the COVID-19 pandemic, impose significant burdens on the voting process, the successful navigation of which can be the difference between casting an effective ballot and outright disenfranchisement.

III. PROCEDURAL HISTORY

On August 10, 2020, Plaintiffs filed a complaint, which they amended on August 18, against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections of several North Carolina election laws.

Also on August 18, Plaintiffs filed a motion for preliminary injunction, and, on September 4, submitted a memorandum with supporting evidence in the form of expert reports, voter and other witness affidavits, and official documents.

Among Plaintiffs' affiants include:

- Dr. Catherine Troisi, an infectious disease epidemiologist, public health expert, and Associate Professor in multiple departments at the University of Texas Health Science Center at Houston School of Public Health (UTSPH) and an Adjunct Associate Professor at Baylor College of Medicine, who concluded, based on her 40 years of experience in

epidemiology specializing in viruses, that voting in person, or in the presence of a witness particularly from outside the home, increases the risk of viral spread and an individual's chance of contracting COVID-19. *See* Troisi Aff., Ex. 2.

- Dr. Kenneth R. Mayer, a Professor of Political Science at the University of Madison-Wisconsin, who concluded that the Challenged Provisions imposes both direct and indirect costs on voters which are significantly exacerbated during the pandemic, resulting in an increase in the absentee ballot rejection rate from prior elections and tens of thousands more potentially disenfranchised voters. *See* Mayer Aff., Ex. 17.

- Ronald Stroman, who served for nine years as Deputy Postmaster General—the second highest-ranking official in USPS—from 2011 until June 1, 2020, and explained that the challenges USPS is currently facing as a result of COVID-19 and recent policy changes will place voters at significant risk of disenfranchisement under the current service standards and the likely delays in mail service which affect the delivery absentee ballots. *See* Stroman Aff., Ex. 25.

- Dr. Michael Herron, a Professor of Government at Dartmouth College, who concluded that, based on a literature review and thorough analysis of election irregularity reports in North Carolina and other states, (1) voter fraud in the United States and in North Carolina is exceedingly rare, including in absentee voting, and (2) there is no relationship between a state's allowance or denial of third party absentee ballot delivery assistance and the prevalence of absentee voting fraud. He further concludes that the coordinated election fraud conspiracy perpetrated in NC-9 in 2018 does not reveal anything about the prevalence of absentee voter fraud, or its relationship to ballot delivery assistance. Notably, the North Carolina State Board of Elections considered and found credible Dr. Herron's research on absentee ballot abnormalities in North Carolina's 9th Congressional District during its investigation. *See* Herron Aff., Ex. 34.

In addition, Plaintiffs submitted over a dozen affidavits of voters detailing the ways in which the Challenged Provisions have burdened their right to vote, and will continue to burden them when they attempt to vote in the November election—and in many cases, cause outright disenfranchisement. *See* Johnson Aff., Ex. 6; Rabinowitz Aff., Ex. 7; R. Kociemba Aff., Ex. 8; T. Kociemba Aff., Ex. 9; Newsome Aff., Ex. 10; Coggins Aff., Ex. 11; Clark Aff., Ex. 12; Curtis Aff., Ex. 13; Matos Aff., Ex. 14; Malone Aff., Ex. 21; Jurek Aff., Ex. 22; Gardner Aff., Ex. 23; Fowler Aff., Ex. 27; Fellman Aff., Ex. 32; *see also* Dworkin Aff., Ex. 29 (explaining the burdens the Challenged Restrictions place on many of the North Carolina Alliance for Retired Americans'

more than 50,000 members); Clarke Aff., Ex. 35 (detailing experience of a voter whose absentee ballot application was denied).

Plaintiffs also offered the affidavit of Kristin Scott, who has served as a county elections director for 11 years. *See* Scott Aff., Ex. 16. Ms. Scott explains the administrative burdens that the increase in requests for absentee ballots has placed on local election officials. *Id.* ¶ 3. Based on her knowledge of election administration and the disenfranchisement caused by the Receipt Deadline in past elections, Ms. Scott also explains that significantly more ballots than usual will likely arrive after the deadline this year. *Id.* ¶ 7. She recommends an extension of the Receipt Deadline for ballots postmarked by Election Day and confirms that her county board would have no issue counting ballots that arrive after the Receipt Deadline up until November 12, 2020, just before the canvass. *Id.* ¶ 6-7. She also explains that the Witness Requirement plays no role in the county board's ballot verification process and, in fact, officials have no way to confirm whether the witness information and signature provided is genuine. *Id.* ¶ 10.

Finally, Plaintiffs introduced extensive documentary evidence from state and federal government officials, which demonstrate the pandemic's ongoing disruption to day-to-day life in North Carolina (Exec. Order No. 141, Ex. 3; Exec. Order No. 155, Ex. 4; Exec. Order No. 147, Ex. 5; Order of the Chief Justice of the Supreme Court, Ex. 15); the ways in which the pandemic disrupts North Carolina's election administration and voting processes (State Board March 26, 2020 Letter, Ex. 18; State Board April 22, 2020 Letter, Ex. 19; April 7, 2020, Recommendations to Address Election-Related Effects of COVID-19, Ex. 20; Numbered Memo 2020-14, Ex. 24 Number Memo 2020-19, Ex. 30), and the impact of mail service timelines and delivery delays on this year's elections, July 30, 2020 USPS Letter, Ex. 1; August 12, 2020, USPS PMG Briefing,

Ex. 28; USPS Millennials and the Mail Report, Ex. 31; North Carolina Complaint against USPS, Ex. 26.

IV. PROPOSED CONSENT JUDGMENT

Plaintiffs and Executive Defendants reached a settlement to fully resolve Plaintiffs' claims and filed a Joint Motion for Entry of a Consent Judgment, along with the proposed Consent Judgment and three exhibits thereto (Numbered Memos 2020-19, 2020-22, and 2020-23). The express objective of the Consent Judgment is

> to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

Consent Judgment § V. The only parties bound by the Consent Judgment are Defendants Damon Circosta and the North Carolina State Board of Elections, and all Plaintiffs. *See id.* § III. As such, the Consent Judgment is a "settlement and resolution of Plaintiffs' claims against Executive Defendants . . . ." *Id.* § IV.A.

Under the terms of the proposed Consent Judgment, the Executive Defendants agreed to implement a number of election administration procedures for the upcoming elections. First, Executive Defendants agreed to count ballots postmarked by Election Day if they are otherwise eligible and received up to nine days after Election Day. *See id.* § VI.A-B; Numbered Memo 2020-22. Second, Executive Defendants defined the parameters of and will implement and maintain a cure process for certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses. *See* Consent Judgment § VI.C; Numbered Memo 2020-19 (as

revised Sept. 22, 2020).[12] Third, Executive Defendants agreed to instruct county boards to designate separate absentee ballot drop-off stations at all one-stop early voting locations and county board offices, through which voters and authorized persons may return absentee ballots in person. *See* Consent Judgment § VI.D; Numbered Memo 2020-23. Finally, Executive Defendants agreed to take reasonable steps to inform the public of these procedures. *See* Consent Judgment § VI.E.

In exchange for these changes, Plaintiffs agreed to withdraw their motion for Preliminary Injunction, not file any further motions for relief for the 2020 elections based the claims raised in their Amended Complaint, and dismiss all remaining claims related to the 2020 elections with prejudice. *See* Consent Judgment § VI.F, H. All Consent Parties further agreed to bear their own fees, expenses, and costs. *See id.* § VI.G.

V. LEGAL STANDARD

"A consent judgment is the contract of the parties entered upon the record with the sanction of the court. Thus, it is both an order of the court and a contract between the parties." *Potter v. Hileman Labs., Inc.*, 150 N.C. App. 326, 334, 564 S.E.2d 259, 265 (2002) (citing *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994)). Courts examine their terms to determine whether such agreements are "fair, adequate, and reasonable" and also to confirm that the agreement is not "illegal, a product of collusion, or against the public interest." *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); *see In re Estate of Militana*, 211 N.C. App. 197, 711 S.E.2d 875 (2011) (approving consent judgment that court found to be a "fair, adequate

[12] A federal court previously ordered the Executive Defendants to provide North Carolinians with a process to remedy mistakes made on ballots. *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-457, -- F. Supp. 3d --, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020). Here, the Consent Parties have agreed to the contours of this process and State Executive Defendants have agreed to implement and maintain the specific process outlined in revised Numbered Memo 2020-19.

and reasonable compromise"); *see also Stovall v. City of Cocoa*, 117 F.3d 1238, 1240 (11th Cir. 1997) ("courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy"). "In other words, a court entering a consent decree must examine its terms to ensure they are fair and not unlawful." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). A court's decision to enter a consent judgment will be reversed only "upon a clear showing that the district court abused its discretion in approving the settlement." *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975) (citations omitted).

In conducting this evaluation, courts should "be guided by the general principle that settlements are encouraged." *North Carolina*, 180 F.3d at 581. The policy "to encourage settlements 'has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.'" *United States v. E.I. du Pont de Nemours & Co.*, No. 5:16-CV-00082, 2017 WL 3220449, at *11 (W.D. Va. July 28, 2017) (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)); *see Md. Dep't of the Env't v. GenOn Ash Mgmt., LLC*, Nos. 10-0826, 11-cv-1209, 12-cv-3755, 2013 WL 2637475, at *1 (D. Md. June 11, 2013) (citing *United States v. City of Welch*, No. 1:11-00647, 2012 WL 385489, at *2 (S.D. W. Va. Feb. 6, 2012)) ("[W]hen a settlement has been negotiated by a specially equipped agency, the presumption in favor of settlement is particularly strong.").

VI. ARGUMENT

To approve a consent judgment, "the Court need not decide whether Plaintiffs had established their claim 'to a legal certainty,' nor need it reach 'any dispositive conclusions on . . . unsettled legal issues in the case[.]'" *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *6 (W.D. Va. May 5, 2020) ("*Virginia LWV I*")

(quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975)). Instead, the Court need only "examine the merits of Plaintiffs' settled claims in order to determine whether success was at least probable." *Id.* "So long as the record before it is adequate to reach an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise, it is sufficient." *Id.* This review "does not require the court to conduct a trial or a rehearsal of the trial," but rather "ensure that it is able to reach an informed, just and reasoned decision." *North Carolina*, 180 F.3d at 581 (citations omitted). Overall, courts should judge the fairness of the compromise "by weighing the plaintiff[s'] likelihood of success on the merits against the amount and form of the relief offered in the settlement" but, critically, they "do not decide the merits of the case or resolve unsettled legal questions." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (citation omitted); *Bragg v. Robertson*, 83 F. Supp. 2d 713, 718 (S.D. W. Va. 2000) ("[The court] need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy. In fact, it is precisely the desire to avoid a protracted examination of the parties' legal rights that underlies entry of consent decrees.") (citations omitted), *aff'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001).

A. The proposed Consent Judgment is "fair, adequate, and reasonable."

As part of its determination as to whether the proposed Consent Judgment is fair, adequate, and reasonable, the court may assess the strength of Plaintiffs' case, taking into account "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement." *North Carolina*, 180 F.3d at 581 (citations omitted). But, to be clear, "[the court] need not . . . inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy." *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D. W. Va. 2000).

1. Stage of the proceedings

This case was filed in early August. Because it seeks relief for the November 2020 election, it requires swift resolution. *See Virginia LWI*, 2020 WL 2158249, at *5 (approving consent judgment agreed to just two weeks after case was filed, in part because case challenged restrictions on election taking place seven weeks later). Discovery in this case was limited to several depositions conducted by the Legislative Intervenors to facilitate their response to Plaintiffs' motion for preliminary injunction, but, as acknowledged by the court in *Virginia LWV I*—a case challenging a similar witness requirement in Virginia—"there is little indication [that] . . . the length or amount of discovery . . . will be particularly relevant to the strength of Plaintiffs' case." *Id.* Instead, there, like here, much of the documents and evidence necessary to prove Plaintiffs' case were in the public record or offered by experts. *Id.* This includes government reports, state and federal public health policies and orders, as well as the declarations of experts demonstrating that the Receipt Deadline and the Witness Requirement will burden and disenfranchise North Carolina voters. *Id*. ("Plaintiffs would presumably rely, as they have thus far in this action, on government reports, state and federal public health policies and orders, as well as the declarations of experts").

Among the extensive evidence Plaintiffs presented thus far was an expert report from Dr. Ken Mayer who examined past election data to forecast that tens of thousands of North Carolinians would be disenfranchised by the Receipt Deadline and the Witness Requirement in the November election. Plaintiffs also submitted published reports and communications from the USPS itself which warned that North Carolina's deadlines for requesting and submitting absentee ballots do not comport with standard USPS delivery timelines—much less the well-documented service delays that led the State of North Carolina to file a lawsuit against USPS—and would result in the

disenfranchisement of North Carolina voters; numerous documents from federal and state agencies, explaining the risks of contracting COVID-19 through interactions necessitated by the Witness Requirement and voting in-person, along with a public health expert, Dr. Troisi, whose report explained the health risks of in-person voting and of complying with the Witness Requirement. In total, Plaintiffs submitted four expert reports, 17 affidavits, and numerous publicly-available documents, in support of their motion for preliminary injunction, amounting to over 500 pages of evidence, all of which were appropriately considered by the Executive Defendants in reaching a compromise settlement and entering into a proposed consent judgment.

That the Legislative Intervenors have not completed all of the discovery they desire is no basis to withhold approval of a consent judgment, nor are Legislative Defendants entitled to *post-settlement* discovery on the merits of Plaintiffs' claims simply because they object to the Consent Judgment. Indeed, this year alone, numerous courts have approved consent judgments granting similar relief from absentee voting restrictions in the midst of the COVID-19 pandemic, without *any* discovery whatsoever. *See Virginia LWV I*, 2020 WL 2158249 (approving consent judgment, without discovery, just two weeks after plaintiffs filed their complaint, enjoining enforcement of Virginia's absentee ballot witness requirement for 2020 primary election); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 4927524 (W.D. Va. Aug. 21, 2020) ("*Virginia LWV II*") (approving consent judgment filed 10 days after motion for preliminary injunction, without discovery, enjoining enforcement of Virginia's witness requirement for 2020 general election); *Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4365608, at *1 (D.R.I. July 30, 2020) (approving consent judgment, without discovery and just six days after Plaintiffs filed their complaint, enjoining enforcement of Rhode Island's absentee ballot witness requirement for the November 2020 general

election), *stay denied sub nom.* No. 20A28, 2020 WL 4680151 (Aug. 13, 2020); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment, without discovery, enjoining Minnesota's witness requirement and ballot receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (same for November general election).

2. Compromises reached in the proposed Consent Judgment

The fairness and reasonableness of the proposed Consent Judgment is reflected in the concessions each party made to reach an agreement that will benefit the parties and, most importantly, North Carolina voters. *See Virginia LWV I*, 2020 WL 2158249, at *5. Especially important in evaluating the fairness of the proposed Consent Judgment is the "limited nature of the settlement agreement's relief," and the fact that it grants Plaintiffs only a portion of the relief sought in the case "weighs in favor of a finding that it is 'fair, adequate, and reasonable.'" *Virginia LWV II*, 2020 WL 4927524, at *7.

Plaintiffs originally sought to enjoin several voting restrictions that were bargained away in the negotiating of the Consent Judgment, including North Carolina's refusal to pre-pay postage for absentee ballots; restrictions on third party assistance for voters in requesting and submitting absentee ballots; limitations on the number of early voting days and hours that counties may offer; and, the Witness Requirement. Notably, other courts have granted such relief (or, in the case of the postage requirement, other states have voluntarily agreed to pre-pay postage after a lawsuit was filed) in light of the COVID-19 pandemic.[13] *See, e.g., Harding v. Edwards*, No. CV 20-495-

[13] Legislative Defendants and the Republican Committees may argue that Numbered Memo 2020-23 authorizes absentee ballot delivery by third parties, but any such claim misrepresents the

SDD-RLB, 2020 WL 5543769, at *19 (M.D. La. Sept. 16, 2020) (granting injunctive relief to increase early voting period for November election); Joint Stipulation Resolving Postage Claims, *Middleton v. Andino*, No. CV 20-1730-JMC, ECF No. 58 (D.S.C. July 8, 2020) (South Carolina will provide prepaid postage on all absentee ballot return envelopes for November 2020 election); *Driscoll v. Stapleton*, No. DA 20-0295 (Mont. Sup. Ct. Sept. 29, 2020) (permanently enjoining limits on third party ballot collection assistance); *Mich. Alliance for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (enjoining limits on third party ballot collection assistance for four days preceding Election Day).

And the agreements contained in the Consent Judgment are eminently reasonable. The modest extension of the Receipt Deadline, for instance, brings the Deadline for all North Carolinians in line with the pre-existing deadline for oversees and military voters, and also responds to warnings issued by USPS in its July 30, 2020 letter to North Carolina's Secretary of State. The absentee ballot drop-off stations set forth in Consent Judgment § VI.D; Numbered

Numbered Memo, North Carolina law, and the longstanding practices of North Carolina election officials. North Carolina law does not prohibit, and Plaintiffs did not challenge, any restriction on the counting of ballots delivered by third parties, because none exists. Rather, Plaintiffs challenge the prohibition against absentee ballot delivery by most third parties. *See* Am. Compl., Prayer for Relief. The Memo's instruction to count ballots delivered by third parties merely reiterates longstanding policy in North Carolina and does not alter any North Carolina law. As the State Board's General Counsel explained, there is no prohibition in North Carolina law against counting absentee ballots delivered by a third party. *See* State Board of Elections, Sept. 15, 2020, Meeting Minutes at 7-8 ("An absentee ballot is not invalid if delivered by someone not authorized."), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/DRAFT_SBOE%20Minutes%209.15.20%20Closed%20Session.pdf; *compare* N.C.G.S. § 163-226.3(a)(5) (it is a felony for most third parties to deliver a voter's absentee ballot) *with id.* § 163-230.2(e)(4) (a request for absentee ballots is not valid if returned by anyone other than the voter or an authorized individual). Moreover, Numbered Memo 2020-23 makes clear that "[o]nly the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot," and that "an absentee ballot may not be left in an unmanned drop box." Numbered Memo 2020-23 at 1. And the memo reiterates that "[i]t is a class I felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections." *Id.* at n.1 citing G.S. § 163-223.6(a)(5).

Memo 2020-23 provide voters a safer more streamlined option to return their ballots in person, alleviating the need for those who can travel to drop off their ballots to rely on potentially delayed mail service, third parties, or to wait in long lines at early voting sites to deliver their ballots, and has the invaluable benefit of reducing adverse public health outcomes for voters and election workers. The procedures set forth in Consent Judgment § VI.C, Numbered Memo 2020-19, allow voters to cure certain errors on absentee ballot envelopes, including missing witness information, by completing an affidavit (provided directly by election officials and personally-addressed specifically to each voter). At the same time, it leaves the Witness Requirement in place.

In sum, the proposed Consent Judgment would resolve the entirety of Plaintiffs' lawsuit and provide certainty as to the procedures that will apply for absentee and in-person voting well in advance of Election Day and the early voting period—which may not have been the case had the parties engaged in protracted litigation.

3. Probability of success on the merits

Plaintiffs' lawsuit pled several likely violations of North Carolina Constitution on which Plaintiffs had a strong probability of success on the merits, providing further support for the fairness and reasonableness of the proposed Consent Judgment. As Plaintiffs argued in their Preliminary Injunction brief, the Receipt Deadline and Witness Requirement severely burden the fundamental right to vote on equal terms and burden constitutionally-protected speech and political association, thus strict scrutiny applies. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (applying strict scrutiny because "[i]t is well settled in this State that the right to vote on equal terms is a fundamental right") (citation omitted), *stay denied*, 535 U.S. 1301 (2002). To pass strict scrutiny, "the government must show a compelling interest in the regulation, and the regulation

must be narrowly tailored to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012).

But even if these challenged provisions were subject to less stringent scrutiny, even lesser burdens imposed on the right to vote, still must "be sufficiently weighty to justify the limitation imposed on the party's rights." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 48, 707 S.E.2d 199, 205-06 (2011) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). This framework is analogous to the one federal courts apply, developed in the U.S. Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Under this framework, courts "weigh 'the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Thus, state regulations that do not necessarily impose "severe" burdens on the fundamental right to vote are nonetheless subject to exacting forms of scrutiny, requiring the state to "articulate specific, rather than abstract state interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545-46 (6th Cir.), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). Even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio State Conf. of N.A.A.C.P.*, 768 F.3d at 538 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.)). As applied to the upcoming November Election, neither the Receipt Deadline nor the Witness Requirement passes constitutional muster under strict scrutiny or the *Anderson-Burdick* test.

a. Receipt Deadline

To ensure that voters who timely cast a valid absentee ballot are not disenfranchised, the proposed Consent Judgment extends the absentee ballot Receipt Deadline from three days to nine days after Election Day and provides alternative, streamlined procedures for in-person absentee ballot drop-off stations at all one-stop early voting locations and county board offices. Consent Judgment §§ VI.B, VI.D. This relief follows warnings from USPS indicating that the deadlines for requesting and submitting absentee ballots under North Carolina law are incompatible with USPS's service standards and poses a substantial risk of disenfranchising countless voters who request their ballots within the time permitted under North Carolina law and "promptly" return them. July 30, 2020, USPS Letter, *see* Stroman Aff. ¶¶ 14-17. Further exacerbating the risk of disenfranchisement are the well-documented mail delivery delays, which result in voters' ballots being rejected for reasons entirely outside of their control. *See id.* ¶¶ 11, 13, 17; Compl., ECF No. 1, *Commonwealth of Pa. v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020). Even before the onset of the pandemic, when very few North Carolinians voted by mail, thousands of otherwise eligible absentee ballots were rejected for late arrival. Mayer Aff. at 15-16 (Table 2). Based on the projections of state officials, the number of mail absentee ballots cast this November will be in the range of 1.8 million to 2.3 million (if not more); if past trends hold, that means *at least* tens of thousands of timely-submitted ballots will be rejected simply because they were delivered late. *Id.* at 29.

As more voters turn to absentee voting and mail delays grow, courts across the country have recognized that receipt deadlines must be altered to match reality, and states are being ordered to accept—and count—otherwise valid ballots mailed by Election Day to prevent widespread disenfranchisement. *See* Stroman Aff. ¶¶ 13-14. For example, in April, the U.S. Supreme Court affirmed a federal district court decision that extended Wisconsin's receipt deadline by six days,

saving the votes of nearly 80,000 citizens who cast valid ballots that were postmarked on or before Election Day but arrived in the days following due to delayed mail service and complications caused by COVID-19. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). The Supreme Court expressed no concerns about "afford[ing] Wisconsin voters several extra days in which to mail their absentee ballots," so long as those ballots were "postmarked by election day." 140 S. Ct. at 1206. Due to the pandemic, unprecedented levels of expected absentee voting, USPS delays, and well-founded concerns that voters who cast otherwise valid absentee ballots on or before Election Day will be disenfranchised through no fault of their own, numerous other courts have granted similar receipt deadline extensions. *Democratic Nat'l Committee v. Bostelmann*, Nos. 20-cv-249-wmc, 20-cv-278-wmc, 20-cv-340-wmc & 20-cv-459-wmc (W.D. Wis. Sept. 21, 2020), Ex. A, attached hereto, *stay denied*, Nos. 20-2835 & 20-2844 (7th Cir. Sept. 29, 2020), Ex. B, attached hereto (extending Wisconsin's ballot receipt deadline for November 2020 election); *Common Cause Ind. v. Lawson*, No. 1:20-cv-02007-SEB-TAB (S.D. Ind. Sept. 29, 2020), Ex. C, attached hereto (same for Indiana); *Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (same for Michigan); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (same for Pennsylvania); *New Ga. Project v. Raffensperger*, No. 1:20-cv- 01986-ELR (N.D. Ga, Aug. 31, 2020) (same for Georgia); *LaRose v. Simon*, No. 62-CV-20-3149, at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's ballot receipt deadline).

No state interest is sufficiently weighty to justify the burdens imposed by the Receipt Deadline. Receiving ballots until November 12 will not interfere with the State's ability to count votes and certify elections. In fact, election officials are already required and frequently called upon to count ballots submitted or finalized well after Election Day: North Carolina voters who

submit provisional ballots may provide supporting documentation up until close of business on the day before the county canvass, which cannot occur before 11:00 a.m. on the tenth day after an election to have their ballots counted, *see* N.C.G.S. § 163-82.4(f), and military and overseas voters' absentee ballots are considered timely if they are transmitted by Election Day and received before close of business on the day before the county canvass, *see* N.C.G.S. § 163-258.12(b). The election officials who would count these ballots *confirm* that doing so prior to the canvass would impose no burden on their operations. *See* Scott Aff. ¶ 6 (explaining county board would have no issue counting a ballot that arrives any time before the canvass on November 12). In any event, the prospect of counting more ballots cannot justify the arbitrary disenfranchisement caused by the Receipt Deadline. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (holding "administrative convenience" cannot justify the deprivation of a constitutional right); *see also Democratic Nat'l Comm. v. Bostelmann*, 415 F. Supp. 3d 952, 971 n.14 (W.D. Wis.), *stayed in part*, Nos. 20-1538, 20-1546, 20-1539, 20-1545, 2020 WL 3619499 (7th Cir. Apr. 3), *stayed in part sub nom. Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).[14]

b. Witness Requirement

The Consent Judgment does not eliminate the Witness Requirement; Plaintiffs and the State Board instead compromised on a procedure to cure certain deficiencies on absentee ballots, including missing voter, witness, or assistant signatures and addresses. Consent Judgment § VI.C. Nevertheless, the likelihood of success on Plaintiffs' challenge to the Witness Requirement was at

[14] According to the State Board, the Election Day postmark deadline "is in place to prohibit a voter from learning the outcome of an election and then casting their ballot." Numbered Memo 2020-22 at 1. Since the date by which a voter must send their ballot remains unchanged and on or before Election Day, the Receipt Deadline extension does not infringe upon the State's interests served by this law. Indeed, the Numbered Memo makes clear that only ballots that can be verified as having been in the position of a USPS or commercial carrier by Election Day may be counted. *Id.* at 2.

least probable, thus the compromise reached by the Consent Parties, which leaves the Witness Requirement in place, further demonstrates the reasonableness of the proposed Consent Judgment.

The Witness Requirement mandates that even voters in single-adult households, like Plaintiffs Rabinowitz and Johnson and the Alliance's members, complete their absentee ballots in the physical presence of a qualified adult witness. *See* Rabinowitz Aff. ¶ 5; Johnson Aff. ¶ 5; Dworkin Aff. ¶ 8; Curtis Aff. ¶ 4; Clark Aff. ¶ 6. Earlier this year, the State Board acknowledged that the Witness Requirement "increases the risk of transmission or exposure to disease," State Bd. Apr. 22, 2020 Ltr., including through environmental surfaces like ballot envelopes, that can be contaminated with the virus, Troisi Aff. ¶¶ 11, 31. Moreover, "there is increasing evidence . . . that aerosolized droplets . . . can spread the virus" to individuals over 15 feet away, and that aerosols may play a more important role in transmission than droplets. *Id.* ¶ 11.

Since the State Board's initial warning, the rate of new COVID-19 cases in North Carolina has only increased, Troisi Aff. ¶ 10, yet the Witness Requirement forces over at least a million North Carolinians who live alone to choose between protecting their health and exercising their constitutional right to vote. Mayer Aff. at 12. Recognizing the unjustifiable burdens that witness requirements place on voters, numerous courts have modified or enjoined their enforcement for at least the duration of the pandemic—exactly the relief Plaintiffs were seeking here.[15] That Plaintiffs

[15] *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment and decree suspending "notary or two-witness requirement" for mail ballots), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (Aug. 13, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witnessing requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests

or other North Carolinians may limitedly venture out to fulfill the needs of daily life does not lessen the burden of risking one's health to vote. "Such risks may be necessary to obtain food and other necessities, but the burden one might be forced to accept to feed oneself differs in kind from the burden that the First and Fourteenth Amendments tolerate on the right to vote." *Virginia LWV II*, 2020 WL 4927524, at *9. Nor does the possibility of individual voters taking great measures to exercise their right to vote lessen the burden of the challenged restriction. As a federal court in Rhode Island explained:

> Could a determined and resourceful voter intent on voting manage to work around these impediments? Certainly. But it is also certain that the burdens are much more unusual and substantial than those that voters are generally expected to bear. Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.

Common Cause RI. v. Gorbea, No. 20-1753, 2020 WL 4579367, at *14-15 (1st Cir. Aug. 7, 2020), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (Aug. 13, 2020).

These burdens imposed by the Witness Requirement are not justified by any purported interests in fraud prevention. In *Virginia LWV I*, the Western District of Virginia considered a similar witness requirement's efficacy in preventing voter fraud in assessing whether the burdens it imposed were justified. 2020 WL 2158249 at *9. There was no evidence suggesting that allowing certain voters to opt out of the witness requirement would "increase voter fraud in any meaningful way," which was "particularly true when considering all of the other means of combatting voter fraud integrated into the absentee-voting system." *Id.*

of combating voter fraud and protecting voting integrity"); *Virginia LWV I*, 2020 WL 2158249, at *8 ("The Constitution does not permit a state to force" voters to choose "between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election.").

Similarly, in *Middleton v. Andino*, a South Carolina federal court enjoined the state's witness requirement for the November election, finding that it poses "a significant burden" on voters. 3:20-cv-01730-JMC, 2020 WL 5591590, at *30 (D.S.C. Sept. 18, 2020).[16] In doing so, the Court found that, although the state generally has an interest in investigating voter fraud, "the specific means of promoting that interest—here, the Witness Requirement—is marginal." *Id.* at *31. Defendants had introduced a declaration of a veteran investigator of the South Carolina Law Enforcement Division who alleged that the witness requirement provided a "significant" investigatory function; however, the court refused "to take the state's conclusory assertions at face value simply because one veteran law enforcement officer describes the Witness Requirement as providing a 'significant' lead in fraud investigations." *Id.* Much like in *Virginia LWV I* and *Middleton*, it is well-documented that the incidence of voter fraud, including absentee voter fraud, in American elections (including elections held in North Carolina) is extremely low. Herron Aff. ¶¶ 26-54. And the Witness Requirement did nothing to prevent Republican operatives led by Leslie McRae Dowless from forging witness signatures and impersonating voters in furtherance of their fraudulent scheme which corrupted the 2018 general election in North Carolina's Ninth Congressional District. *See* Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District, N.C. State Bd. of Elections, March 13, 2019 ("Order"), at p. 2, Ex. 33. The State Board found that Dowless engaged in a calculated effort to "submit forged absentee by mail request forms without voters' knowledge" and collect unsealed and unvoted absentee

[16] The District Court's injunction was initially stayed pending appeal by a divided panel of the Fourth Circuit. *See Middleton v. Andino*, No. 20-2022, 2020 WL 5739010, at *1 (4th Cir. Sept. 24, 2020). However, in an incredibly rare move, the Fourth Circuit *sua sponte* vacated the stay and granted rehearing en banc. *See Middleton v. Andino*, No. 20-2022, 2020 WL 5752607 (4th Cir. Sept. 25, 2020). The en banc Fourth Circuit denied the motion for stay pending appeal. *See Middleton v. Andino*, No. 20-2022 (4th Cir. Sept. 30, 2020), Ex. D, attached hereto.

ballots—actions which were already prohibited by other criminal laws. *Id.* ¶¶ 46-47, 52, 60, 62-63; *see also* Herron Aff. ¶¶ 52, 104-06, 108, *see also* 121-22, N.C.G.S. § 163-237(d) (criminalizing fraud in connection with absentee ballots). Although the Witness Requirement was in place long before Dowless perpetrated his fraudulent scheme, it clearly did not deter his criminal enterprise. County election officials have themselves confirmed that the Witness Requirement plays no role in their verification process for absentee ballots, nor does it deter or prevent potential voter fraud. *See* Scott Aff. ¶ 10, 12-14.

The State Board, moreover, has provided evidence in other litigation that "the primary purpose of the witness signature requirement is not to verify the voter's identity (which is done through other means), but rather to prevent the voter from having her ballot stolen and marked without her knowledge."[17] Here, the cure provision necessarily addresses that risk by requiring that the individual voter be contacted by a county election official and affirm through a sworn affidavit that the ballot at issue is indeed theirs. Numbered Memo 2020-19. There can be no dispute that the cure process outlined in Numbered Memo 2002-19 "prevents" a "voter from having her ballot stolen and marked without her knowledge." *Id.* The consent judgment does *not* eliminate the Witness Requirement, but instead provides voters with an opportunity to resolve errors or other questions about their ballot that would otherwise result in their disenfranchisement. Consent Judgment § VI.C. No state interest justifies a prohibition on *curing* absentee ballots, even those

[17] North Carolina Department of Justice Memorandum to SBOE re: COVID-19-Related Litigation, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/2020.09.14%20Memo.pdf.

with missing witness information, through procedures that accomplish the same purpose (i.e. witness identification) while avoiding the disenfranchisement of countless voters.[18]

4. The Parties were adequately represented by counsel.

The parties are each ably represented by experienced counsel, which further supports the fairness and adequacy of the consent judgment. Plaintiffs' counsel from Perkins Coie LLP and Patterson Harkavy LLP have extensive public interest litigation experience, particularly in voting rights cases at all levels of North Carolina state and federal courts, and the U.S. Supreme Court. Executive Defendants also benefit from the experienced and specialized representation of the Department of Justice. *See, e.g.*, *Virginia LWV I*, 2020 WL 2158249, at *5 (finding counsel for plaintiffs and state defendants "provided fair and adequate legal counsel in representing Plaintiffs in the adoption of the partial settlement agreement"); *Carcano v. Cooper*, No. 1:16CV236, 2019 WL 3302208, at *6 (M.D.N.C. July 23, 2019) (finding "the parties have had the benefit of excellent legal counsel" including representation by "large, sophisticated law firms" and the "Defendants are well-represented by the North Carolina Department of Justice"). "[W]hen a settlement has been

[18] Indeed, many courts in the past several months have ordered election officials to give voters an opportunity to cure absentee ballots, including after Election Day. *Ariz. Democratic Party v. Hobbs*, 2020 WL 5423898 (D. Ariz. Sept. 10, 2020) (granting preliminary injunction and ordering Arizona election officials to provide voters with seven days after Election Day to cure absentee ballots with missing signatures); *League of Women Voters of New Jersey et al. v. Tahesha Way*, No. 20-cv-05990, ECF No. 34 (E.D.N.J. June 17, 2020) (granting preliminary injunction and ordering New Jersey election officials to allow voters to cure absentee ballots with missing or mismatched signatures for sixteen days after Election Day); *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 3068160 (D.N.D. June 5, 2020) (holding North Dakota's cure procedures for absentee ballots violated due process and ordering North Dakota's election officials to allow voters six days after Election Day to cure their absentee ballot); *Frederick v. Lawson*, No. 1:19-cv-0959-SEB-MJD, 2020 WL 4882696, (S.D. Ind. Aug. 20, 2020) (permanently enjoining Indiana election officials from rejecting any absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *League of Women Voters of the United States et al. v. Kosinski*, et al., No. 1:20-cv-05238, ECF No. 37 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring New York election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

negotiated by a specially equipped agency, the presumption in favor of settlement is particularly strong." *Md. Dep't of the Env't*, 2013 WL 2637475, at *1. And where the parties consist of the North Carolina State Board of Elections and its Chair—each of which has specialized experience in administering elections in North Carolina—that presumption is at its zenith.

B. All other relevant factors support entering the consent judgment.

1. The agreement is in the public interest and the agreement is not unlawful.

A consent judgment that prevents "the likely unconstitutional application of a state law . . . is neither unlawful, nor against the public interest." *Virginia LWV I*, 2020 WL 2158249, at *10. This is especially true in the context of a consent decrees applicable to an election "which [is taking] place during the worst pandemic this state, country, and planet has seen in over a century." *Id.* "The public health implications have been vast and unprecedented in the modern era, with no one left untouched by the risk of transmission." *Id.* Thus, under these circumstances, a consent judgment that removes unnecessary restrictions on voters' ability to cast their vote without risking exposure to COVID-19, and avoids a probable violation of the Constitution advances the public interest, which "favors permitting as many qualified voters to vote as possible." *Holmes v. Moore*, 840 S.E.2d 244, 266 (N.C. App. 2020). *See Virginia LWV I*, 2020 WL 2158249, at *10-11.

The extended ballot receipt deadline, cure procedure, and additional absentee ballot drop-off stations reduce burdens on voters, prevent arbitrary disenfranchisement, and protect voters' and election workers' health. This is particularly true given the warning from USPS that North Carolina's Receipt Deadline poses a substantial risk of disenfranchising countless voters who timely request and promptly return their absentee ballots. July 30, 2020, USPS Letter; *see also* Stroman Aff., ¶¶ 14-17. By ensuring that North Carolina voters are not arbitrarily disenfranchised for reasons (i.e. delayed mail delivery) outside their control, the proposed Consent Judgment ensures that North Carolina remains faithful to the long-held principle that "fair and honest

elections are to prevail in this state." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128 (N.C. Super. Ct. Sept. 3, 2019) (quoting *McDonald v. Morrow*, 119 N.C. 666, 26 S.E.2d 132, 134 (1896), *aff'd*, 955 F. 3d 246 (4th Cir. 2020)).

2. The agreement is not the product of collusion between the drafting parties.

The proposed Consent Judgment was the product of good-faith negotiations between the Consent Parties. Absent evidence to the contrary, the court may presume that settlement negotiations were conducted in good faith and that the resulting agreement was reached without collusion. *Virginia LWV I*, 2020 WL 2158249, at *11 (citing cases); *Virginia LWV II*, 2020 WL 4927524, at *11 (citing cases). Not only is the record devoid of any evidence of collusion—which entitles the Consent Parties to a presumption of good faith—various factors present here indicate arms-length negotiations.

First, the Consent Parties reached a partial agreement only after Plaintiffs filed their preliminary injunction motion and extensive supporting evidence, including four expert reports and 17 lay witness affidavits, and after the Court set a hearing date on that motion. *See supra* at 7-10. Plaintiffs also cited countless publicly-available documents, including documents from federal and state officials relating to the COVID-19 pandemic, the difficulties of voting during the pandemic, and official USPS reports and communications demonstrating that North Carolina's election deadlines were incompatible with its delivery standards. The limited nature of the proposed Consent Judgment, which provides relief for only a portion of Plaintiffs' claims, is a significant indicator that the agreement was negotiated at arms' length, as are the compromises and concessions made by both of the Consent Parties. *See supra* at 10-11.

It is of no import that the Executive Defendants had not yet filed briefs opposing Plaintiffs' claims. The time to do so has not passed. *Virginia LWV I*, 2020 WL 2158249, at *11 (finding that though Defendant had not yet opposed plaintiffs' preliminary injunction motion, "Defendants'

litigation posture is fully consistent with an arms-length negotiation among opposing parties to seek a negotiated solution to a narrow, immediate dispute rather than collusion."). Similarly, Executive Defendants' opposition to intervention by political parties "is neither a surprise nor a hallmark of collusion." *Id.* at *11. Nor is there any concern here about "elected state officials seek[ing] to bind their successors as to a matter about which there is substantial political disagreement," *Carcano*, 2019 WL 3302208, at *6, as the agreement only pertains to the 2020 elections. Any allegations of collusion are unfounded.

To further demonstrate the fairness of the proposed Consent Judgment, Executive Defendants have taken the unusual step of publicly releasing confidential briefings and closed session minutes.[19] Members of the State Board voted to release these documents after two former board members issued unsubstantiated public statements criticizing the process that led to the proposed agreement—the authenticity of those statements was swiftly debunked.[20] The materials released by Executive Defendants conclusively demonstrate that the proposed Consent Judgment involved significant compromises for all parties, that negotiations were conducted at arm's length, that all State Board members were thoroughly briefed on the possibility of settlement, and that all

[19] *See State Board Releases Closed Session Minutes, Briefings*, N.C. State Bd. of Elections (Sept. 25, 2020), https://www.ncsbe.gov/news/press-releases/2020/09/25/state-board-releases-closed-session-minutes-briefings.

[20] *See, e.g.*, Will Doran & Danielle Battaglia, *Republican election officials resigned after call with lawyer for 'very unhappy' NCGOP*, News & Observer (Sept. 25, 2020), https://www.newsobserver.com/news/politics-government/election/article246017110.html (stating that Republican board members' resignation letters came after a call with an attorney for the North Carolina Republican Party and noting evidence the resignations were "not voluntary," but rather that board members were "told to resign").

members had ample opportunity to—and did—ask questions and provide feedback on the proposed Consent Judgment.[21]

3. The agreement does not burden any third parties' obligations, rights, or duties.

The proposed Consent Judgment implicates the rights of the Consent Parties, and requires no approval from Legislative Intervenors or the Republican Committees. *See* Consent Judgment § IV.A ("This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit."). To enter a consent judgment, North Carolina law only requires the consent "of the parties thereto." *Carden v. Owle Constr., LLC*, 218 N.C. App. 179, 184, 720 S.E.2d 825, 829 (2012); *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 492-93, 521 S.E.2d 117, 120 (1999); *Brundage v. Foye*, 118 N.C. App. 138, 140, 454 S.E.2d 669, 670 (1995). Plaintiffs and Executive Defendants have consented to the Consent Judgment, and it is otherwise "fair and not unlawful," and should therefore be entered by the Court. *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002).

One party is not permitted to prevent others from entering into a consent judgment to resolve their disputes. *See Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of*

[21] *See* Closed Session Board Minutes, N.C. State Bd. of Elections (Sept. 15, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/DRAFT_SBOE%20Minutes%209.15.20%20Closed%20Session.pdf. (demonstrating significant discussion of possible settlements and agreement to final terms); *Bench Memo*, N.C. State Bd. of Elections (Sept. 15, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/September%2015%202020%20Bench%20Memo_Redacted.pdf (thoroughly informing board members of the status of lawsuits and factors to consider when decided whether to settle); Memorandum, N.C. State Bd. of Elections (Sept. 14, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2020-09-25/2020.09.14%20Memo.pdf (providing board members with information on the status of outstanding lawsuits, outcomes of similar lawsuits in other states, and discussion of the advantages and disadvantages of possible settlement terms).

Cleveland, 478 U.S. 501, 528-29 (1986) ("It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation."). An intervenor cannot block a Consent Judgment by merely withholding consent. *Id.* at 529; *see Sierra Club v. North Dakota*, 868 F.3d 1062, 1066 (9th Cir. 2017) ("The Supreme Court adopted this approach for good reason; otherwise, one party could hold the other parties hostage in ongoing litigation, and a global settlement or judgment would be the only option.").

While "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree," that is clearly not the case here where the proposed Consent Judgment does "not impose duties or obligations on [Legislative Intervenors]." *Local No. 93*, 478 U.S. at 529. Specifically, the Consent Judgment "does not bind" Legislative Intervenors "to do or not do anything." *Local No. 93*, 478 U.S. at 537; *see also Democratic National Committee v. Bostelmann*, Nos. 20-2835 & 20-2844 (7th Cir. Sept. 29, 2020), Ex. B, attached hereto (finding state legislature had no standing to appeal order extending Receipt Deadline because the "[c]onstitutional validity of a law does not concern any legislative interest"). In fact, it does not reference the Legislative Intervenors whatsoever and "does not purport to resolve any claims" that Legislative Intervenors might have. Consent Judgment § VII; *see also Virginia LWV I*, 2020 WL 2158249, at *14 (approving consent judgment over objection of third party when judgment did not "bind" the party, "impose[d] no legal duties or obligations" on the party, and "reference" the party, or "purport to resolve" any claims the party might have). Rather, "only the parties to the decree" can be held liable "for failure to comply with its terms." *Id.*; *see* Consent Judgment § VII.

Here, Legislative Intervenors will have opportunity to object to the proposed Consent Judgment at the hearing scheduled by the Court. *Local No. 93*, 478 U.S. at 529. However, this is

"all the process that [Legislative Intervenors are] due." *Id.*; *see Virginia LWV I*, 2020 WL 2158249, at *13 ("[T]he rule [against permitting intervenors to block consent decrees] is 'especially applicable' where the intervenor . . . participates in the hearing on the proposed consent decree and briefs the proposed remedy." (quoting *Sierra Club*, 868 F.3d at 1067)); *see Virginia LWV I*, 2020 WL 2158249, at *14. Plaintiffs' claims raise serious constitutional questions that demand the type of relief offered by the proposed Consent Judgment.

4. The consent judgment's terms fall within the State Board's emergency powers.

The State Board has ample authority to enter into the agreement set forth in the proposed Consent Judgment. It has broad, general supervisory authority over elections, N.C. Gen. Stat. § 163-22(a), and is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c). Furthermore, the Executive Director of the State Board, who is appointed by and reports to the Board, N.C. Gen. Stat. § 163-27, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19. Indeed, the State Board's implementation of Numbered Memo 2020-19 was compelled by the federal court injunction entered in *Democracy North Carolina*, which remains in force. In sum, the proposed Consent Judgment not only reflects a good faith compromise necessary to resolve likely violations of the State Constitution, it is consistent with the authority granted to the State Board to conduct elections in times of emergency, under the very circumstances that gave rise to this lawsuit in the first place.

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

Dated: September 30, 2020

Respectfully submitted,

By: /s/ Uzoma N. Nkwonta

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I certify that I served the foregoing document by email to counsel for defendants, addressed as follows:

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This the 30th day of September, 2020.

/s/ Uzoma N. Nkwonta
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Ex. A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

OPINION AND ORDER

20-cv-249-wmc

SYLVIA GEAR, et al.,

Plaintiffs,

v.

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

20-cv-278-wmc

CHRYSTAL EDWARDS, et al.,

Plaintiffs,

v.

20-cv-340-wmc

ROBIN VOS, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

JILL SWENSON, et al.,

Plaintiffs,

v.

20-cv-459-wmc

MARGE BOSTELMANN, et al.,

Defendants,

and

WISCONSIN LEGISLATURE,
REPUBLICAN NATIONAL COMMITTEE,
and REPUBLICAN PARTY OF WISCONSIN,

Intervening-Defendants.

In these four, consolidated lawsuits, various organizations and individuals have moved for preliminary injunctive relief concerning the conduct of the Wisconsin general election on November 3, 2020. While the Commissioners and Administrator of the Wisconsin Election Commission ("WEC") oppose the motions only to the extent the requested relief would exceed the WEC's statutory authority, the Wisconsin Legislature,

the Republican National Committee and the Republican Party of Wisconsin have intervened to offer a more robust opposition to those motions.[1] In addition to these pending motions for preliminary injunction, defendants and intervening defendants have also moved to dismiss three of the four cases.

For the reasons that follow, the court will largely reject defendants' grounds to dismiss. As for the requests for preliminary relief, election workers' and voters' experiences during Wisconsin's primary election in April, which took place at the outset of the COVID-19 crisis, have convinced the court that some, limited relief from statutory deadlines for mail-in registration and absentee voting is again necessary to avoid an untenable impingement on Wisconsin citizens' right to vote, including the near certainty of disenfranchising tens of thousands of voters relying on the state's absentee ballot process. Indeed, any objective view of the record before this court leads to the inevitable conclusion that: (1) an unprecedented number of absentee ballots, which turned the predominance of in-person voting on its head in April, will again overwhelm the WEC and local officials despite their best efforts to prepare; (2) but for an extension of the deadlines for registering to vote electronically and for receipt of absentee ballots, tens of thousands of Wisconsin voters would have been disenfranchised in April; and (3) absent similar relief, will be again in November. Consistent with the fully briefed motions, evidence presented, and the hearing held on August 5, 2020, therefore, the court will grant in part and deny in part the

[1] In the *Edwards* case, the Wisconsin State Assembly, Senate and members of the Wisconsin Legislature were also named as direct defendants along with the WEC Commissioners.

parties' motions for reasons more fully explained below, including entering a preliminary injunction providing the following relief:

- extending the deadline under Wisconsin Statute § 6.28(1), for online and mail-in registration from October 14, to October 21, 2020;
- directing the WEC to include on the MyVote and WisVote websites (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence";
- extending the receipt deadline for absentee ballots under Wisconsin Statute § 6.87(6) until November 9, 2020, but requiring that the ballots be mailed and postmarked on or before election day, November 3, 2020;
- enjoining Wisconsin Statute § 6.87(3)(a), which limits delivery of absentee ballots to mail only for domestic civilian voters, allowing online access to replacement absentee ballots or emailing replacement ballots for the period from October 22 to October 29, 2020, as to those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot; and
- enjoining Wisconsin Statute § 7.30(2), which requires that each election official be an elector of the county in which the municipality is located, allowing election officials to be residents of other counties within Wisconsin for the upcoming November 2020 election.

In recognition of the likelihood of appellate review, however, this order is STAYED for one week, and NO voter can depend on any extension of deadlines for electronic and mail-in registration and for receipt of absentee ballots unless finally upheld on appeal. In the meantime, lest they effectively lose their right to do so by the vagaries of COVID-19, mail processing or other, unforeseen developments leading up to the November election, the court joins the WEC in urging especially new Wisconsin voters to register by mail on or before October 14, 2020, and all voters to do so by absentee ballot as soon as possible.[2]

[2] In a vain effort (in both senses of that word) at forestalling the inevitable judge-appointment and

FACTS

A. Election Laws in Wisconsin

1. Registering to vote

A citizen wishing to vote in Wisconsin must first register in the ward or district in which they reside. To do so, the voter must complete a registration form and provide "an identifying document that establishes proof of residence."[3] Wis. Stat. § 6.34(2). The deadline for registering by mail or online is the third Wednesday preceding the election, Wis. Stat. § 6.28, which for the upcoming November 2020 election is October 14, 2020. A voter may also register in person at their local municipal clerk's office up to the Friday before the election, Wis. Stat. § 6.29(1)-(2), which for the November election is October 30. Finally, a voter may register in person on election day itself at their designated polling place. Wis. Stat. § 6.55(2).

2. Voting by mail

Absentee voting in Wisconsin is available to any registered voter who "for any reason is unable or unwilling to appear" at the polls. Wis. Stat. § 6.85. To obtain an

bias dialogue so prevalent in what remains of the independent press, among commentators and on the internet, let me stress, as I did with the parties during the August hearing, the limited relief awarded today is without regard to (or even knowledge of) who may be helped, except the average Wisconsin voter, be they party-affiliated or independent. Having grown up in Northern Wisconsin with friends across the political spectrum (and in some cases back again), my only interest, as it should be for all citizens, is ensuring a fair election by giving the overtaxed, small WEC staff and local election officials what flexibility the law allows to vindicate the right to vote during a pandemic.

[3] Military and overseas voters are exempt from this proof of residence requirement. Wis. Stat. § 6.34(2). Also, proof of residence is not required if the voter registers online *and* provides the number of a current and valid Wisconsin operator's license or state ID card, together with his or her name and date of birth, provided this information is verified. Wis. Stat. § 6.34(2m).

absentee ballot, a registered voter must submit an absentee ballot request form, along with a copy of an acceptable photo ID. Wis. Stat. § 6.86.[4] Voters who are "indefinitely confined because of age, physical illness or infirmity" are exempt from this photo ID requirement, but such a voter must still provide a signed statement by the individual who witnesses and certifies the voter's ballot "in lieu of providing proof of identification." Wis. Stat. § 6.87(4)(b)2.

On March 29, 2020, the WEC issued guidance on the proper use of indefinitely confined status, explaining that: "Designation of indefinitely confined status is for each individual voter to make based upon their current circumstances. It does not require permanent or total inability to travel outside of the residence." Wisconsin Election Commission, *Guidance for Indefinitely Confined Electors COVID-19* (Mar. 29, 2020), https://elections.wi.gov/node/6788. Two days later, the Wisconsin Supreme Court issued a decision that preliminarily endorsed the WEC guidance, finding that it "provides the clarification on the purpose and proper use of the indefinitely confined status that is required at this time." *Jefferson v. Dane Cty*, No. 2020AP557-OA (Wis. Mar. 31, 2020).[5]

Whether submitted online, by fax or by mail, an absentee ballot application must

[4] For certain voters without an acceptable photo ID, there is also an "ID Petition Process" that has been the subject of substantial litigation unrelated to the current pandemic. *See Luft v. Evers*, 963 F.3d 665, 678 (7th Cir. 2020).

[5] However, litigation on that issue is ongoing, with oral argument before the Wisconsin Supreme Court scheduled for September 29, 2020. *See* Wis. Supreme Court Pending Cases (last accessed Sept. 3, 2020), https://www.wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=285226. Because all of the issues certified for review by the Wisconsin Supreme Court in *Jefferson* relate exclusively to Wisconsin law, none overlap or conflict with the federal constitutional and statutory claims at issue in the instant case.

be received *no* later than 5 p.m. on the fifth day immediately preceding the election, Wis. Stat. § 6.86(1)(ac), (b), which means for the November election on or before 5 p.m. on October 29, 2020. Clerks must begin to send out absentee ballots no later than the 47th day before a general election, at which point the absentee ballot itself must be mailed to a qualified voter within one business day of the receipt of an absentee ballot request. Wis. Stat. § 7.15(1)(cm).

If a clerk is "reliably informed" that the absentee requester is a *military or overseas voter*, the clerk may also fax or transmit an electronic copy of the ballot in lieu of mailing it. Wis. Stat. § 6.87(3)(d). Indeed, up until very recently, due to a 2016 injunction by this court, clerks had the discretion to email ballots to *all* voters. *See One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 946-48 (W.D. Wis. 2016) (enjoining "the provision prohibiting municipal clerks from sending absentee ballots by fax or email [because it] violates the First and Fourteenth Amendments"). On June 29, 2020, however, the Seventh Circuit vacated this injunction, meaning that non-military/overseas voters may now receive an absentee ballot only by mail. *See Luft v. Evers*, 963 F.3d 665, 676-77 (7th Cir. 2020).

Once received, to cast an absentee ballot by mail, the voter must (1) complete the ballot in the presence of a witness, (2) enclose the ballot in the envelope provided, (3) sign the envelope and obtain a signature from the witness and (4) return the ballot for actual receipt no later than 8 p.m. on election day. Wis. Stat. § 6.87(2), (4)(b), (6). In light of the COVID-19 pandemic, the WEC further issued guidance on March 29, suggesting several options for voters to meet the witness signature requirement safely. *See* WEC, "Absentee Witness Signature Requirement Guidance" (Mar. 29, 2020),

https://elections.wi.gov/node/6790. This guide outlines a multi-step process to acquire a signature while observing social distancing and other best health practices. *Id.* For example, the guide suggests that a voter could recruit a friend or neighbor to watch the voter mark their ballot through a window or over video chat, with the voter then placing the ballot outside for the witness to sign as well. *Id.* To return an absentee ballot, a voter may then mail it, hand deliver it to the clerk's office or other designated site, *or* bring it to their polling place on election day. Some, though not all, localities also offer absentee ballot "drop boxes." *See* WEC, "Absentee Ballot Return Options - COVID-19" (Mar. 31, 2020), https://elections.wi.gov/node/6798. In that instance, another person may deliver the ballot on behalf of the voter. *Id.* Finally, "[i]f a municipal clerk receives an absentee ballot with an improperly completed certificate or with no certificate, the clerk may return the ballot to the elector . . . whenever time permits the elector to correct the defect and return the ballot." Wis. Stat. § 6.87(9).[6]

3. Voting in person

A registered voter may also vote absentee in-person, by simultaneously requesting and casting an absentee ballot at the clerk's office or other designated location beginning two weeks before election day through the Sunday preceding that election, in this election meaning Sunday, November 1. Wis. Stat. §§ 6.85(1)(a)2, 6.855, 6.86(1)(b). Once an absentee ballot is received by a clerk, the ballot is sealed in a carrier envelope until election

[6] Wisconsin law also permits a voter to receive up to *three* replacement ballots if they spoil or erroneously prepare their ballot, provided they return the defective ballot. Wis. Stat. §§ 6.80(2)(c), 6.86(5).

day, at which point the ballots are canvassed like any other absentee ballot. Wis. Stat. §§ 6.88, 7.51-52.

Of course, on election day, a voter may cast a regular ballot in person at their designated, local polling station. *See* Wis. Stat. §§ 6.77, 6.79. These polls are staffed by various election officials and poll workers, all of whom are required by Wisconsin law to be "qualified elector[s] of a county in which the municipality where the official serves is located." Wis. Stat. § 7.30(2)(a). As noted above, Wisconsin also offers same-day registration, so an unregistered voter or a voter who needs to change their registration may arrive, register and cast a ballot at the polls in person, all on election day. Wis. Stat. § 6.55(2).

Historically, Wisconsin voters have relied heavily on this election day registration process. For example, between 2008 and 2016, 10 to 15% of all registrations took place on election day. As Administrator Wolfe testified, Wisconsin has a "cultural tradition" of same-day registration, with approximately 80% of voter records having been impacted in some way by same-day registration. (8/5/20 Hr'g Tr. (dkt. #532) 57-58.)[7]

B. The COVID-19 Pandemic's Impacts on Wisconsin's April and August Elections

1. Growing problem and related litigation

Since early 2020, Wisconsin and most of the rest of the world has been impacted

[7] Unless otherwise noted, the docket entries are to the 20-cv-249 docket.

to varying degrees by the novel coronavirus.[8] On February 6, the first case of COVID-19 was diagnosed in Wisconsin, and as of September 17, 94,746 confirmed cases have been recorded in the state. Much is still unknown about the virus and the COVID-19 illness that it causes, but experts appear to agree that COVID-19 is mainly spread via person-to-person, respiratory droplets, and it is more likely to spread between people who are in close contact with one another for a sustained period. A person may also become infected by "touching a surface or object that has the virus on it and then touching their own nose, mouth, or possibly their eyes." (Edwards Pls.' PFOFs (dkt. #417) ¶ 27 (quoting Goode Decl., Ex. I (CDC, Targeting COVID-19's Spread) (dkt. #415-9).) Certain individuals, such as those who are elderly, immunocompromised or suffer comorbidities, are at a greater risk for complications from COVID-19.

As the virus first started to spread in Wisconsin in February and March, even greater uncertainty surrounded the extent, seriousness and nature of COVID-19. By March 12, Governor Evers had issued a statewide health emergency; and on March 24, the Secretary of Wisconsin's Department of Health Services had issued a "Safer at Home" order, which banned all public and private gatherings, closed nonessential businesses, and required that everyone maintain social distancing of at least six feet from any other person.

Obviously, all this occurred within just a few weeks of Wisconsin's April 7, 2020, primary election. In mid-March, certain WEC Commissioners began expressing concern about the state's ability to conduct a fair and safe election; local clerks reported that they

[8] Technically, SARS-CoV-2 is the name of what has become known as the "coronavirus," while COVID-19 is the name of the illness caused by that virus.

were running out of absentee ballot materials and felt overwhelmed by the volume of absentee ballot requests; and various mayors urged that the election be delayed. Between March 18 and March 26, three lawsuits were also filed with this court requesting various relief relating to Wisconsin's impending primary election.

Shortly after, this court granted the following narrow, preliminary relief: (1) extending the online registration deadline by 12 days to March 30; (2) extending by one day the window to request an absentee ballot; (3) adjusting the witness certification requirement under Wis. Stat. § 6.87(2); and (4) extending the absentee ballot receipt deadline by six days to April 13 at 4 p.m. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249 (W.D. Wis. Mar. 20, 2020); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249 (W.D. Wis. April 2, 2020). Most of this relief was challenged by emergency appeal to the Seventh Circuit (extension of the registration deadline being the exception). That court declined to stay relief granted as to the extension of absentee-ballot-requests and receipt deadlines by mail, but granted a stay as to the adjustment to the witness signature requirement. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1546, -1545, at * 3-4 (7th Cir. April 3, 2020). A further, emergency appeal was accepted by the U.S. Supreme Court, which sought a stay of this court's injunction only to the extent that it permitted ballots postmarked after election day (April 7) to be counted if actually received by April 13. Brief of Petitioner, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U. S. ___ (2020) (No. ___). The Supreme Court granted the stay, ordering that a voter's absentee ballot must be either postmarked by election day and received by April 13 or hand-delivered by election day. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ___

(2020) (per curiam).

2. Effort to fulfill absentee ballot applications

Meanwhile, the WEC and local clerks were undertaking admirable (and in some cases, heroic) efforts to administer absentee voting and prepare the polls for in-person voting on April 7 in the midst of the pandemic. Despite these efforts, unprecedented challenges confronted clerks and poll workers before and on election day. To begin, clerks received a flood of absentee ballot requests, ultimately receiving a total of 1,282,762 absentee ballot applications.[9] A post-election report by the WEC explained that some inadequately staffed offices were "nearly overwhelmed" by this number of applications. (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 56 (citing Goodman Decl., Ex. 18 (WEC May 20 Meeting Materials) ('459 dkt. #43-18) 6).) At one point, clerks even ran out of absentee certificate envelopes, although this shortage was ultimately rectified. Plaintiffs have produced numerous declarations from voters who testified that they timely -- often two or three weeks before the election -- requested an absentee ballot but never received it *or* received it after election day; some of these voters chose to vote in person, but others were unwilling or unable to go to the polls due to safety concerns with COVID-19, long lines or other problems. (*See* Swenson Pls.' PFOFs ('459, dkt. #42) ¶¶ 51, 164, 176 (citing declarations); DNC Pls.' PFOFs (dkt. #419) ¶ 73 (citing declarations); Edwards Pls.' PFOFs (dkt. #417) ¶¶ 67-162, 177-81) (citing declarations); Gear Pls.' PFOFs (dkt. #422) ¶¶ 37, 43, 81, 157-677 (citing declarations).)

[9] In comparison, only 167,832 absentee ballots were sent in the April 2019 election.

Moreover, between April 3 and April 6 (the day before the election), local officials were still in the process of mailing more than 92,000 absentee ballots to voters, virtually all of which the WEC acknowledges were sent too late to be filled out and mailed back by election day.[10] On top of this group, data from the WEC as of April 7 indicates that at least an additional 9,388 ballots were applied for timely but were never even sent out. The WEC advises that due to a reporting lag this number was lower, but does not indicate by how much.

At least some of these problems were rooted in mail delivery issues, which led to some absentee ballots reaching voters or clerks late or not at all. For example, a WEC staff member received a call from a United States Postal Service ("USPS") official in Chicago on April 8, who reported that "three tubs" of absentee ballots from the Appleton/Oshkosh area had been found undelivered in a post office in Chicago, although the Legislative defendants and the RNC/RPC point out that these tubs were dropped off at USPS at the end of the day on April 7 (*see* Leg. Defs.' & RNC/RPW Resp. to DNC Pls.' PFOFs (dkt. #450) ¶ 84). Similarly, in Fox Point, a bin containing about 175 unopened and undelivered ballots was inexplicably returned to the clerk's office on the morning of election day.

Voters also reported problems with satisfying the requirements for requesting and

[10] Administrator Wolfe testified that it may take 14 days for an absentee ballot to make its way through the mail from a clerk's office to a voter and back again, and even under ideal conditions with a two-day first class mail delivery time, a mailed ballot would take at least four to six days to turn around. (Swenson Pls.' Supp. PFOFs (dkt. #494) ¶ 62 (citing Wolfe Dep. (dkt. #247) 51:1-21).)

casting their absentee ballots. For example, some voters testified that they had difficulties uploading their photo ID to the online system or otherwise providing the required ID needed to request an absentee ballot.[11] (DNC Pls.' PFOFs (dkt. #419) ¶ 68 (citing declarations).)

3. Efforts to count absentee ballots

Further, while the WEC issued guidance regarding the safe execution of the witness signature requirement before voting and returning an absentee ballot itself, plaintiffs' expert opined that this complicated advice was not easy to follow. (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 81 (citing Remington Expert Report ('459 dkt. #44)).) For example, plaintiff Jill Swenson testified that she spent two weeks trying to find someone to witness her ballot in a safe manner, ultimately to no avail. (*See* Swenson Decl. ('459 dkt. #47) ¶¶ 11-13.) Relying on this court's preliminary injunction modifying the witness signature requirement in light of such issues, Swenson eventually mailed her ballot without a witness signature, only to find out later that this court's order was stayed on appeal. (*Id.*) Other voters also testified that they did not cast their absentee ballot, or they cast their ballot without the proper certification, due to COVID-19-related safety concerns regarding the witness requirement. (*See* DNC Pls.' PFOFs (dkt. #419) ¶¶ 157-60 (citing declarations).)[12] In addition, although many ballots arrived with no postmarks, two postmarks or unclear

[11] Defendants do not dispute that *some* voters testified to difficulties with uploading their photo ID to the online system (or could otherwise not provide the required ID needed to request an absentee ballot), but as discussed further in the opinion below, none of the declarations persuasively establish that the ID requirement was or will be difficult to satisfy for most desiring to vote absentee.

[12] As was conceded in the hearing, none of the plaintiffs produced any evidence of a voter who was ultimately unable to meet the proof of residence requirement.

postmarks, on this issue, the guidance issued by the WEC simply left it up to each municipality to determine whether a ballot was timely.

In the end, 120,989 voters who requested absentee ballots did not return them as of election day, although what portion of these voters ended up voting in-person on election day or why they did not is unknown. Even for those absentee ballots that did reach clerks' offices, more than 14,000 ballots were rejected due to an "insufficient" witness certification and "thousands" were rejected for other reasons. (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 90.) However, the WEC maintains that "the final election data conclusively indicate[d] that the election did not produce an unusual number [of] unreturned or rejected [absentee] ballots," adjusting for the larger number of absentee votes submitted. (WEC Resp. to Swenson Pls.' PFOFs (dkt. #439) ¶ 74.)

All told, absentee ballots represented 73.8% of all ballots counted. Approximately 61.8% of absentee ballots were mailed in, while the remaining 12% were cast in-person absentee or hand-delivered, meaning only roughly 26.2% were cast on election day. Absentee votes never comprised more 20% of all ballots in recent past elections, and often, they represented less than 10% of ballots cast. The WEC itself stated in a report that the increase in absentee voting "created resource issues for a system primarily designed to support polling place voting." (Swenson Pls.' PFOFs ('459, dkt. #42) ¶ 50 (quoting Goodman Decl., Ex. 18 (WEC May 20 Meeting Materials) ('459, dkt. #43-18) 19-21).)

4. Election day voting

As for voting on the actual election day itself, April 7, 2020, severe shortages of poll workers caused significant problems in some jurisdictions. In particular, because of the age

and health concerns of poll workers who declined to volunteer, Milwaukee was only able to open *five* of its usual 180 polling sites, and Green Bay reduced its usual 31 polling sites to just *two*. In part due to this consolidation, some individuals had to wait in long lines, sometimes for hours before being allowed to vote. While Governor Evers authorized the Wisconsin National Guard to serve as poll workers, he only did so on April 2, less than one week before the election. In addition, while the WEC was able to send sanitation and personal protective equipment ("PPE") to all polling sites, some supplies were limited or inadequate. Some poll workers even reported that they had to rely on vodka as a sanitizer. Moreover, the WEC did not issue any particular mandate requiring specific public health measures to be taken by clerks or poll workers. Finally, voters and poll workers reported various perceived safety problems, including: (1) cramped polling locations that made it difficult to maintain social distancing; (2) no enforcement of social distancing by poll workers; (3) a lack of or improper mask-wearing by voters and poll workers; (4) poll workers' reuse of paper towels to clean voter booths between voters; (5) a lack of sanitized pens; and (6) poll set-ups requiring poll workers to sit approximately two feet from each other.

Plaintiffs also cite to various declarations to highlight the difficulties faced by some citizens who sought to vote in-person in the April election. (*See* DNC Pls.' PFOFs (dkt. #419) ¶¶ 62-66 (citing declarations).) For example, although Jeannie Berry-Matos requested and received an absentee ballot, it was for the wrong ward; unable to correct the error in time, she then was forced to vote in person on April 7 at Washington High School in Milwaukee. (DNC Pls.' PFOFs (dkt. #419) ¶ 62 (citing Berry-Matos Decl. (dkt.

#263)).) When Berry-Matos arrived, she found a line stretching several blocks, no available close parking, no poll workers enforcing social distancing, and no way to sanitize her pen or her photo ID. (*Id.*) All in all, it took her an hour and thirty-five minutes to vote in person. (*Id.*) Other voters who requested but did not receive absentee ballots similarly showed up at the polls to vote, but concerned about safety and confronted with long lines, they ultimately did not cast their vote. (DNC Pls.' PFOFs (dkt. #419) ¶¶ 63-66 (citing Wortham Decl. (dkt. #367); Moore Decl. (dkt. #330); Washington Decl. (dkt. #363)); *see also* Gear Pls.' PFOFs (dkt. #422) ¶¶ 236-38, 468-70, 599-602, 627 (citing declarations).)

Overall, 1,555,263 votes were cast in the April election. This court's injunction extending the absentee ballot physical receipt deadline from April 7 to April 13 appears to have resulted in approximately 80,000 ballots being counted that would have otherwise been rejected as untimely. (DNC Pls.' PFOFs (dkt. #419) ¶ 10.) In addition, the court's injunction extending the registration deadline arguably resulted in an estimated 57,187 voters successfully registering in advance. (*Id.* ¶ 197.) Of course, absent the court's injunction some portion of those voters may have opted to register to vote in person on election day just before voting, rather than sending their absentee ballot by mail.

Plaintiffs point to expert reports concluding that COVID-19 and its effects reduced voter turnout in the election. (*See* Swenson Pls.' PFOFs ('459 dkt. #41) ¶ 131 (citing Fowler Expert Report ('459 dkt. #46)); DNC Pls.' PFOFs (dkt. #419) ¶ 111 (citing Burden Decl. (dkt. #418)).) Still, 34.3% of eligible voters cast a ballot in the April election; in comparison, the turnout for previous spring primary elections was 27.2% (2019), 22.3%

(2018), 15.9% (2017), 47.4% (2016), 26.1% (2012), and 34.9% (2008).

5. COVID-19 impacts on in-person voting

As for the relationship between Wisconsin's April election and COVID-19 transmission in the state, the parties point to arguably conflicting reports on this subject. Plaintiffs note that a Wisconsin Department of Health Services analysis traced 71 cases of COVID-19 to in-person voting in April. (Edwards Pls.' PFOFs (dkt. #417) ¶ 4; DNC Pls.' PFOFs (dkt. #419) ¶ 6.) Similarly, expert witness Meagan Murry, M.D., an epidemiologist at Harvard School of Public Health, reported "71 confirmed cases of Covid-19 among people who may have been infected during the election." (Swenson Pls.' Supp. PFOFs (dkt. #494) ¶ 5 (quoting Murry Decl. (dkt. #370) ¶ 60).) They also reference a working paper, which concludes that in-person voting led to approximately 700 additional COVID-19 cases in Wisconsin. (Edwards Pls.' PFOFs (dkt. #417) ¶ 4.)

The Legislative defendants and the RNC/RPW, for their part, point to two reports concluding that the April election was *not* associated with an increase in COVID-19 infection rates. (Leg. Defs.' & RNC/RPC's Resp. to Swenson Pls.' PFOFs (dkt. #451) ¶¶ 7, 36 (citing Tseytlin Decl., Exs. 18, 19 (dkt. ##458-18, -19).)[13] The Legislative

[13] In particular, defendants cite to a report authored in part by two individuals affiliated with the World Health Organization Collaborating Centre for Infectious Disease Epidemiology and Control, which purported to analyze confirmed COVID-19 cases in the weeks surrounding the April 7 election, and found that the election was not associated with an increase in COVID-19 infection rates. (Tseytlin Decl., Ex. 18 (dkt. #458-18).) They also cite to a second report authored by individuals affiliated with the Larkin Community Hospitals in Miami, the Department of Math and Statistics at the University of South Alabama, and the Froedtert & The Medical College of Wisconsin in Milwaukee. (Tseytlin Decl., Ex. 19 (dkt. #458-19).) This report concluded that: "There was no increase in COVID-19 new case daily rates observed for Wisconsin or its 3 largest counties following the election on April 7, 2020, as compared to the US, during the post-incubation interval period." (*Id.*)

defendants and the RNC/RPW also point out that the Wisconsin DHS explained that it is "not clear how many of the infections may have been caused by the spring election because many of the people had other exposures." (Leg. Defs.' & RNC/RPW's Resp. to Edwards Pls.' PFOFs (dkt. #485) ¶ 3.)

After the court's evidentiary hearing in this case, Wisconsin also held another primary election on August 11. Evidence presented by the parties prior to the election suggested that certain localities again had to consolidate polling locations due to poll worker shortages. For example, Sun Prairie expected to consolidate eight polling places down to one. The WEC told municipalities "not to plan on" assistance from the National Guard (Swenson Supp. Pls.' PFOFs (dkt. #494) ¶ 94), but the parties represented that Governor Evers ultimately did deploy the Guard to assist with the election on August 5, less than one week before the election. In the end, both the April and August elections suggest that in-person voting can be conducted safely if the majority of votes are cast in advance, sufficient poll workers, polling places, and PPE are available, and social distancing and masking protocols are followed. Of course, the aged, those with comorbidities or those lacking confidence in the ability of local officials and the public to get all those factors right are understandably less confident in that assessment.

C. Plans for the November Election in Light of the Ongoing COVID-19 Pandemic

While the exact trajectory of COVID-19 in Wisconsin is unknown, the unrebutted public health evidence in the record demonstrates that COVID-19 will continue to persist, and may worsen, through November. Recent outbreaks, particularly among Wisconsin

college students, and the onset of flu season continue to complicate assessments. For example, concern remains that the significant new infections reported on reopened college campuses may spread into the community. David Wahlberg, *UW-Madison threatens 'more drastic action' as experts say COVID-19 outbreak impacting broader community*, Wis. State Journal (Sept. 16, 2020), https://madison.com/wsj/news/local/education/university/uw-madison-threatens-more-drastic-action-as-experts-say-covid-19-outbreak-impacting-broader-community/article_dd00c9cc-5dc9-5924-99ca-40c94a0f6738.html. Indeed, with flu season yet to arrive, Wisconsin has already broken numerous new case records this month, with over 2,000 new cases reported on September 17, 2020, up from a daily average of 1,004 just one week prior. *See* WPR Staff, *Wisconsin Sets New Daily Record with 2,034 Coronavirus Cases Reported Thursday*, Wis. Public Radio (Sept. 17, 2020), https://www.wpr.org/wisconsin-sets-new-daily-record-2-034-coronavirus-cases-reported-thursday. Regardless, given the significantly higher voter turnout expected for the November election in comparison with April, there is little doubt that the WEC, clerks and voters will again face unique challenges in the upcoming election. As a result, the WEC is already urging as many people as possible to vote absentee in the hopes of avoiding large lines, shortages and attendant health risks on election day.

Moreover, the evidence suggests that Wisconsin voters will again rely heavily on the absentee voting system for the November election, with the WEC expecting some 1.8 to 2 million voters to request an absentee ballot, again smashing all records and turning historic voter patterns on their head. Unfortunately, Madison City Clerk Maribeth Witzel-Behl testified that at least her office "has not been given the resources and money necessary to

meet the anticipated demand for mail-in absentee ballots in November," and "with other departments going back to work, [her] staff now only has a few dozen League of Women Voters volunteers available to help." (Gear Pls.' Supp. PFOFs (dkt. #506) ¶ 20 (quoting Witzel-Behl Decl. (dkt. #382) ¶ 6).)

As previously discussed, the absentee ballot system in Wisconsin is also heavily reliant on the USPS, which has and continues to face its own challenges. WEC Administrator Wolfe in particular acknowledged "significant concerns about the performance of the postal service in connection with the April 7 election." (DNC Pls.' PFOFs (dkt. #419) ¶¶ 140, 142 (quoting Wolfe Dep. (dkt. #247) 89:10-15).) In addition, a report by the USPS Inspector General's Office found that voters requesting ballots five days before the election -- the deadline set by Wisconsin statutes -- face a "high risk" that their ballot will not be delivered, completed and returned in time to be counted. (Swenson Pls.' Supp. PFOFs (dkt. #494) ¶ 61 (quoting Second Goodman Decl., Ex. 17 (Timeliness of Ballot Mail) (dkt. #495-17) 6-7).) USPS also faces budget shortfalls, as well as challenges caused by increasing COVID-19 rates among postal workers themselves. Moreover, just a few weeks ago, the new Postmaster General established "major operational changes . . . that could slow down mail delivery," including restricting the ability for USPS employees to work overtime. (DNC Pls.' Supp. PFOFs (dkt. #501) ¶¶ 7-8.)

As to fulfilling the witness signature requirement, over 600,000 Wisconsinites live alone and even more live with an individual who is unqualified to be a witness. Prospective absentee voters in that situation will need to find someone outside of their household to witness their ballot before returning it. According to plaintiffs' expert, a "significant"

portion of voters who do not live with a qualified witness are senior citizens, who also face special risks of complications from COVID-19. (DNC Pls.' PFOFs (dkt. #419) ¶ 153 (citing Fowler Rep. ('459 dkt. #46) 12-13).) Relatedly, another expert produced by plaintiffs opined that the WEC's guidance on the witness signature requirement "may be difficult to understand by the homebound individual and witness" and "may be impractical in certain situations, such as for persons living in multi-level or multi-unit apartment complexes." (Swenson Pls.' PFOFs ('459 dkt. #42) ¶ 81 (citing Remington Rep. ('459 dkt. #44)).) That being said, notwithstanding a few, individual affiants who had experienced difficulties securing a witness signature requirement or submitting proof of ID for the April election, the Legislature points out that plaintiffs produced no evidence of voters who are still unable to meet the challenged requirements *for November*.[14]

In-person voting in November is also likely to be strained by a shortage of poll workers, despite more time to plan for that shortage than was available for the spring election. On the one hand, Milwaukee officials testified that they hope to be able to open all 180 polling sites (up from five in April), and Green Bay expects to have at least 13 polling locations (up from two in April). On the other hand, clerks are still reporting poll worker shortages for November. Similarly, WEC Administrator Wolfe testified that

[14] The DNC plaintiffs also contend that: "many workplaces, public libraries, and copy shops may remain or become closed given the pandemic's acceleration in the U.S., many voters will continue to face substantial burdens in obtaining the copies or scans they need to complete their absentee ballot applications and will continue to be prevented from voting. In addition, even if those establishments were open, many voters are fearful of leaving their homes because of the health risks of the coronavirus pandemic and the restrictions imposed under their respective County's health orders." (DNC Pls.' PFOFs (dkt. #419) ¶ 164.) Again, however, the only evidence they cite in support is voter declarations expressing fear of in-person voting due to COVID-19, rather than a personal inability to arrange an effective witnessing of their ballot.

"despite the advance warning [and] the greater time to plan for people who will opt-out because of COVID-19 risks, local municipalities are still having problems filling all their polling stations." (8/5/20 Hr'g Tr. (dkt. #532) 82.) Because of this, Wolfe explained a lack of poll workers was the thing she "worr[ies] about the most" for the upcoming November election. (*Id.* at 83.)

More fundamentally, plaintiffs have produced a credible expert report that concludes in-person voting in November will continue to pose "a significant risk to human health" due to the COVID-19 pandemic. (Swenson Pls.' PFOFs ('459 dkt. #42) ¶ 7 (citing Remington Expert Report ('459 dkt. #44)).) While not disputing this risk, the WEC counters with the general observation that the risk of transmission is "greatly reduced" if people are wearing masks and practicing social distancing. (WEC Resp. to Swenson Pls.' PFOFs (dkt. #439) ¶ 7.) The Legislative defendants and the RNC/RPC further dispute any suggestion that in-person voting in November will be unsafe, again pointing to the two studies concluding that the April election was not associated with an increase in COVID-19 infection rates. (*See* (Leg. & RNC/RPW's Resp. to Swenson Pls.' PFOFs (dkt. #451) ¶¶ 7, 36 (citing Tseytlin Decl., Ex. 18, 19 (dkt. ##458-18, -19)).) At minimum, the evidence continues to suggest that a large election day turnout will stretch safety protocols and increase risk of transmission particularly to poll workers, which is why the WEC has continued to promote voting by mail.

Regardless of the objective risks, plaintiffs have also produced declarations from various voters who aver that if unable to vote by mail, they will not vote in-person in November. (*See* Gear Pls.' PFOFs (dkt. #422) ¶¶ 186, 215, 279, 323, 355, 387, 407 (citing

various voter declarations).) Others declare that they intend to vote by mail in November, but would like a "back-up" option, because of their previous personal experiences in not receiving an absentee ballot for the April election despite requesting it timely. (*See id.* ¶¶ 445, 474, 501, 576, 633, 669 (citing various voter declarations).)

In preparation for these anticipated challenges in administering the November election, the WEC has taken a number of steps. Of particular note, the WEC mailed absentee ballot *applications* to nearly all registered voters. The application itself contains an information sheet, which among other things generally describes the "indefinitely confined" exception to the photo ID requirement, but does not indicate what constitutes "indefinitely confined" under Wisconsin law. Instead, the instructions warn a prospective voter may be fined $1,000 or imprisoned up to 6 months for falsely asserting that they are indefinitely confined. This mailer went out on September 1st.

In addition to encouraging Wisconsinites to vote absentee, the WEC has also: (1) directed staff to spend federal CARES Act grant money to distribute sanitation supplies to all 72 counties in Wisconsin; (2) planned to implement intelligent mail barcodes ("IMB") to facilitate more detailed absentee-ballot tracking; (3) planned to spend up to $4.1 million on a CARES Act sub-grant to local election officials to help pay for increased elections costs caused by the pandemic; (4) made upgrades to the MyVote website; (5) issued guidance to local officials about providing drop boxes for the safe and easy return of absentee ballots; (6) made CARES Act subgrant money available for the purchase of additional, absentee ballot drop boxes; (7) urged localities to solicit election inspectors, create recruitment tools for local officials, and promote the need for poll workers; (8) produced content to educate

voters on "unfamiliar aspects of voting" for use by local election officials, voter groups, and the public; (9) worked with public health officials to produce public health guidance documents for clerks, poll workers, and the public; and (10) developed a webinar series for local officials to provide training on election procedures, including COVID-19-specific training. Just as in April, what the WEC has not done is ease any of the statutory deadlines, having again concluded on a 3-3 vote that it lacks the authority to do so even in the face of the anticipated effects of the COVID-19 pandemic.

OPINION

I. Motions to Dismiss

As an initial matter, the court will address certain issues raised in defendants' pending motions to dismiss, considering first various jurisdictional challenges and then arguments that some of plaintiffs' claims must be dismissed for failure to state a claim on which relief may be granted. [15]

[15] Specifically, the WEC moved to dismiss the Swenson plaintiffs' complaint (*see* WEC's Mot. to Dismiss ('340, dkt. #14)), and the Legislative defendants moved to dismiss the Gear, Edwards and Swenson plaintiffs' operative complaints (*see* Leg. Defs.' Mot. to Dismiss Gear Compl. ('278 dkt. #382); Leg. Defs.' Mot to Dismiss Edwards Compl. ('340 dkt. #12); Leg. Defs.' Mot to Dismiss Swenson Compl. ('459 dkt. ##27, 272)). Although the WEC also initially moved to dismiss the Gear plaintiffs' original complaint, after the Gear plaintiffs' filed a proposed, first amended complaint, plaintiffs filed a joint stipulation with the WEC, which withdrew the WEC's pending motion to dismiss the first amended complaint, while reserving its right to answer, move or otherwise plead in response to the second amended complaint. (Joint Stipulation (dkt. #230).) Finally, although the Legislative defendants did not formally move to dismiss the DNC plaintiffs' second amended complaint (the court having previously denied their motion to dismiss the DNC plaintiffs' first amended complaint (6/10/20 Op. & Order (dkt. #217)), they argued in their briefing that "especially after *Luft*, the DNC Second Amended Complaint must be dismissed for many of the same reasons supporting dismissal of the operative complaints in Gear and Swenson." (Leg. Defs.' Omnibus Br. (dkt. #454) 5 n.3.)

A. Jurisdictional Challenges

In evaluating challenges to its subject matter jurisdiction, this court "must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff." *Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993) (quoting *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993)). Still, the court may "properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co.*, 999 F.2d at 191.

The WEC argues that no actual controversy exists between that entity and plaintiffs' since the WEC neither opposes nor supports plaintiffs' requests for injunctive relief (WEC Br. ('340, dkt. #15) 4-5), and for a case to be justiciable, there must be an actual dispute between adverse litigants. (*See id.* (citing *Oneida Tribe of Indians v. Wisconsin,* 951 F.2d 757, 760 (7th Cir. 1991).) However, as the U.S. Supreme Court held in *United States v. Windsor*, 570 U.S. 744 (2013), "even where 'the Government largely agree[s] with the opposing party on the merits of the controversy,' there is sufficient adverseness and an 'adequate basis for jurisdiction in the fact that the Government intended to enforce the challenged law against that party.'" *Id.* at 759 (quoting *INS v. Chadha*, 462 U.S. 919, 940 n.12 (1983)). Similarly, in this litigation, the WEC has indicated its intention to enforce Wisconsin's current elections laws unless otherwise directed by a state or federal court. Thus, regardless of its failure to dispute plaintiffs' requested relief affirmatively, sufficient adverseness exists between the parties to create a justiciable dispute. Of course, by virtue of the intervention by multiple other defendants who *are* actively disputing plaintiffs' right

to any of the relief requested, there is little question that there is an actual dispute between the parties needing resolution by this court.

Next, both the WEC and the Legislative defendants attack plaintiffs' claims on standing grounds. To establish standing, "[t]he plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 572 U.S. 118, 125 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Again, the WEC maintains that it has "no power to enact any changes to the election laws in regard to the Spring Election, and it has no authority to change the law relative to the conduct of future elections." (WEC Br. ('340, dkt. #15) 6.) After *Windsor*, however, this is just the same "case or controversy" argument in different clothing, since the WEC's administration of Wisconsin's elections, including the enforcement of its current election laws, is the cause of plaintiffs' alleged injuries. Moreover, the WEC has the authority to implement a federal court order relating to election law to redress these alleged injuries. That the WEC maintains it lacks any *independent* authority under state law to make the changes requested by plaintiffs poses no jurisdictional barrier. If anything, it demonstrates the WEC is an indispensable party for plaintiffs to achieve the remedies they seek.

Relatedly, the Legislative defendants argue that many of plaintiffs' claims challenge independent actions of third-parties who were not named as defendants -- specifically, the USPS and local election officials -- and thus plaintiffs' lack standing to bring those claims. (Leg. Defs.' Omnibus Br. (dkt. #454) 100.) Certainly, actions of both the USPS and local

election officials appear to have contributed and may contribute to plaintiffs' alleged injuries, and those third-parties may also have some power to redress those injuries, but this does not mean the WEC's actions or inactions were not *also* causes of plaintiffs' injuries. What matters for standing is that: (1) defendant's conduct was *one* of the multiple causes; and (2) defendant can at least partially redress the wrong. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."); *Orangeburg v. Fed. Energy Reg. Comm'n*, 862 F.3d 1071, 1077-84 (D.C. Cir. 2017) ("FERC contends that the causation element is not satisfied because Orangeburg's injury is actually caused by NCUC, an absent third party, not the Commission. To be sure, NCUC -- a non-party -- is a key player in the causal story. But the existence of, perhaps, an equally important player in the story does not erase FERC's role.").

Similarly, here, the actions of the USPS and local election officials may be equally important players in the conduct of the November election but that does not erase the WEC's overall statutory responsibility for the administration of Wisconsin's elections. Wis. Stat. § 5.05(1). Regardless, it is the WEC's role and specific authority to promulgate rules and guidance to localities in order to implement Wisconsin law (including any court order) related to elections and their proper administration under § 5.05(1)(f) that is in dispute. Moreover, should this court enter a binding order, the WEC will be required to issue updated rules, procedures, or formal advisory opinions under § 5.05(5t) to ensure its implementation. This is more than enough to establish standing.

The Legislative defendants further lodge a narrower standing challenge against just one of the Swenson plaintiffs' ADA claims. (*See* Leg. Defs.' Omnibus Br. (dkt. #454) 105-08.) Specifically, they contend the Swenson plaintiffs lack standing to pursue a claim that the WEC's failure to provide accessible online ballots impermissibly discriminates against voters with vision or other print disabilities because none of the Swenson plaintiffs have such a disability. (*See id.*) As the Swenson plaintiffs point out, however, they have produced evidence that Disability Rights Wisconsin (one of the named plaintiffs in the Swenson complaint) has *itself* been injured by the alleged violation of the ADA, as it has had to divert its own resources to assist voters with those disabilities to both get access to and cast absentee ballots. (*See* Swenson Pls.' Reply (dkt. #493) 21.) Because Disabilities Rights Wisconsin has alleged a concrete and particularized injury to its own interests, and advocate for the interests of others with relevant disabilities, the Swenson plaintiffs have established standing to pursue their claim regarding accessible online ballots. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-80 (1982) (holding that organization that had to divert resources to mitigate effects of allegedly discriminatory practices had standing bring suit).

Finally, the Legislative defendants contend that plaintiffs' claims are unripe and should be dismissed under the *Burford* abstention doctrine. Little time need be spent on these contentions because the court previously addressed nearly identical arguments in an earlier opinion and order. (*See* 6/10/20 Op. & Order (dkt. #217).) The court finds no reason to depart from its earlier conclusion that plaintiffs' claims are ripe and fit for judicial review, presenting an "actual and concrete conflict premised on the near-certain

enforcement of the challenged provisions in the context of the present and ongoing COVID-19 health care crisis" and because plaintiffs are "likely to suffer adverse consequences if the court were to require a later challenge." (*Id.* at 7-8.) Further, as previously explained, the *Burford* abstention doctrine is not applicable to any of the cases or controversies before this court because Wisconsin state courts "are not specialized tribunals with a special relationship with voting rights issues" and because *Burford* abstention is often "inappropriate in federal constitutional challenges to state elections laws." (*Id.* at 17-18.)

B. Failure to State a Claim

Dismissal under Rule 12(b)(6) is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). To survive a motion to dismiss, a complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Certain of plaintiffs' claims are plainly barred by immunity doctrines, and thus, fail to state a claim. First, to the extent that any plaintiffs seek money damages pursuant to § 1983, such relief is barred by state sovereign immunity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 66 (1989). Second, the Edwards plaintiffs' claims against Wisconsin State Assembly Speaker Robin Vos and Wisconsin State Senate Majority Leader Scott Fitzgerald are foreclosed by the doctrine of legislative immunity, which provides absolute immunity from liability for an official's legitimate legislative activity. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Tenney v. Brandhove*, 341 U.S. 367, 376

(1951). The Edwards plaintiffs' complaint faults Speaker Vos and Majority Leader Fitzgerald for failing to take action to postpone the April election or otherwise enact measures regarding Wisconsin's elections in the face of the pandemic, but any decision not to act qualifies as legislative activity protected by absolute immunity. *See NRP Holdings LLC v. City of Buffalo*, 916 F.3d 177, 192 (2nd Cir. 2019) (decision not to introduce resolutions before city council was protected legislative activity).

The Edwards plaintiffs' only response to defendants' invocation of legislative immunity is to assert without legal authority that it applies only to state law claims. (*See* Edwards Pls.' Br. ('340, dkt. #25) 16.) To the contrary, the immunity doctrine is a creature of federal common law and applies to federal civil claims. *See Bogan*, 523 U.S. at 48 (explaining that the U.S. Constitution and federal common law "protect[s] legislators from liability for their legislative activities"); *NRP Holdings LLC*, 916 F.3d at 190 (describing the doctrine of absolute legislative immunity as a matter of common law created by the U.S. Supreme Court and applicable to federal civil claims).

Oddly, having asserted immunity on their behalf, the Legislative defendants nevertheless urge the court to permit Speaker Vos and Majority Leader Fitzgerald to remain as parties to defend state law. (Leg. Defs.' Br. ('340, dkt. #13) 30-31.) In doing so, they, too, cite to no legal basis for a defendant to be found immune from suit yet remain as a party. (*See id.*) Even if there were some legal basis to allow the defendants to remain, this court has previously held that an individual "legislator's personal support [of a law he or she enacted] does not give him or her an interest sufficient to support intervention." *See One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 397 (W.D. Wis. 2015) (citing *Buquer v. City*

of Indianapolis, No. 11–cv–00708, 2013 WL 1332137, at *3 (S.D. Ind. Mar. 28, 2013), *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 251 (D.N.M. 2008)). Indeed, to their credit, defendants themselves readily admit that the Edwards plaintiffs have "name[d] the Wisconsin Assembly and the Wisconsin Senate as parties, meaning there is no practical need to retain Speaker Vos and Majority Leader Fitzgerald as additional named Defendants here." (Leg. Defs.' Br. ('340, dkt. #13) 31.) Having been presented no legal or practical reason to grant immunity but retain Speaker Vos and Majority Leader Fitzgerald as defendants, the court will dismiss them from this case.[16]

II. Motions for Preliminary Injunction[17]

To make out a prima facie case for a preliminary injunction, a party must show (1)

[16] Defendants also move to dismiss the Edwards plaintiffs' claim for monetary damages under the ADA. A required element of a compensatory damages claim for intentional discrimination under Title II of the ADA is deliberate indifference. *See Lacy v. Cook Cty., Ill.*, 897 F.3d 847, 862-63 (7th Cir. 2018). This requires both "knowledge that a harm to a federally protected right is substantially likely" and "a failure to act upon that likelihood." *Id.* at 863 (quoting *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013)). The WEC and Legislative defendants both argue that the Edwards plaintiffs do not assert a cognizable claim for ADA damages because they failed to allege deliberate indifference explicitly. (WEC Defs.' Mot. to Dismiss Br. ('340, dkt. #15) 8; Leg. Defs.' Mot. to Dismiss Br. ('340, dkt. #14) 24.) Reading the Edwards plaintiffs' complaint in the light most favorable to them, as this court must at the pleading stage, it is reasonable to infer this claim based on their allegations that defendants have (1) knowledge of the past and planned enforcement of Wisconsin's election laws, as well as the dangers posed by the COVID-19 pandemic, and (2) have and are continuing to fail to act on that likelihood. Thus, plaintiffs have alleged sufficient facts to support their implicit claim for deliberate indifference and survive the defendants' motions to dismiss. Of course, whether or not there was or is likely to be a violation of the ADA, much less a deliberate one, remains to be proven. Finally, as to defendants' remaining grounds for dismissal based on plaintiffs' failure to plead sufficient allegations to support their claims as a matter of law, the court will address these arguments in its substantive consideration of each of plaintiffs' claims in the discussion that follows.

[17] In addition to the parties' briefs, the court received two amicus briefs from Common Cause (dkt. #251) and the American Diabetes Association ('340 dkt. #23). The policy of the Seventh Circuit is to "grant permission to file an amicus brief only when: (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another

irreparable harm, (2) inadequate traditional legal remedies, and (3) some likelihood of success on the merits. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If all three threshold requirements are met, the court must then engage in a balancing analysis, weighing "the harm the plaintiff will suffer without an injunction against the harm the defendant will suffer with one." *Harlan v. Scholz*, 866 F.3d 754, 758 (7th Cir. 2017). The court must also "ask whether the preliminary injunction is in the public interest." *Id.* "The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984).

A. *Anderson-Burdick* Analysis

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court set forth a balancing test to determine whether an election law unconstitutionally burdens a citizen's right to vote. Under the *Anderson-Burdick* test, a court must weigh "the character and magnitude of the asserted injury to the rights" against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).[18]

case, and the case in which he seeks permission to file an amicus curiae brief, may by operation of stare decisis or res judicata materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Following that same policy, the court concludes that these parties fall into the latter category, will grant their respective motions, and has considered their proposed briefs.

[18] As a group, plaintiffs also invoke four additional, legal claims: (1) Title II of the Americans with

The Seventh Circuit recently applied and elaborated on this merits test in its long-awaited decision in *Luft v. Evers*, 963 F.3d 655, considering a series of challenges to Wisconsin's election laws, including some of the provisions at issue in this litigation. Fundamentally, the *Luft* court cautioned that the burden of a specifically challenged election provision must be considered against "the state's election code as a whole" -- that is, by "looking at the whole electoral system," rather than "evaluat[ing] each clause in isolation." *Id*. at 671. *Luft* further "stressed" that "Wisconsin's system as a whole is accommodating." *Id.* at 674. At the same time, the court reaffirmed its earlier holding that "the right to vote is personal" and, therefore, "the state must accommodate voters" who cannot meet the state's voting requirements "with reasonable effort." *Id.* at 669.

Having already addressed at length the scope of the state's constitutional obligation to accommodate voting rights during the COVID-19 pandemic in its April 2, 2020, decision (4/2/20 Op. & Order (dkt. #170) 26-28), which was largely left unchallenged on appeal to the Seventh Circuit, *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1546, -1545, (7th Cir. April 3, 2020), and U.S. Supreme Court, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. ____ (2020) (per curiam), the court simply adopts it

Disabilities Act, 42 U.S.C. § 12132; (2) the *Mathews v. Eldridge*, 424 U.S. 319 (1976), procedural due process balancing test; (3) the Equal Protection Clause's guarantee against arbitrary election administration; and (4) section 11(b) of the Voting Rights Act ("VRA"). The latter three legal claims either prove a poor fit for the relief plaintiffs are seeking, or plaintiffs fail to describe how these standards would advance their claims beyond the *Anderson-Burdick* test. Thus, for reasons addressed at the close of this opinion, the court concludes that plaintiffs have failed to demonstrate any likelihood of success on the merits as to those claims for relief beyond that available under the *Anderson-Burdick* test. Finally, three of the cases before the court also pursue claims for injunctive relief under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. At the hearing, plaintiffs specifically relied on the ADA to advance two of the requests for relief, to enjoin or modify the witness signature requirement and to provide an accessible, online absentee ballot. The court addresses those challenges where relevant below.

again by reference. Instead, in considering plaintiffs' requests for injunctive relief with respect to the November election, the court will stress the three, core concerns that drives its analysis here.

First, the court is mindful, as it must be, that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion," and "[a]s an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). In weighing the individual requests for relief, the court must consider the risk that any of its actions may create confusion on the part of voters, either directly or indirectly, by creating additional burdens on the WEC and local election officials. To ameliorate that risk, the court has generally attempted to issue a decision far enough in advance to allow an appeal of the court's decision, provide sufficient time for the WEC and local election officials to implement any modifications to existing election laws, and to communicate those changes to voters. Issuing the decision now, six weeks out, rather than two weeks as in the April election, does not come without its tradeoffs: the court must make certain, reasonable projections about what the pandemic and other events relevant to voting will be like by late October and early November. Of course, the court would prefer to be making these decisions with a more complete understanding of the record of voter behavior during that time, but that luxury does not exist. On the other hand, the court has a much better understanding of the likely impacts of the pandemic on voting behavior, as well as the State of Wisconsin's capacity to address them, than it did in March.

Second, the court will focus solely on how the COVID-19 pandemic presents unique challenges to Wisconsin's election system and burdens Wisconsin voters. The court is not

interested in plaintiffs' general challenges to Wisconsin elections, because those challenges have now been largely addressed in *Luft* or, to the extent left open, remain subject to further proceedings before Judge Peterson. On the other hand, the court rejects the Legislature's attempts to paint plaintiffs' claims as purely facial challenges, arguing that specific individuals who face insurmountable burdens due to the COVID-19 pandemic could bring as-applied challenges for relief at a later date. Still, recognizing that the line between a facial and an as-applied challenge can be hazy, *see Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012), plaintiffs' claims here are only viable to the extent they constitute as-applied challenges and, in particular, are compelling after fairly extrapolating from relevant voters' and local election officials' experiences during the pandemic in April to prove near certain burdens in November, particularly with respect to the availability of mail-in absentee, early absentee and in-person voting options.

To the extent that some of the relief requested -- for example, the extension of certain deadlines -- is substantial likely to provide needed relief to Wisconsin voters and poll workers burdened by the pandemic's impact, and even likely to "severely restrict" an individual's right to vote, the state may still articulate "compelling interests" for the challenged election laws and prove those laws have been "narrowly tailored." *Luft*, 963 F.3d at 672. As to other requested relief, plaintiffs seek "safety nets" to ensure that the state is protecting the "personal" nature of the right to vote. *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("*Frank II*"); *Luft*, 963 F.3d at 677-78 (reaffirming *Frank II* holding that "voting rights are personal," requiring "that each eligible person must have a path to cast a vote"). Regardless of how it is characterized, the relief requested by plaintiffs

must be consistent with the Seventh Circuit's decisions in *Luft* and *Frank II*. The rub, as described in detail below, is whether plaintiffs have submitted sufficient evidence from which this court must conclude that certain individuals are unlikely to be able to exercise their right to vote despite reasonable effort.

Third, while the court will take up each of plaintiffs' requested items of relief, after *Luft*, the court must consider each request in light of the election system as a whole. Here, the court principally considers the interplay between the WEC's, local officials' and voters' expressed preference for absentee voting by mail in this election compared to the historic, overwhelming preference for in-person voting. Obviously, ensuring that mail-in, absentee voting is a tenable option for the majority of the electorate who are expected to vote this way in November, whether based on the WEC's strongly-stated preference or on personal risk assessments, will decrease the number of individuals who will need to vote in-person. In turn, this will help ensure that there are adequate and safe, in-person voting sites for individuals unable or uninterested in voting by mail, whether because of a personal preference to exercise their right to vote in person or because of difficulties in providing the necessary photo ID, obtaining a required witness signature, or negotiating the U.S. mail system., Even so,, to the extent the State has had more time to address those issues before this election and chosen not to address them by virtue of a lack of political will or simple inertia, the court will only grant relief where this failure to act in the face of the pandemic is substantially likely to severely restrict the right to vote.

With those considerations in mind, the court addresses plaintiffs' requests for preliminary injunctive relief in the following, four categories: registration, absentee voting,

in-person voting, and miscellaneous relief.

1. Registration

a. Extending Registration Deadlines

The DNC plaintiffs seek an order enjoining Wisconsin Statute § 6.28(1), which requires a mail-in registration to be received by the clerk or postmarked no later than the third Wednesday preceding the election (here, October 14), and requires electronic registrations to be received by 11:59 p.m. on the third Wednesday preceding the election. DNC argues that the court should extend both deadlines to the Friday before the election, October 30, to align with the deadline for registering in person before election day. As the DNC points out, the court granted similar, preliminary relief to that requested by plaintiffs here before the April election, extending the mail-in postmark date and electronic registration receipt deadline by 12 days to the Friday before the election. (3/20/20 Op. & Order (dkt. #37) 10-15.)

However, the six weeks leading up to this election are different than the week or two before the April 7 election, when the pandemic was a new phenomenon and demanded swift adjustments to the timetable to accommodate voting from the safety of one's home, rather than venturing out into the public. As defendants persuasively argue, individuals are now sufficiently on notice of the pandemic's risks, its impacts on their daily lives, and measures that can be taken to reduce those risks. So, to the extent individuals wish to register electronically or by mail to facilitate later voting by mail, defendants argue that voters must plan accordingly and complete their electronic and mail-in registrations by the established deadline of October 14.

Of course, what the Legislature originally afforded as a convenience to in-person registration and voting has, at least for this election, become a necessity for some, as well as an important tool for WEC and local officials to reduce the number of people voting in person on the day of the election. Even more to the point, as WEC Administrator Wolfe testified at the hearing, registering in person on the day of the election not only risks longer lines, but increases the amount of time individuals are inside polling stations, as well as requiring person-to-person engagement in two separate processes, which are further prolonged by the additional, COVID-19 protections of social distancing and masking. (8/5/20 Hr'g Tr. (dkt. #532) 60-61, 98-100.) Facilitating early registration electronically and by mail will not only limits sustained interactions on election day, but will allow some, significant number of unwary individuals sufficient time to request absentee ballots and vote by mail (or by drop-off), rather than voting in person before or on the day of the election. For these reasons, WEC Administrator Wolfe testified at the hearing, the tradition of having a significant number of individuals register in person on the day of the election is incompatible with the goal of -- and projected, significant demand for -- voting by mail via absentee ballot. (*Id.* at 57.) Cutting off electronic and mail-in registrations three weeks before the election will not just thwart efforts to encourage Wisconsin voters to vote by mail via absentee ballots, but increase the burdens and risks on those choosing to vote in person. This is especially true in light of Wisconsin's "cultural tradition" of registering on election day, with more than 80% of registered voters having engaged in that process in the past. (*Id.* at 58.)

Still, the recognized health benefits of driving the electorate to mail-in registration

and absentee voting is probably insufficient alone to justify this court modifying an established deadline for doing so. The difference in April, and again this November, is the sheer number of new registrations and absentee voters who will rely on the U.S. mail to do so, especially as compared to past elections, and the risks of severely restricting that option during the pandemic for those who will come to the realization that the window has closed too soon for them to register and request an absentee ballot. Unless some relief is provided to the October 14 deadline, the likelihood of thousands of voters missing this window and choosing not to vote in person is quite high, and while that eventuality may be present in any election, the risks expand to tens of thousands of voters in the midst of the pandemic. For these reasons, plaintiffs have demonstrated that discontinuing electronic and mail registration options precipitously on October 14 will likely restrict many Wisconsin citizens' freedom to exercise their right to vote, at least without having to take unnecessary risks of COVID-19 exposure by registering in person, and for some significant minority of citizens, will severely restrict that right because of age, comorbidities or other health concerns. *See Luft*, 963 F.3d at 671–72 ("Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules.") (citations omitted).

In contrast, the only interest in enforcing the October 14 deadline articulated by the defendants is providing sufficient time for election officials to prepare voter records. As WEC Administrator Wolfe testified at the hearing, however, this deadline could be extended an additional week until October 21, 2020, while still providing sufficient time for local election officials to print poll books. (8/5/20 Hr'g Tr. (dkt. #532) 62.) Indeed,

the record reflects that local election officials were able to accommodate the court's April 2020 extension of electronic registration by 12 days before the April election without significant impact of local officials' ability to manage in-person voting. (*Id.* at 63-64; *see also* DNC Pls.' PFOFs (dkt. #419) ¶ 194.)

Accordingly, the court concludes that plaintiffs have sufficiently demonstrated that the current electronic and mail-in registration deadline of October 14, 2020, will substantially (and in a smaller, but significant group, severely) restrict the right to vote during the ongoing pandemic, particularly after considering the likely impact of increased, in-person registration on the orderly, safe functioning of voting on Election Day. Moreover, by moving the deadline only one week to October 21st, rather than the two-week extension requested by plaintiffs, the court has amply accounted for any arguable state interest in allowing sufficient time to prepare voter records. Finally, with this accommodation, the court finds that the balance of interests weighs heavily in favor of plaintiffs as to this narrow relief.

b. Proof-of-Residence Requirement

The DNC plaintiffs also seek an order enjoining the proof-of-residence requirement under Wisconsin Statute § 6.34(2) for individuals who attest under penalty of perjury that they cannot meet the requirement after reasonable efforts. During the evidentiary hearing, the DNC plaintiffs acknowledged that they do not have any declarations establishing an actual instance of a voter being unable to meet this requirement. (8/5/20 Hr'g Tr. (dkt. #532) 200.) In light of the record evidence, this is unsurprising, since it is fairly easy to satisfy the requirement. For those requesting an absentee ballot electronically, a driver's

license also satisfies the proof-of-residence requirement. (8/5/20 Hr'g Tr. (dkt. #532) 80 (Wolfe testifying that "[i]f someone registers to vote online, they do not need to provide proof of residence because the match with their DMV record fulfills that requirement").) If a person wishes to register by mail or early in person, a utility bill would suffice, and the voter would not even need to provide a copy of it. For some individuals, this requirement still may constitute a burden -- for example, as the DNC plaintiffs argued at the hearing, there may be college students not on a lease or on utility accounts -- but this is *always* the case and not specific to the pandemic.[19] Finally, as the Seventh Circuit recognized in *Luft*, there is a significant state interest in ensuring that individuals are voting in their proper districts. *Luft*, 963 F.3d at 676. On this record, therefore, the court concludes that plaintiffs are not likely to succeed in demonstrating that the proof-of-residence requirement substantially burdens the right to vote or that this burden outweighs the State's interests, even in light of the circumstances surrounding the COVID-19 pandemic.

2. Absentee Voting

a. Counting of Absentee Ballots

Next, the Edwards and Swenson plaintiffs seek an order enjoining Wisconsin Statute §§ 6.88, 7.51-.52, which require that absentee ballots not be counted before election day. Plaintiffs argue that this requirement thwarts local election officials' ability to address defects in absentee ballots -- particularly a voter's failure to comply with the

[19] While the DNC plaintiffs propose use of "an affidavit" as a possible "safety net," *Frank II*, 819 F.3d at 387, they fall short of proposing specific language, much less describing how this exception would be administered. Regardless, the court is concerned about adding any additional burdens on the WEC's electronic registration process or on the stretched resources of local election officials.

witness certification requirement. If the court were to enjoin this requirement and allow counting before the election day, then local election officials could find defects, contact voters and give them a chance to fix them before it is too late.

The court is not persuaded by this argument. As the Legislature explains, Wisconsin law already provides procedures for absentee ballot voters to correct errors. Indeed, the errors typically will occur on the outside of the envelope, and therefore, it need not be opened, nor must the ballot be counted for an election official to alert a voter of a witness certification error or some other defect. Regardless, the court agrees with the Legislature that plaintiffs' proposed solution is a poor fit for the general problem of absentee ballot errors. Finally, plaintiffs' argument is insufficiently tied to the particular circumstances surrounding the pandemic. Indeed, to the extent that plaintiffs pursue this injunction to facilitate efficient counting of absentee ballots, the court's extension of the absentee ballot receipt deadline sufficiently addresses this concern. If anything, by precluding early counting of absentee ballots during a period when they are likely to comprise 60 to 75% of all ballots cast, the state's interest in securing the tallying process until after the election is closed is stronger. On this record, the court finds no basis to grant relief.

b. Witness Signature Requirement

All four plaintiffs next seek an order enjoining the witness signature requirement under Wisconsin Statute § 6.87(2), although the plaintiffs again suggest various replacements for this requirement. In essence, the DNC plaintiffs seek to enjoin this requirement for those individuals who (1) attest under penalty of perjury that they cannot meet the requirement after reasonable efforts, (2) sign a form and provide contact

information, and (3) cooperate with local election officials who may follow-up. The DNC argues that this process would satisfy *Frank II* and *Luft*. The Edwards plaintiffs similarly request that the court allow the small population of people who cannot secure a witness to sign a sworn statement to that effect. Next, the Gear plaintiffs propose an order following the Seventh Circuit's opinion reviewing this court's April preliminary injunction by allowing voters to write in the name and address of a witness but not require a signature. Finally, the Swenson plaintiffs argue that self-certification should be sufficient to satisfy the State's interest.

In support of their various requests for relief from a witness signature, plaintiffs submit substantive evidence in the form of affidavits from individuals who recount difficulties they encountered in obtaining or attempting to obtain a witness signature during the April election. (*See, e.g.*, DNC Pls.' PFOFs (dkt. #419) ¶¶ 157-60 (citing declarations).) Plaintiffs also assert that the proposed alternatives in the April election (e.g., have someone witness it via a video call or through a window) obviously did not work in light of the roughly *14,000* ballots that were rejected because of insufficient witness certifications, and further suggest that some portion of the 135,000 unreturned ballots were not submitted because voters could not secure a witness.

While acknowledging the possible burden that the witness signature requirement will place on some voters, the Seventh Circuit reversed this court's entry of preliminary relief from this requirement for the April 2020 election. *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-1538, -1546, -1545, (7th Cir. April 3, 2020). Moreover, it did so even though the arguable need was greater then, given (1) the compressed period for election

officials to adjust to the COVID-19 restrictions, (2) increased uncertainty as to how the virus spreads and risks of contracting it, and (3) the dramatic increase in first-time absentee applications and voters. Further, the Seventh Circuit faulted this court for giving inadequate weight to the State's interests behind the witness requirement and vacated that portion of this court's preliminary injunction, rather than merely modifying it to require a more robust affidavit or a witness, but no signature. Finally, the Supreme Court recently signaled its own reticence to set aside such state law requirements by staying the effect of an Eleventh Circuit decision blocking photo-ID and witness-signature requirements for absentee ballots. *See Merrill v. People First of Ala.*, No. 19A1063 (U.S. July 2, 2020).

To the extent, the Seventh Circuit left room for other possible workarounds to the witness-signature requirement, the WEC has again proposed a number of options for any voters having difficulty meeting the requirement for safety or other reasons all of which would allow a voter to maintain a safe distance from the witness. *See* WEC, "Absentee Witness Signature Requirement Guidance" (Mar. 29, 2020), https://elections.wi.gov/node/6790. Given a greater understanding as to the efficacy of masks and social distancing in substantially lowering the risk of transmitting the virus (and the seemingly reduced risks of its transmittal on surfaces than by aerosols), these options also appear more viable and safe for individuals wishing to vote via absentee ballot than they did in April; albeit for some, the requirement may still present a significant hurdle. Finally, under *Purcell*, there remains the challenge of fashioning and implementing an effective exception to this requirement in the shorter period for voting via absentee ballot in terms of: drafting an appropriate form, publicizing the option, managing its distribution

to voters who cannot meet the requirement, and effecting the return of that form.

Viewing the election system as a whole, including the flexibility surrounding this requirement, coupled with additional options for voting in person, either early or on the day of the election, the court concludes that plaintiffs have failed to demonstrate a sufficient likelihood of success in proving that the burden placed on some voters by this requirement outweighs the State's interests and possible disruption in the orderly processing of an unprecedented number of absentee ballots. Accordingly, the court will deny this request for relief under *Anderson-Burdick*.

As noted above, some of the plaintiffs assert claims under the ADA as well. At the hearing, the Swenson plaintiffs specifically argued that relief from the witness signature requirement was warranted in light of the ADA. To establish a violation of the ADA, a plaintiff "must prove that he is a 'qualified individual with a disability,' that he was denied 'the benefits of the services, programs, or activities of a public entity' or otherwise subjected to discrimination by such an entity, and that the denial or discrimination was 'by reason of' his disability." *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (quoting 42 U.S.C. § 12132). A defendant's "failure to make reasonable modifications in policies, practices, or procedures can constitute discrimination under Title II." *Lacy v. Cook Cty.*, 897 F.3d 847, 853 (7th Cir. 2018) (citing 28 C.F.R. § 35.130(b)(7)(i)3). An accommodation is reasonable if "it is both efficacious and proportional to the costs to implement it." *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 784 (7th Cir. 2002). The ADA, however, does not require a modification that would "fundamentally alter the nature of the service, program, or activity." *P.F. by A.F. v. Taylor*,

914 F.3d 467, 472 (7th Cir. 2019) (quoting 28 C.F.R. § 35.130(b)(7)(i)).

Here, for the same reason that the court concluded the risks of administering an affidavit, self-certifying or other program outweigh the burden on voting rights, the court also concludes that the recommended accommodation is not reasonable under the ADA, because it is not "efficacious and proportional to the costs to implement it." *Oconomowoc Residential Programs*, 300 F.3d at 784. As such, plaintiffs have not shown a likelihood of success in proving that the witness signature requirement violates the ADA.

c. Receipt Deadline of Absentee Ballots

Next, the DNC plaintiffs and the Swenson plaintiffs seek an order enjoining the requirement that absentee ballots must be received by election day under Wisconsin Statute § 6.87(6), urging instead that the ballots again be postmarked by election day to be counted. In its prior opinion and order, the court extended the deadline for receipt of mailed-in absentee ballots until the Monday after the election day. On appeal, the Seventh Circuit upheld this same extension, as did the U.S. Supreme Court, except for requiring that the return envelope be postmarked before or on election day.

The reasons for the court's extension of the deadline for receipt of mailed-in absentee votes for the April 2020 election applies with almost equal force to the upcoming November 2020 election. The WEC is now projecting 1.8 to 2 million individuals will vote via absentee ballot, exceeding the number of absentees by a factor of three for any prior general, presidential elections *and* exceeding by as much as a million the number of absentee voters that overwhelmed election officials during the April 2020 election. As the court discussed during the August 5th hearing, Wisconsin's election system also allows

individuals to request ballots up to five days before the election. While this deadline has worked for the most part during a normal election cycle, the same statutory deadline is likely to disenfranchise a significant number of voters in the November election given the projected, record volume of absentee ballots. On top of the sheer volume of absentee ballot requests that election officials found difficult to manage, the record also establishes that the USPS's delivery of mail has slowed due to budget constraints or other reasons, and will undoubtedly be overwhelmed again with ballots in November, as they were in April.

Regardless of cause, plaintiffs have established significant problems with fulfilling absentee ballot requests timely, and even greater problems in getting them back in time to be counted. Indeed, those problems would have resulted in the disenfranchisement of some 80,000 voters during the April election but for this court's entry of a preliminary injunction, and there is *no* evidence to suggest that the fundamental causes of these problems have resolved *or* will be resolved in advance of the November election. To the contrary, the WEC acknowledges that the unprecedented numbers of absentee voters will again be very challenging for local election officials to manage in the compressed time frame under current law despite their best efforts to prepare for and manage this influx, and they have no reason to expect any better performance by the USPS.[20]

[20] This is not to denigrate the ongoing efforts of the small staff at WEC and efforts of local election officials, nor of postal workers, just to reflect the systemic issues that will arise in a system never meant to accommodate massive mail-in voting. Indeed, in addition to its efforts to encourage staffing up locally, WEC worked with USPS to add bar codes to absentee ballots, but without increased USPS personnel or automated tracking equipment, this is unlikely to change the speed of receipt of applications or absentee ballots, much less receipt of executed ballots. At best, it may help to better track how thousands of applications and votes became misplaced long after completion of the November election.

In response, the Legislature argues that individuals should request ballots now, so that they can receive, complete and mail them back well in advance of the statutory deadline, which requires receipt on or before election day. The court whole-heartedly agrees that Wisconsin voters should proactively manage their voting plans, request absentee ballots online or by mail *now* (or as soon as possible thereafter), if they wish to vote by absentee ballot, and then diligently complete and return them well in advance of the election. *Everyone* -- the WEC, the Legislature, other elected officials, and the political parties and affiliated groups -- should be advocating for and to a large extent are advocating for such action, although the latter entities are more targeted at best and subject mischief at worst. Nonetheless, given the sheer volume expected this November, there remains little doubt that tens of thousands of seemingly prudent, if unwary, would-be voters will not request an absentee ballot far enough in advance to allow them to receive it, vote, and return it for receipt by mail before the election day deadline despite acting well in advance of the deadline for requiring a ballot.

While the Legislature would opt to disregard the voting rights of these so-called procrastinators, Wisconsin's election system sets them up for failure in light of the near certain impacts of this ongoing pandemic. If anything, the undisputed record demonstrates that unwary voters who otherwise reasonably wait up to two weeks before the October 29, 2020, deadline, to request an absentee ballot by mail face a significant risk of being disenfranchised because their executed, mailed ballot will not be received by officials on or before the current election day deadline. Moreover, it is particularly unreasonable to expect undecided voters to exercise their voting franchise by absentee ballot well before the

end of the presidential campaign, especially when the Wisconsin's statutory deadline is giving them a false sense of confidence in timely receipt.

Not really disputing the magnitude of this risk in light of the vast, unprecedented number of absentee ballots received after the deadline in April, the Legislature instead argues that a similar extension this time will somehow undermine the state's interests in having prompt election results. Even this argument rings hollow during a pandemic, but it also ignores that some fourteen states, other than Wisconsin and the District of Columbia, follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election, so long as they are timely postmarked. (DNC Pls.' Supp. PFOFs (dkt. #501) ¶ 19.) As such, Wisconsin will not be an anomaly. Furthermore, by including a postmark-by-election-day requirement, there is no concern that initial election results will influence a voter's decision. Moreover, unlike in April, the court will not require election officials to refrain from publishing results until after the extended absentee ballot deadline, since that requirement was only added because of this court's original decision *not* to include a postmark deadline. With the guidance of the United States Supreme Court that a postmark deadline is warranted, any concern about early release of election results is mitigated.

Finally, while not addressed by defendants, plaintiffs offered evidence that the election day receipt requirement actually furthered the state's interest in completing its canvass during the April election. Regardless, WEC Administrator Wolfe testified that election officials were able to meet all post-election canvassing deadlines notwithstanding this court's six-day extension of the deadline in April, and the extension gave election

officials time to tabulate and report election results more efficiently and accurately. (DNC Pls.' PFOFs (dkt. #419) ¶ 195.) Nor have defendants identified any other predicted or unforeseen anomalies arise because of this extension. On the contrary, as previously discussed, there is strong evidence that as many as 80,000 voters' rights were vindicated by the extension in the primary election, and a reasonable extrapolation for the general election could well exceed 100,000.

Thus, on this record, the court concludes that plaintiffs have shown a likelihood of success in demonstrating the risk of disenfranchisement of thousands of Wisconsin voters due to the election day receipt deadline outweighs any state interest during this pandemic. Accordingly, the court will grant this request, extending the receipt deadline for absentee ballots until November 9, 2020, but requiring that the ballots be mailed and postmarked on or before election day, November 3, 2020.[21]

[21] The court is mindful that the addition of a postmark requirement by the U.S. Supreme Court created some unintended consequences in April 2020, since a small proportion of the absentee ballots returned by mail lacked a legible postmark, apparently as a result of processing anomalies at local post offices. The court was hopeful that the planned use of intelligent mail barcodes ("IMB") would assuage this concern, although it appears that the presence of IMBs on most return envelopes is uncertain, if not unlikely. To the extent that the use of IMBs does not resolve this issue, the WEC will again need to provide guidance to local election officials, as it did for the April election. Given the political deadlock among WEC Commissioners and the apparent lack of state law guidance on this subject -- as well as the fact that this postmark requirement is federally mandated and the apparent importance of equal treatment of ballots after *Bush v. Gore*, 531 U.S. 98 (2000) -- it is this court's view that local election officials should generally err toward counting otherwise legitimate absentee ballots lacking a definitive postmark if received by mail after election day but no later than November 9, 2020, as long as the ballot is signed and witnessed on or before November 3, 2020, unless there is some reason to believe that the ballot was actually placed in the mail after election day. *See Shiflett v. U.S. Postal Serv.*, 839 F.2d 669, 672 (Fed. Cir. 1988) (discussing prior version of regulation when timing was triggered by mailing of appeal to the Merit Systems Protection Board, explaining that "[t]he date of a filing by mail shall be determined by the postmark date; if no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt"); *Wells v. Peake*, No. 07-913, 2008 WL 5111436, at *3 (Vet. App. Nov. 26, 2008) (relying on prior regulation where timing of appeal was triggered by its mailing, to

d. Electronic Receipt of Absentee Ballots

The Gear, Edwards and Swenson plaintiffs further request an injunction preventing enforcement of Wisconsin Statute § 6.87(3)(a), which limits delivery of absentee ballots to mail only for domestic civilian voters, while military and overseas civilian voters can receive an absentee ballot by fax or email delivery, or can even access a ballot electronically, then download and print it. Wis. Stat. § 6.87(3)(d). As explained above, Judge Peterson invalidated this ban on email delivery of absentee ballots for domestic civilians in *One Wisconsin Institute*, 198 F. Supp. at 946-48, but that order was reversed by the Seventh Circuit's decision in *Luft*. Regardless, for the roughly four-year period of time that this court's order was in place, local election officials were given the option to email or fax absentee ballots to voters to ensure timely and efficient delivery.

Plaintiffs' renewed request for this relief is limited to those voters who timely request an absentee ballot (having already timely submitted their photo ID and registered by mail), had their requests processed *and* an absentee ballot mailed to them, but because of issues with the USPS (or for some other reason), the voters did not actually receive an absentee ballot by mail in a timely fashion. The record is replete with such examples from the April 2020 election. (*See* Swenson Pls.' PFOFs ('459, dkt. #42) ¶¶ 51, 164, 176 (citing declarations); DNC Pls.' PFOFs (dkt. #419) ¶ 73 (citing declarations); Edwards Pls.' PFOFs (dkt. #417) ¶¶ 67-162, 177-81) (citing declarations); Gear Pls.' PFOFs (dkt. #422)

explain that "[s]ince there was no postmark, the BVA applied 38 C.F.R. § 20.305(a), which presumes the postmark date to be five days before the date VA receives the document, excluding Saturdays, Sundays, and legal holidays").

¶¶ 37, 43, 81, 157-677 (citing declarations).)[22]

In response, the Legislature argues generally that there are no special circumstances here to warrant granting this relief, even temporarily. The record strongly suggests otherwise. Specifically, the evidence is nearly overwhelming that the pandemic *does* present a unique need for relief in light of: (1) the experience during the Spring election, (2) much greater projected numbers of absentee ballot requests and votes in November, and (3) ongoing concerns about the USPS's ability to process the delivery of absentee ballot applications and ballots timely. None of this was remotely contemplated by the Legislature in fashioning an election system based mainly in person voting, nor addressed by the Seventh Circuit's recent decision in *Luft*. Moreover, the relief requested is narrowly tailored only to those voters who timely fulfilled *all* of the necessary steps to vote by mail, but were thwarted through no fault of their own. Indeed, this is exactly the "1% problem" that the Seventh Circuit indicated requires a safety net in both *Luft* and *Frank II*. The Gear plaintiffs further suggest that the court limit it to the week before the deadline for requesting absentee ballots, which for this election is October 29, 2020. Up until that deadline, voters may request a replacement ballot by mail. *See* Wis. Stat. § 6.86(5) (explaining process for requesting an absentee ballot).

The Legislature also argues that this solution may create significant administrative

[22] The Swenson plaintiffs also request online ballot delivery for individuals with print disabilities under the ADA. While this request may have merit, plaintiffs have failed to explain adequately why the current options have proven inadequate in past elections or how the pandemic creates sufficient, additional burdens to warrant relief. Given the numerous requests for relief in these consolidated cases, the court must remain focused on those requests for which the need and solution are clear and circumstances surrounding the pandemic in particular warrant an injunction.

hurdles for local election officials, specifically citing to the need by local election officials to recast the absentee ballot into a form that is readable by voting machines. However, local election officials themselves represent that this inconvenience is outweighed by the benefit of having fewer, in-person voters on election day. (Gear Br. (dkt. #421) 42.) Plus, Wisconsin has a four-year history when fax or electronic delivery was available to all voters at the discretion of local election officials without incident. In contrast, the court's injunction will only apply to a narrow subset of those voters for whom an absentee ballot was not received timely by mail, who afterwards request a replacement ballot in the week leading up to the deadline for making such a request, *and* satisfy local election officials of the need for an alternative means of delivery. For all these reasons, this limited relief should not overtax election officials' abilities to administer the November election.

Finding that plaintiffs are likely to succeed on their claim that limiting receipt of absentee ballots to mail delivery burdens voters' rights who fail to receive their absentee ballot timely, and that this burden is not outweighed by the interests of the State, the court will grant that relief. As set forth below, however, the ban on allowing online access to replacement absentee ballots or emailing replacement ballots is only lifted for the narrow period from October 22 to October 29, 2020, as to those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot in time to vote. For the limited number of disabled who truly require an electronic ballot to vote effectively under the ADA, and have failed to discern an effective means to vote using a hard absentee ballot, after meeting all the same requirements set forth above for all voters, this may also provide an alternative.

e. Mail Absentee Ballots to All Registered Voters

Finally, with respect to absentee ballots, the Edwards plaintiffs seek an order requiring the WEC to send out absentee ballots to all registered voters, or at least to all voters who previously voted absentee. This request was not pursued at the hearing, and for good reason, since it is neither narrowly tailored to the alleged violations to voting rights caused by the pandemic, nor considers the substantial burden it would place on the WEC and local election officials who have already begun responding to actual applications for absentee ballots. The court, therefore, denies this request.

3. In-Person Voting

a. Early In-Person Voting

Plaintiffs further seek several injunctions relating to in-person voting. To begin, the Edwards plaintiffs seek to enjoin Wisconsin Statute § 6.86(1)(b), which limits in-person, absentee voting to the period beginning 14 days before the election and ending the Sunday before the election. This request warrants little discussion because the Edwards plaintiffs failed to develop the record as to why a 12-day period is not sufficient to provide voters an adequate opportunity to vote early in-person. Viewing the election system as whole, a two-week period for in-person, early voting, is sufficient to protect voters' constitutional rights, especially when considered in light of a robust mail-in absentee voting option and what will hopefully be a generally safe and adequate, in-person voting opportunity on the day of the election.

b. Selection of Early In-Person Voting Sites

The Edwards and Swenson plaintiffs also seek to enjoin Wisconsin Statute §

6.855(1), which requires municipalities to designate in-person, absentee voting site or sites (other than the clerk of board of election commissioners' office) 14 days before absentee ballots are available for the primary. For the November election, this means the required designations were due by June 11, 2020. Plaintiffs contend that extending this deadline would (1) allow increased flexibility and (2) reduce crowds and encourage social distancing by allowing extra sites added. Here, again, plaintiffs have failed to develop any record to find that additional, in-person voting sites are necessary to meet the demand of voters who wish to vote in person before the election day, especially given that voters may do so over a 12-day period of time. Accordingly, the court will also deny this request.

a. Photo ID Requirement

The DNC and Edwards plaintiffs both seek an order enjoining the photo ID requirement under Wisconsin Statute § 6.87(1), although the contours of the relief requested are different: the DNC plaintiffs seek to enjoin the requirement for those individuals who attest under penalty of perjury that they cannot meet those requirements after reasonable efforts; while the Edwards plaintiffs seek to enjoin the requirement for people with disabilities if they swear that they are unable to obtain the required ID.

The DNC's request for relief from the photo ID requirement falters for similar reasons as plaintiffs' request for relief from the proof-of-residence requirement. When pressed at the hearing, the DNC plaintiffs listed four declarations from individuals who they represented were not able to vote in the April 2020 election because of the ID requirement. From the court's review of these four declarations, only one -- the declaration of Shirley Powell (dkt. #341) -- actually provides support for the requested relief. Powell

avers that she attempted to request an absentee ballot by mail, but could not do so because she did not want to leave her house to obtain the necessary copy of her photo ID. (*Id.* ¶ 5.)[23] That proof falls well short of a substantial burden on her right to vote.

For their part, the Edward plaintiffs simply direct the court to a report about the difficulty in obtaining photo IDs for the *2016* election, offering neither evidence specific to the COVID-19 pandemic nor proof of any unique burdens it places on disabled voters under the ADA. While the court acknowledges that some voters like Powell may encounter difficulty in uploading a photo of their ID or obtaining a hard copy, this burden has likely diminished since April 2020, given both the additional time voters will have to obtain the necessary documents to request an absentee ballot electronically or by mail, coupled with the increased awareness of how COVID-19 spreads and efforts one can take to avoid transmission upon leaving the house.[24]

Even if not entitled to broader relief, plaintiffs argue, the creation of a "safe harbor" or "fail-safe" measure is called for by the Seventh Circuit's decisions in *Luft* and *Frank II*. However, the court concludes that, while not a perfect solution, the "indefinitely confined" designation under Wisconsin Statute § 6.87(4)(b)2 provides such relief already for those

[23] The other individuals -- Sue Rukamp, Sharon Gamm and Marlene Sorenson -- simply averred that they encountered difficulty in uploading a photo of their ID or submitting a hard copy via mail, but it appears that all three were eventually able to *request* an absentee ballot. (Dkt. ##349, 294, 355.) Not to diminish the burdens that they encountered, their declarations do *not* support providing relief from the photo ID requirement. Instead, the difficulties that they encountered are more appropriately addressed in providing electronic delivery of ballots for those individuals who do not timely receive absentee ballots by mail and by extending the deadline for receipt of absentee ballots to account for USPS delays. Both forms of relief are granted below.

[24] Of course, the court is not definitively concluding such a burden cannot be proved, just that plaintiffs have not begun to proffer evidence of their likelihood of doing so given the work-arounds now available.

unique individuals who are *both* (1) not able to upload a photograph of their ID or obtain a copy *and* (2) avoiding public outings because of legitimate COVID-19 concerns.

Apparently anticipating this outcome, plaintiffs further argue that if the court relies on the "indefinitely confined" status as a safety net for the photo ID requirement, then it should also define that term and direct the WEC to provide this definition in its materials explaining and promoting voting via absentee ballot. As it concluded in its earlier opinion and order, however, the plain language of the statute, coupled with the WEC's March 2020 guidance that the term "does not require permanent or total inability to travel outside of the residence" provides sufficient, albeit imperfect, information to guide voters' use of that safe harbor. *See* Wisconsin Election Commission, *Guidance for Indefinitely Confined Electors COVID-19* (Mar. 29, 2020)), https://elections.wi.gov/node/6788.

On this record, therefore, the court concludes that plaintiffs have failed to demonstrate a likelihood of succeeding in their claim that the COVID-19 pandemic amplifies the typical burden of requiring a photo ID, so as to outweigh the State's repeatedly recognized interest in doing so. Because the court relies on the "indefinitely confined" option as a safety net or fail-safe for those legitimately unable to meet this requirement, however, the court will direct the WEC to include on the MyVote website (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence."

b. Election Official Residence Requirement

Next, the Edwards and Swenson plaintiffs seek to enjoin Wisconsin Statute § 7.30(2), which requires that each election official be an elector of the county in which the municipality is located. This request has significant more traction in light of the record. In particular, based on her past experience and unique perspective, Administrator Wolfe testified that her biggest worry in the administration of the November election is a lack of poll workers for in-person voting on election day. (8/5/20 Hr'g Tr. (dkt. #532) 83.) Both for the April and August 2020 elections, local municipalities struggled to recruit and retain sufficient poll workers, which resulted in some localities being severely limited in providing in-person voting opportunities. In fact, even with substantially greater warning and opportunity to plan, local election officials still had difficulty securing adequate people for Wisconsin's much smaller August 2020 election. (*Id.* at 82-83.) At minimum, eliminating the residence requirement would provide greater flexibility across the state to meet unanticipated last-minute demands for staffing due to COVID-19 outbreaks or fear.

In response, the Legislature simply argues that this requirement furthers the State's interest in promoting a decentralized approach to election management. Without discounting the value of this interest, if a county or municipality lacks sufficient poll workers and wishes to recruit workers from other locations within the state, *including* accessing National Guard members who reside outside of their community (should the Governor choose to answer the repeated call by local officials to make them available sooner rather than later), the municipality or county has already conceded its inability to maintain that interest while still conducting a meaningful election, at least with respect to

the location of residence of poll workers. Regardless, in light of the record evidence demonstrating that recruitment of poll workers will present a tricky and fluid barrier for adequate in-person voting options up to and during election day, plaintiffs have demonstrated a likelihood of success in proving that this requirement will burden their right to vote and that this burden outweighs any state interest in maintaining the requirement over expressed, local need.. As such, the court will grant this requested relief during the ongoing pandemic.

c. Ensure Safe and Adequate In-Person Voting Sites

The DNC and Swenson plaintiffs seek an order requiring the WEC to provide safe and adequate, in-person voting options, including (1) adequate voting sites with sufficient number of poll workers, and (2) implementation of safety protocols like PPE, masks, social distancing requirements, hand washing and sanitizing steps. While the court agrees, and more importantly the WEC and, in turn, local election officials agree, that these are appropriate steps to be taken, the court sees no basis to *order* this requested relief.

Specifically, the WEC has earmarked $4.1 million to provide increased safety measures at locations and has also designated $500,000 to secure and distribute sanitation supplies. WEC also is providing public health guidance and training to local election officials. Plaintiffs fail to describe how these measurers fall short. As for the concern about the number of voting locations, as previously described, local election officials in Milwaukee and Green Bay, in particular, have indicated their intent to open significantly more polling locations than that opened in April. Again, considering the election system as a whole, including the WEC's, local officials', and now the court's efforts to ensure

robust absentee voting options, the court concludes that plaintiffs have failed to demonstrate that the WEC and local election officials' efforts to date with respect to ensuring safe and adequate election-day voting sites are inadequate.

4. Requests for Miscellaneous Relief

Finally, the Swenson plaintiffs propose a number of other areas of relief, which all involve ordering the WEC to do more or do better. Specifically, the Swenson plaintiffs seek orders requiring the WEC to: (1) upgrade electronic voter registration systems and absentee ballot request systems; (2) engage in a public education drive; (3) ensure secure drop boxes for in-person return of absentee ballots; and (4) develop policies applicable to municipal clerks regarding coordinating with USPS to ensure timely delivery of and return of absentee ballots. Again, all of these are worthwhile requests, but the record reflects that the WEC is taking such steps or, at least, that a court order to the same effect is unlikely to do more before November 3 than hamper the ongoing state and local efforts. For example, in its June 25, 2020, report to the court, the WEC detailed its efforts to upgrade MyVote and WisVote, as well as provide federal funds to help municipalities with their IT needs. Moreover, the WEC described its development of various voter outreach videos, guides and surveys to help educate voters on unfamiliar aspects of voting. Further, as the Legislature points out, Wisconsin Statute § 6.869 already requires the WEC to prescribe uniform instructions on absentee voting. As for the request for more drop boxes, the WEC is providing funding from the CARES Act to municipalities to provide such boxes. Finally, as described above, the WEC is working with the USPS to implement intelligent mail barcodes to track absentee ballots.

To the extent mail delivery issues persist despite these steps, the court has attempted by entry of the order below to accommodate these concerns by permitting online access, by emailing and faxing of absentee ballots for those individuals who do not receive their requested absentee ballots timely, and by extending the absentee ballot receipt date. Plaintiffs' further requests for relief are either too vague to be meaningful or unnecessary because the WEC is already taking such steps.

B. Alternate Claims for Relief Under the Due Process and Equal Protection Clauses and Voting Rights Act

As already discussed, constitutional challenges to laws that regulate elections are generally analyzed under balancing test set forth by the U.S. Supreme Court in the *Anderson-Burdick* test. *See, e.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008); *Luft*, 963 F.3d at 671; *see also* Samuel Issacharoff et al., *The Law of Democracy* 92-127 (5th ed. 2016) (reviewing the general constitutional framework for challenges to election laws affecting the right to vote). This balancing test is rooted in both the First and Fourteenth Amendments to the U.S. Constitution. *See Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 788-89). In interpreting the Supreme Court's election law jurisprudence, the Seventh Circuit has concluded that the *Anderson-Burdick* test "applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (emphasis in original); *see also Harlan v. Scholz*, 866 F.3d 754, 759 (7th Cir. 2017) (the *Anderson-Burdick* framework addresses "the constitutional rules that apply to state election regulations").

As explained during oral argument, this court is exceedingly reluctant to apply more

generalized constitutional tests to the election laws challenged here, at least without a specific legal and factual basis to do so. Indeed, in its order preceding completion of briefing and oral arguments on the motions for preliminary injunction, the court suggested that to proceed on claims under other constitutional frameworks, plaintiffs must adequately distinguish such claims from those brought under *Anderson-Burdick*. (*See* 6/10/20 Op. & Order (dkt. #217) 14-15.) Without ever adequately addressing this concern, some plaintiffs nevertheless maintain that this court should venture outside of the *Anderson-Burdick* framework and consider their claims under alternative procedural due process and equal protection clause standards.

Specifically, plaintiffs urge the court to apply the more general procedural due process balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976). That test requires the court to balance: (1) the interest that will be affected by the state action; (2) the risk of erroneous deprivation of this interest through the procedures used by the state and the probable value, if any, of additional procedural safeguards; and (3) the state's interest, including the fiscal and administrative burdens that the additional procedure would entail. *Id.* at 340-49. The Swenson plaintiffs contend that the *Anderson-Burdick* and *Mathews* tests are "analytically distinct" because "[t]he focus of the procedural due process inquiry is what *process* is due before a statutorily protected liberty or property interest is deprived." (Swenson Pls.' Br. ('459, dkt. #41) 47 n.188.) Similarly, the DNC plaintiffs contend that "*Anderson-Burdick* balances burdens on voting rights against states' justifications, while due process claims focus on the sufficiency of the process involved before the State deprives someone of their right to vote." (DNC Pls.' Br. (dkt. #420) 55.)

During initial briefing, no plaintiff could cite to any case law to support the nuanced differences suggested by their respective positions. To the contrary, the DNC plaintiffs acknowledged that "we have not yet found a decision in which a court accepted an *Anderson-Burdick* claim while rejecting a due process challenge to the same provision; or rejected an *Anderson-Burdick* challenge while striking down the same provision as violating due process." (DNC Br. (dkt. #420) 54.) Since then, plaintiffs have pointed to three, recent election cases in which a district court applied the general *Mathews* test to election law challenges, all of which were considered in the context of the current pandemic. (*See* Notice of Supp. Authority (dkt. #536) (citing *The New Georgia Project v. Raffensperger*, 1:20-cv-01986-ELR (N.D. Ga. Aug. 31, 2020)); Notice of Supp. Authority (dkt. #534) (citing *Frederick v. Lawson*, No. 19-cv-01959, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020)); Notice of Supp. Authority (dkt. #523) (citing *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. Jul. 27, 2020)).) However, even these cases fail to address the overlap between the *Mathews* and *Anderson-Burdick* standards, much less the exclusive role played by the latter test in the U.S. Supreme Court's overall election law jurisprudence, thus providing little guidance as to the role, if any, of the *Mathews* test here. Accordingly, plaintiffs have not convinced this court that in the claims before it, an independent analysis under the *Mathews* test is necessary, much less appropriate.[25]

As for the equal protection claims, plaintiffs rely on the standard articulated by the

[25] The DNC plaintiffs themselves admit that the "*Anderson-Burdick* and *Mathews v. Eldridge* analyses are both multi-factor balancing inquiries . . . and the results of the inquiries may often be the same." (DNC Pls.' Br. (dkt. #420) 55.)

Supreme Court's *per curiam* decision in *Bush v. Gore*, 531 U.S. 98 (2000). There, the Supreme Court explained that a state "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05.[26] Notwithstanding that the Supreme Court took unusual pains to limit its "consideration" specifically to the "present circumstances" surrounding the 2000 Florida recount, *id.* at 109, other courts have appeared to rely on *Gore* in attempting to analyze subsequent election challenges. *See, e.g.*, *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 337 (4th Cir. 2016) (redistricting); *Obama for Am. v. Husted*, 697 F.3d 423, 428–29 (6th Cir. 2012) (restrictions on early voting); *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077 & n.7 (9th Cir. 2003) (ballot-initiative process).

Even if applicable, however, the Legislative defendants persuasively point out that this standard requires plaintiffs to prove that the arbitrary and disparate treatment is a result of specific election "procedures." *Bush*, 531 U.S. at 105. Here, the alleged disparate treatment is rooted in poll closings and poll-worker shortages, lack of adequate personal protective equipment at some polling locations and disparate treatment regarding voter registration and requests for absentee ballots. Arguably, therefore, these allegations are not rooted in specific "procedures" at all. Even if they were, plaintiffs again fail to explain adequately what *additional* relief would or should be afforded under the equal protection

[26] Plaintiffs also included a variety of facts regarding the disparate impact of COVID-19 on particular groups seeking to vote, such as specific racial minorities and the elderly. Without denigrating this impact in any way, plaintiffs' equal protection claim is premised on a general "arbitrary treatment" theory, rather than an argument that defendants' actions specifically discriminated against a particular protected class of voters, making many of these facts not relevant to, and thus not referenced further in, the court's discussion.

clause that is not already available under *Anderson-Burdick*.

Finally, in addition to these constitutional arguments, the Swenson plaintiffs assert a claim under Section 11(b) of the Voting Rights Act ("VRA"), which provides in relevant part that "[n]o person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting." 52 U.S.C. § 10307(b). The Swenson plaintiffs argue that defendants' inadequate response to the pandemic means that voters are intimidated to vote in person, for fear of catching COVID-19. (Swenson Pls.' Br. (dkt. #41) 25.) Although admittedly a creative argument, such an interpretation seriously stretches the purpose and common-sense meaning of section 11(b).

The VRA was signed into law in 1965 against the backdrop of the civil rights movement and state resistance to enforcement of the Fifteenth Amendment. *See generally* Dep't of Justice, *History of Federal Voting Rights Laws* (July 28, 2017), https://www.justice.gov/crt/history-federal-voting-rights-laws. While other sections of the VRA had enormous consequences on voting rights -- particularly section 2, which prohibits discriminatory voting practices, and section 5, which provides for federal "preclearance" of election changes in states with a history of discriminatory practices -- relatively little case law has explored the scope of section 11(b). *See* Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 190 (2015). Considering this background, there is no evidence that Congress contemplated extending the VRA to impose liability on states that do not take adequate action to reduce citizens' "intimidation" of in-person voting due to an infectious virus.

Moreover, the plain language of the statute itself suggests that the intimidation must be caused by a "person," not a disease or other natural force. Further, the parties disagree over whether section 11(b) requires a *mens rea* -- plaintiffs argue that it does not, the Legislature argues that it does -- and no definitive answer is found in case law. In light of these various considerations and uncertainties, 11(b) also appears a poor fit for analyzing the issues presented in this case, and the court finds that plaintiffs have presented no likelihood of success on the merits of their claims under the VRA as well.

ORDER

IT IS SO ORDERED:

1) Common Cause Wisconsin's motion for leave to file a brief as amicus curiae ('249 dkt. #251; '278 dkt. #186; '340 dkt. #51; '459 dkt. #75) is GRANTED.

2) Plaintiffs Democratic National Committee and Democratic Party of Wisconsin's motion for preliminary injunction ('249 dkt. #252) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

3) The Wisconsin Legislature's motion to dismiss the Gear complaint ('278 dkt. #382) is DENIED.

4) Plaintiffs Sylvia Gear, *et al.*'s motion for preliminary injunction ('278 dkt. #304) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

5) Defendants Scott Fitzgerald, Robin Vos, Wisconsin State Assembly, and Wisconsin State Senate's motion to dismiss the Edwards complaint ('340 dkt. #12) is GRANTED IN PART AND DENIED IN PART. Plaintiffs' claims against Scott Fitzgerald and Robin Vos are DISMISSED. In all other respects, the motion is denied.

6) Defendants the WEC Commissioners and Administrator's motion to dismiss the Edwards complaint ('340 dkt. #14) is DENIED.

7) American Diabetes Association's motion for leave to file an amicus curiae brief ('340 dkt. #23) is GRANTED.

8) Plaintiffs Chrystal Edwards, *et al.*'s motion for preliminary injunction ('340 dkt. #195) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

9) The Wisconsin Legislature's motion to dismiss the Swenson complaint ('459 dkt. ##27, 272) is DENIED.

10) Plaintiffs Jill Swenson, *et al.*'s motion for preliminary injunction ('459 dkt. #40) is GRANTED IN PART AND DENIED IN PART as explained above and set forth below and in the separate preliminary injunction order.

11) Defendants the Commissioners of the Wisconsin Election Commission and its Administrator are:

a) Enjoined from enforcing the deadline under Wisconsin Statute § 6.28(1), for online and mail-in registration. The deadline is extended to October 21, 2020.

b) Directed to include on the MyVote and WisVote websites (and on any additional materials that may be printed explaining the "indefinitely confined" option) the language provided in their March 2020 guidance, which explains that the indefinitely confined exception "does not require permanent or total inability to travel outside of the residence."

c) Enjoined from enforcing the deadline for receipt of absentee ballots under Wisconsin Statute § 6.87(6), and the deadline is extended until November 9, 2020, for all ballots mailed and postmarked on or before election day, November 3, 2020.

d) Enjoined from enforcing Wisconsin Statute § 6.87(3)(a)'s ban on delivery of absentee ballots to mail only for domestic civilian voters, with that lifted to allow online access to replacement absentee ballots or emailing replacement ballots, for the period from October 22 to October 29, 2020, provided that those voters who timely requested an absentee ballot, the request was approved, and the ballot was mailed, but the voter did not receive the ballot.

e) Enjoined from enforcing Wisconsin Statute § 7.30(2), to the extend individuals need not be a resident of the county in which the municipality is located to serve as election officials for the November 3, 2020, election.

12) The preliminary injunction order is STAYED for seven days to provide defendants and intervening defendants an opportunity to seek an emergency appeal of any portion of the court's order.

Entered this 21st day of September, 2020.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

Ex. B

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 20-2835 & 20-2844

DEMOCRATIC NATIONAL COMMITTEE, *et al.*,

Plaintiffs-Appellees,

v.

MARGE BOSTELMANN, SECRETARY OF THE WISCONSIN ELECTIONS COMMISSION, *et al.*,

Defendants,

and

WISCONSIN STATE LEGISLATURE, REPUBLICAN NATIONAL COMMITTEE, and REPUBLICAN PARTY OF WISCONSIN,

Intervening Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Wisconsin.
Nos. 20-cv-249-wmc, *et al.* — **William M. Conley**, *Judge*.

SUBMITTED SEPTEMBER 26, 2020 — DECIDED SEPTEMBER 29, 2020

Before EASTERBROOK, ROVNER, and ST. EVE, *Circuit Judges*.

PER CURIAM. The Democratic National Committee and other plaintiffs contend in this suit that statutes affecting the

registration of voters and the conduct of this November's election, although constitutional in principle, see *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), will abridge some voters' rights during the SARS-CoV-2 pandemic. The state's legislative branch, plus the Republican National Committee and the Republican Party of Wisconsin, intervened to defend the statutes' application to this fall's election.

A district judge held that many of the contested provisions may be used but that some deadlines must be extended and two smaller changes made. 2020 U.S. Dist. LEXIS 172330 (W.D. Wis. Sept. 21, 2020). In particular, the court extended the deadline for online and mail-in registration from October 14 (see Wis. Stat. §6.28(1)) to October 21, 2020; extended the deadline for delivery of absentee ballots by mail from October 22 (see Wis. Stat. §6.87(3)) by allowing for online delivery and access by October 29; and extended the deadline for the receipt of mailed ballots from November 3 (Election Day) to November 9, provided that the ballots are postmarked on or before November 3. Two other provisions of the injunction (2020 U.S. Dist. LEXIS 172330 at *98) need not be described. The three intervening defendants have appealed and asked us to issue a stay; the executive-branch defendants have not appealed. With the election only a few weeks away, the decision with respect to a stay will effectively decide the appeals on the merits.

We need not discuss the parties' arguments about the constitutional rules for voting or the criteria for stays laid out in *Nken v. Holder*, 556 U.S. 418 (2009), because none of the three appellants has a legal interest in the outcome of this litigation.

This conclusion is straightforward with respect to the Republican National Committee and the Republican Party of Wisconsin. The district court did not order them to do something or forbid them from doing anything. Whether the deadline for online registration (for example) is October 14 or October 21 does not affect any legal interest of either organization. Neither group contends that the new deadlines established by the district court would violate the constitutional rights of any of their members. The political organizations themselves do not suffer any injury caused by the judgment. See *Transamerica Insurance Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997). Appeal by the state itself, or someone with rights under the contested statute, is essential to appellate review of a decision concerning the validity of a state law. See, e.g., *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Kendall-Jackson Winery, Ltd. v. Branson*, 212 F.3d 995 (7th Cir. 2000). See also *1000 Friends of Wisconsin Inc. v. Department of Transportation*, 860 F.3d 480 (7th Cir. 2017) (same when the validity of an administrative decision is at stake).

That leaves the legislature. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015), shows that a state legislature may litigate in federal court, consistent with Article III of the Constitution, when it seeks to vindicate a uniquely legislative interest. See also, e.g., *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797–98 (7th Cir. 2019). The interest at stake here, however, is not the power to legislate but the validity of rules established by legislation. All of the legislators' votes were counted; all of the statutes they passed appear in the state's code. Constitutional validity of a law does not concern any legislative interest, which is why the Supreme Court held in *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), that a

state legislature is not entitled to litigate in federal court about the validity of a state statute, even when that statute concerns the apportionment of legislative districts. "This Court has never held that a judicial decision invalidating a state law as unconstitutional inflicts a discrete, cognizable injury on each organ of government that participated in the law's passage." *Id*. at 1953. State legislatures must leave to the executive officials of the state, such as a governor or attorney general, the vindication of the state's interest in the validity of enacted legislation.

The legislature contends that the situation is different in Wisconsin in light of Wis. Stat. §803.09(2m), which provides:

> When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene … at any time in the action as a matter of right by serving a motion upon the parties … .

In an earlier stage of this litigation, we concluded that §803.09(2m) permits the legislature to act as a representative of the state itself, with the same rights as the Attorney General of Wisconsin. *Democratic National Committee v. Bostelmann*, No. 20-1538 (7th Cir. Apr. 3, 2020), stayed in part by *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020). The legislature contends that our decision is the law of the case and that it may proceed as a representative of Wisconsin under §803.09(2m).

Intervening authority can justify a departure from the law of the case, and just such an event has occurred. Three months after we concluded that §803.09(2m) permits the legislature to represent the state, the Supreme Court of Wiscon-

sin held that this statute, if taken as broadly as its language implies, violates the state's constitution, which commits to the executive branch of government the protection of the state's interest in litigation. *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67 ¶¶ 50–73 (July 9, 2020). Capacity to sue or be sued is a matter of state law, see Fed. R. Civ. P. 17(b)(3); *Bethune-Hill*, 139 S. Ct. at 1952, so a holding that, as a matter of Wisconsin law, the legislature cannot represent the state's interest, controls in federal court too. Under *Vos* the legislature may represent *its own* interest, see ¶¶ 63–72, which puts Wisconsin in agreement with federal decisions such as *Arizona Independent Redistricting Commission*, but that proviso does not allow the legislature to represent a general state interest in the validity of enacted legislation. That power belongs to Wisconsin's executive branch under the holding of *Vos*.

None of the appellants has suffered an injury to its own interests, and the state's legislative branch is not entitled to represent Wisconsin's interests as a polity. The suit in the district court presented a case or controversy because the plaintiffs wanted relief that the defendants were unwilling to provide in the absence of a judicial order. See *Hollingsworth*, 570 U.S. at 702, 705; *United States v. Windsor*, 570 U.S. 744, 756 (2013). But the appeals by the intervenors do not present a case or controversy within the scope of Article III, and we deny the motions for a stay. Cf. *Republican National Committee v. Common Cause Rhode Island*, No. 20A28 (S. Ct. Aug. 13, 2020) (denying a motion for a stay under similar circumstances). The interim stay previously entered is vacated. In addition to denying the motions, we give appellants one week to show cause why these appeals should not be dismissed for lack of appellate jurisdiction.

Ex. C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMON CAUSE INDIANA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:20-cv-02007-SEB-TAB
	)	
CONNIE LAWSON, et al.	)	
	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This lawsuit is one of several that have been filed in our district and others around the country in the runup to the November 3, 2020 general election[1] implicating the right to vote—"a fundamental matter in a free and democratic society." *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). Here, Plaintiffs Common Cause Indiana ("CCI") and Indiana State Conference of the National Association for the Advancement of Colored People ("NAACP") have brought this action against Defendants Connie Lawson in her official capacity as Indiana Secretary of State, and Paul Okeson, S. Anthony Long, Suzannah Wilson Overholt, and Zachary E. Klutz, all in their official capacities as members of the Indiana Election Commission, challenging the constitutionality of Indiana's requirement,

[1] In our district, these cases include: *Common Cause Indiana v. Lawson*, ___ F. Supp. 3d ___, 2020 WL 5671506 (S.D. Ind. Sept. 22, 2020); *Common Cause Indiana v. Lawson*, ___ F. Supp. 3d ___, 2020 WL 4934271 (S.D. Ind. Aug. 24, 2020), *appeal docketed*, No. 20-2816 (7th Cir. Sept. 21, 2020); *Tully v. Okeson*, ___ F. Supp. 3d ___, 2020 WL 4926439 (S.D. Ind. Aug. 21, 2020), *appeal docketed*, No. 20-2605 (7th Cir. Aug. 24, 2020); *Frederick v. Lawson*, ___ F. Supp. 3d ___, 2020 WL 4882696 (Aug. 20, 2020); *Indiana State Conference of National Association for Advancement of Colored People v. Lawson*, 1:17-cv-02897-TWP-MPB, 2020 WL 4904816 (S.D. Ind. Aug. 20, 2020).

codified at Indiana Code §§ 3-11.5-4-3 and 3-11.5-4-10, that mail-in absentee ballots, in order to be counted, be received by noon on Election Day. This issue, plaintiffs argue, takes on a heightened significance in the context of the ongoing devastations of the COVID-19 pandemic and the risks it presents to all citizens, constituting an undue burden on the fundamental right to vote, in violation of the First and Fourteenth Amendments to the United States Constitution.

Now before the Court is Plaintiffs' request for preliminary injunctive relief [Dkt. No. 9], filed on August 17, 2020, but not fully briefed until September 23, 2020. Specifically, Plaintiffs seek an order from the Court enjoining Defendants, and all those acting in concert with them or at their direction, from enforcing or giving any effect to Indiana Code §§ 3-11.5-4-3 and 3-11.5-4-10 in the November 3, 2020 election, thereby obviating the noon deadline for receipt and processing of the mail-in absentee ballots. Plaintiffs also request that Defendants Okeson, Long, Wilson Overholt, and Klutz, in their official capacities as members of the Indiana Election Commission and pursuant to the powers and duties of the Indiana Election Commission, as defined in Indiana Code § 3-6-4.1-14, be directed to adopt rules, or emergency rules, requiring all county election boards and all those acting in concert with them or under their direction and control, not to reject mail-in ballots postmarked on or before November 3, 2020, and received on or before November 13, 2020, and to ensure that such ballots are counted, if otherwise valid. For the reasons detailed below, we GRANT Plaintiff's motion.

Factual Background

I. Indiana Mail-In Absentee Voting Procedures

This case involves the requirement under Indiana law that mail-in absentee ballots be received by noon on Election Day to be counted. Indiana does not generally provide no-excuse mail-in absentee voting; rather, under Indiana law, eligibility to vote by mail is extended only to those voters who qualify under a list of specific circumstances.[2] Specifically, a registered voter has a statutory right to vote by mail-in absentee ballot if the voter meets one of thirteen statutory qualifications, including, *inter alia*, if the voter has "a specific, reasonable expectation of being absent from the county" while the polls are open on Election Day; is confined to a residence or health care facility "because of an illness or injury" while the polls are open; is scheduled to work during the entire time the polls are open; is prevented from voting due to the unavailability of transportation to the polls; is disabled, or is an "elderly" voter, defined as a voter who is at least 65 years of age on Election Day. IND. CODE § 3-11-10-24(a); *see also id.* §§ 3-11-10-25, 3-5-2-16.5. In addition to these specified circumstances, Indiana has a separate set of rules authorizing mail-in absentee voting by voters who live overseas and voters who are absent from their places of residence by reason of active military duty. *See id.* §§ 3-5-2-1.5, 3-5-2-34.5, 3-11-4-5.7, 3-11-4-6.

[2] Defendants highlight that Indiana's election systems are principally "equipped for in-person voting." *Tully*, 2020 WL 4926439, at *6. All registered voters in Indiana may vote in-person at their precinct polling places on Election Day, or at various early-voting locations for the 28 days prior to Election Day. *See* IND. CODE §§ 3-11-8-2, 3-11-4-1, 3-11-10-26. Alternatively, registered voters suffering from an illness or injury, or caring at home for someone who is ill or injured, may vote via a travelling voter board, which will bring a ballot to the voter's house and then return it to election officials to be counted. *See id.* § 3-11-10-25.

Due to the serious health risks associated with the COVID-19 pandemic, members of the Indiana Election Commission expanded eligibility to vote by mail in the rescheduled June 2, 2020 primary to include any "voter who is unable to complete their ballot because they are temporarily unable to physically touch or be in safe proximity to another person,"[3] effectively allowing all Indiana voters to qualify to vote absentee. As a result, an unprecedented number of Indiana voters cast mail-in absentee ballots. Although state election officials recently voted to withhold a similar privilege for the 2020 general election,[4] it is expected that a record number of Indiana voters eligible under the current statutory regime will cast mail-in absentee ballots in the November 3, 2020 general election in order to avoid the risks of contracting COVID-19 from engaging in in-person voting.

Indiana voters satisfying the eligibility requirements to vote by absentee ballot can apply online to vote by mail, by mailing or hand delivering a physical application form to their county election board, or by emailing an image of their completed application to county officials or the state. IND. CODE § 3-11-4-3(a)(4); Indiana Secretary of State, *Absentee Voting: Absentee Voting by Mail*, https://www.in.gov/sos/elections/2402.htm. Voters may apply as early as the conclusion of the previous election; in fact, Indiana has

[3] Ind. Election Comm'n, Order No. 2020-37, Concerning Emergency Provisions Affecting the 2020 Indiana Primary Election, Section 9A (Mar. 25, 2020), *available at* https://www.in.gov/sos/elections/files/Indiana%20Election%20Commission%20Order%202020-37.pdf

[4] There is an ongoing federal lawsuit pending before our colleague, the Honorable J.P. Hanlon, in which the plaintiffs allege that the State's failure to permit no-excuse mail-in absentee voting, particularly given the COVID-19 pandemic, violates voters' constitutional rights. Judge Hanlon's recent decision denying the plaintiffs' request for preliminary injunctive relief in that case is currently on appeal to the Seventh Circuit.

been accepting applications to vote by mail in the November 3, 2020 general election since the June 2, 2020 primary concluded. Under Indiana law, an application to vote via mail-in absentee ballot must be received by the proper county election board or other appropriate official by 11:59 p.m. on the twelfth day before election day, which is October 22, 2020 for the November 3, 2020 election. *Id.* § 3-11-4-3(a)(4)(A). For presidential elections, federal law requires states to allow voters "who may be absent from their election district or unit in such State on the day such election is held" to apply "not later than seven days immediately prior to such election," 52 U.S.C. § 10502(d), which is October 27, 2020 for the November 3, 2020 election.

No later than forty-five days prior to Election Day, county election officials must begin mailing ballots to voters whose applications have been approved as of that date. *See* IND. CODE § 3-11-4-15 (requiring ballots to be delivered to each county at least fifty days prior to election day); *id.* § 3-11-4-18(c)(2) (requiring ballots to be sent within five days of delivery of the ballots to the county).[5] For voters applying within forty-five days

[5] Following the primary election, election officials in Indiana began a detailed process to prepare the general election ballots so they could be printed and distributed within the statutory deadline. By noon of the second Monday following the primary election (this year, June 15, 2020), after counting the primary votes and finalizing the results, county election officials were required to send the Indiana Election Division a complete list of all candidates nominated and party convention delegates elected. IND. CODE § 3-8-7-5. The Election Division then tabulated the results across Indiana's 92 counties and provided the State's political parties with a list of the candidates nominated because the parties must certify nominees for President and Vice-President (which depends on national party nominating conventions) and attorney general (which depends on state party nominating conventions) as well as, in some cases, nominate candidates for certain ballot vacancies by caucus, convention, or other legal process. *See id.* § 3-8-7-6. Once the vacancy filling process is complete, Indiana law provides for a period of time in which observers may challenge the qualifications of candidates for statewide or state legislative offices. Any such challenge must be filed with the Indiana Election Commission by noon, 74 days before Election Day (this year, August 21, 2020), and the Commission must conclude any hearings on

of election day, Indiana law requires that county officials mail the ballot "on the day of the receipt of the voter's application." *Id.* § 3-11-4-18(c)(1). Thus, this year, on September 19, 2020, Indiana counties were required by law to send a mail-in ballot to every eligible voter whose application they had already received, and, going forward, are required to send eligible voters their mail-in ballots on the same day each application is received. The ballot must be mailed to the voter "postage fully prepaid." *Id.* § 3-11-4-18(a). If a voter has not received their ballot "after a reasonable time has elapsed for delivery of the ballot by mail," the ballot is "destroyed, spoiled, [or] lost," or the voter makes an error on their ballot, they may request that a replacement ballot be sent to them by filing a statement with their county election board. *Id.* § 3-11-4-17.7.

After a voter receives and completes their ballot, it can be returned by mail using the prepaid return envelope.[6] Once the United States Postal Service ("USPS") takes custody of the completed ballot, the ballot is transported to a mail facility for processing, where it is marked with an official postmark or other marking indicating the date on

such challenges within three business days and announce its determination the following business day. *Id.* §§ 3-8-8-3, -4, -5. The Commission's determinations can be appealed to the Indiana Court of Appeals, but any such appeal that is not resolved by noon, 60 days before Election Day (this year, September 4, 2020) was to be terminated regardless of status. *Id.* § 3-8-8-6, -7. The state party chairs are required to certify to the Election Division by noon on the second Tuesday in September (this year, September 8, 2020), the names of their respective party's candidates for President and Vice-President of the United States. The Election Division has until noon on the following Thursday (this year, September 10, 2020) to certify those candidates' names to each county election board, which is the last step in finalizing the content of the General Election ballots. *Id.* § 3-10-4-5(c).

[6] Voters voting by absentee ballot also have the option to return their ballot in-person to the appropriate county clerk or to bring the ballot to the appropriate polling location by noon on Election Day. If, for some reason, the voter is personally unable, a member of the voter's household or the voter's attorney may return the voter's ballot using either of these two methods. IND. CODE §§ 3-11-10-1(a)(6), 3-11-10-24(c)–(d).

which the USPS took custody of the ballot. In Indiana, for a mail-in absentee ballot to be counted, it must be received by the county election board "before noon on election day," regardless of the date on which it was cast and mailed by the voter.[7] IND. CODE §§ 3-11.5-4-3; 3-11.5-4-10. Accordingly, the postmarked date of the ballot has no bearing on whether it will be deemed timely. If a voter misses the ballot-receipt deadline, the voter can vote in-person at the appropriate polling place on Election Day. *Id.* §§ 3-11.5-4-18, 3-11-10-31. But voters typically are not informed of whether their ballots arrived on or before the deadline.

Indiana law does provide that "[e]ach ballot *may* be assigned a unique tracking number as prescribed by the election division using IMb [Intelligent Mail Barcode] Tracing or a similar automated tracking method to provide real-time tracking information for the envelope containing the ballot. As used in this subsection, 'IMb Tracing refers to a real-time mail tracking service offered through the United States Postal Service." IND. CODE § 3-11-4-18(a) (emphasis added). Counties are not *required*, however, to make their ballot envelopes trackable, and, so far as we have been informed, no Indiana counties currently do so. Absentee voters are able to track the date the county clerk's office received their application for an absentee ballot, the date the ballot was mailed to the voter, and, once it is returned, the date the clerk's office received it at

[7] This contrasts with some other states' laws governing mail-in voting deadlines which use the postmark or other USPS marking for the purpose of adjudicating the timeliness of a ballot. *See, e.g.*, Ohio, R.C. § 3509.05 (counts ballots received within ten days if postmarked at least one day prior to election day); Kansas, K.S.A. 25-1132 (counts ballots received within three days if postmarked on or before election day); Illinois, 10 ILCS 5/19-8, 10 ILCS 5/18A-15 (counts ballots received within fourteen days if postmarked on or before election day).

https://indianavoters.in.gov, but unless a county chooses to utilize IMb Tracing or similar technology, absentee voters cannot track the progress of their absentee ballot in real-time and consequently are in the dark about whether their ballots were received by the noon deadline and thus were counted.

Indiana applies a slightly different set of rules to voters who live overseas and to voters who are absent from their places of residence by reason of active military duty. IND. CODE §§ 3-5-2-1.5, 3-5-2-34.5, 3-11-4-5.7, 3-11-4-6. Overseas voters and military voters can submit an application for a mail-in absentee ballot by mail, fax, or email. *See id.* § 3-11-4-6; Indiana Secretary of State, *2020 Military & Overseas Voters' Guide*, at 4, https://www.in.gov/sos/elections/files/2020%20Military%20and%20Overseas%20Voters%20Guideupdate.pdf. If such applications are submitted by mail, they are subject to the same October 22, 2020 deadline that applies to other absentee-by-mail applications, but if the applications are submitted by fax or email, they are valid if received by noon on the day before Election Day (this year, November 2, 2020). *Id.*; IND. CODE § 3-11-4-3(a)(2)(B).

Under Indiana law, overseas and military voters can submit their mail-in absentee ballots by mail, fax, or email.[8] *Id.* § 3-11-4-6(h). If the voter is a domestic military voter, regardless of the method by which they return their ballot, the ballot must arrive by noon on Election Day to be counted, just like other mail-in absentee ballots. This same deadline applies to overseas voters, whether military or civilian, who chose to return their

[8] If such voter chose to submit their ballots via fax or email, they are required to sign a statement indicating that they voluntarily waive their right to a secret ballot. IND. CODE § 3-11-4-6(h).

ballots by fax or email. However, the deadline is extended for overseas voters who return their ballots by mail. Mail-in ballots from overseas voters may be received any time before noon, ten (10) days after Election Day (this year, November 13, 2020), so long as the ballot is postmarked on or before Election Day. *Id.* §§ 3-11.5-4-10, 3-12-1-17.

As county election officials receive absentee ballots, whether by mail or delivered in-person, they are required to store the ballots in a secure location. King Decl. ¶ 4(b). Beginning as early as 6:00 a.m. on Election Day, absentee ballot counters commence the process of opening, authenticating, and counting absentee ballots. *Id.* ¶ 4(c). This process requires ballot counters to evaluate each absentee ballot to determine whether it meets all state-law requirements to be counted. *See* IND. CODE §§ 3-11.5-4-13, 3-11.5-6-6, 3-11.5-8-1. If ballot counters cannot agree whether a ballot should be counted, the county election board makes the final determination. *Id.* § 3-11.5-6-7. After any such issues are resolved, the ballot counters and county election boards tabulate the valid absentee ballots and certify the results. *Id.* §§ 3-11.5-6-18, 3-11.5-6-19, 3-11.5-6-20, 3-11.5-8-2, 3-11.5-8-3. Indiana law requires an uninterrupted count of absentee ballots, so once the process begins, it continues until all absentee ballots are opened, authenticated, and tabulated. *Id.* §§ 3-11.5-5-5, 3-11.5-6-4.

Meanwhile, precinct boards count in-person votes at the precinct polling place after the polls close. King Decl. ¶ 4(f). They submit certified results of their counts to the county election board, which aggregates them with the totals from the absentee ballot count. *Id.* ¶ 4(g). Most counties make the unofficial results, including absentee votes, available to the public on the evening of Election Day by uploading the results to the

Statewide Voter Registration System. *Id.* ¶¶ 5–6. These unofficial results are shared with the public and generally allow the "news media and other observers to identify election winners on the eve of Election Day" for most races. *Id.* ¶ 7.

Indiana law provides for an approximately two-week period following election day to finalize election results, during which time county election boards confirm initial vote counts, resolve disputed questions, and process and count provisional ballots as well as mail-in ballots from overseas voters. *See* IND. CODE §§ 3-11-13-40, 3-11.7-5-1, 3-12-3.5-8, 3-12-4-16, 3-12-4-18, 3-12-1-17. Mail-in ballots from overseas voters are processed and counted in the same manner as other mail-in ballots, meaning they are opened, grouped together by precinct, checked for compliance with state law, and then counted and certified. *See id.* §§ 3-11.5-6-3, 3-11.5-6-5, 3-11.5-6-6, 3-11.5-6-18, 3-11.5-6-19.

After the counties have finalized their election results, the circuit court clerk in each county must prepare, no later than noon on the second Monday following Election Day (this year, November 16, 2020), a certified, final statement of the number of votes received for each candidate and must then transmit that statement to the Indiana Election Division. IND. CODE § 3-12-5-6. This deadline invariably falls one business day after the ten-day post-Election Day deadline for receipt of overseas ballots, which always falls on a Friday.

Upon receipt of the certified statements from the counties, the Indiana Election Division tabulates the number of votes for each candidate in each race, and the Secretary of State then certifies the candidates receiving the highest number of votes for each office

to the Governor. IND. CODE § 3-12-5-7. Federal law then requires the Governor to submit Indiana's formal certification of the State's presidential electors to the Archivist of the United States "as soon as practicable." 3 U.S.C. § 6; *see also* IND. CODE § 3-10-4-6.5. The Electors meet the first Monday after the second Wednesday in December (this year, December 14, 2020), (3 U.S.C. § 7) and Congress tabulates the Electors' votes on "the sixth day of January." *Id.* § 15.

II. The COVID-19 Pandemic

As all have come to know, COVID-19 is an infectious viral disease caused by a novel coronavirus that has rapidly and widely spread throughout the world. The virus that causes COVID-19 is highly contagious and spreads through a variety of means, including especially via respiratory droplets and physical contacts between individuals.[9] Individuals contracting the virus can experience a range of symptoms, from none at all, to including flu-like issues, suffering a severe immune system response that can cause fluid to build in the lungs and ultimately lead to death.[10] Containing the virus is made even more difficult by the fact that asymptomatic and pre-symptomatic individuals, who are likely unaware that they themselves are infected, can infect others with whom they come into contact just as those who do show symptoms.[11] While COVID-19 poses a

[9] Ctrs. for Disease Control & Prevention, *What You Should Know About COVID-19 to Protect Yourselves and Others* (Apr. 15, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf.

[10] *See, e.g.*, Stokes EK, Zambrano LD, Anderson KN, *et al.*, *Coronavirus Disease 2019 Case Surveillance – United States, January 22–May 30, 2020*, Morb. Mortal Wkly. Rep. 69, 759–765 (June 19, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6924e2-H.pdf.

[11] *See* Furukawa, Brooks & Sobel, *Evidence Supporting Transmission of Severe Acute Respiratory Syndrome Coronavirus 2 While Presymptomatic or Asymptomatic*, EMERG. INFECT. DIS. Vol. 26, No. 7 (May 4, 2020), *available at* https://wwwnc.cdc.gov/eid/article/26/

potentially severe health risk to all individuals, public health experts have warned that it can be particularly dangerous for certain demographics, including older people, people with underlying medical conditions, and people of color.[12]

On March 13, 2020, President Donald J. Trump declared a national state of emergency as a result of the widespread outbreak of COVID-19. Within one week of that announcement, forty-eight states, including Indiana, had declared local states of emergency. The virus has continued to spread throughout the United States since then, resulting in a higher number of infections and deaths worldwide than any other country. As of this date, approximately 7,129,313 people in the United States have been infected with the coronavirus and at least 204,598 have died from the virus nationwide.[13] In Indiana, 119,066 people have tested positive and at least 3,385 have died.[14]

The COVID-19 pandemic has also had a significant impact on the 2020 election cycle within many states, including Indiana, who have postponed elections due to stay-at-home orders or changed or suspended state laws governing certain aspects of elections

7/20-1595_article. *See also S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (May 29, 2020) (Roberts, C.J, concurring in the denial of application for injunctive relief) ("At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others.").

[12] Ctrs. for Disease Control & Prevention, *Racial and Ethnic Minority Groups* (Apr. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html; Ctrs. for Disease Control & Prevention, *Health Equity Considerations and Racial and Ethnic Minority Groups* (July 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

[13] *Coronavirus Disease 2019 (COVID-19) Cases and Deaths in the U.S.*, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html (last updated Sept. 29, 2020).

[14] Ind. COVID-19 Dashboard, Ind. COVID-19 Data Report, https://www.coronavirus.in.gov/2393.htm (last updated Sept. 28, 2020).

because of the virus. Because the risk of infection in locations where large numbers of people congregate is substantial, unprecedented numbers of voters voted by mail-in absentee ballot in Indiana's June 2 primary election. In addition, although Indiana has not extended the privilege of no-excuse mail-in voting for the November 3 general election, the parties agree that a record number of those voters who are statutorily eligible to do so are expected to make that choice to avoid the risk of contracting the COVID-19 virus.[15]

III. Indiana's June 2, 2020 Primary Election

As discussed above, the COVID-19 pandemic had a significant impact on Indiana's administration of the 2020 Primary Election. In separate orders issued on March 25 and April 17, 2020, Defendant members of the Indiana Election Commission ("the Commission") postponed the Primary Election from May 5 to June 2, 2020.[16] Those orders also suspended and modified numerous statutory deadlines to accommodate the postponement, including extending the time within which county election officials were required to complete the counting of mail-in ballots from Election Day to ten days

[15] We note that the Secretary of State's office is "in the process of procuring and distributing over 1 million face masks, over 2 million disposable gloves, 15,000 half-gallon bottles of hand sanitizer, 2,500 gallons of surface and equipment disinfectant, tabletop sneeze guards, face shields and other PPE supplies for voters and poll workers," which the State expects will be sufficient to protect all poll workers and up to 2 million in-person voters. Clifton Decl. ¶ 8. The Secretary of State also has financial resources "to procure and distribute additional PPE on an as-needed basis." *Id.* In addition, the Secretary of State will be distributing a manual of best safety practices for voters and poll workers based on CDC guidance, social distancing markers, and posters promoting pandemic safety precautions. *Id.* ¶ 9.

[16] Ind. Election Comm'n, Order No. 2020-37, Concerning Emergency Provisions Affecting the 2020 Indiana Primary Election (Mar. 25, 2020), *available at* https://www.in.gov/sos/elections/files/Indiana%20Election%20Commission%20Order%202020-37%20(002)%20g.pdf; Ind. Election Comm'n, Order No. 2020-40, Concerning Emergency Provisions Affecting the 2020 Indiana Primary Election (April 17, 2020), *available at* https://www.in.gov/sos/elections/files/Order%202020-40%20Draft%20PDF.pdf.

after Election Day.[17] The requirement that mail-in absentee ballots be received by noon on Election Day in order to be counted was not modified, however.

The Commission also significantly expanded eligibility to vote by mail in the Primary Election, construing the phrase "voters with disabilities" in Indiana Code § 3-11-10-24(a)(4) to include "any voter who is unable to complete their ballot because they are temporarily unable to physically touch or be in safe proximity to another person," effectively extending eligibility to vote by mail to all Indiana voters as a result of the COVID-19 pandemic.[18] At the same time, the Commission reduced in-person voting options, granting county election boards discretion to "reduce and consolidate the number of polling locations and poll workers needed to conduct an election on election day" and to provide fewer vote centers for the June 2 election than required under existing law.[19] The Commission's orders also prohibited early in-person voting except between Tuesday, May 26 and noon on Monday, June 1, reducing the total number of early voting days in all early voting locations from 27 days to 6 days.[20]

As a result of these actions by the Commission in response to the COVID-19 pandemic, an unprecedented number of Indiana voters cast mail-in ballots in the June 2, 2020 election. Statewide, nearly 550,000 voters requested mail-in ballots, which was more than ten times the number requested in the 2016 presidential primary, despite the

[17] *See* Ind. Election Comm'n, Order No. 2020-37, Section 15D.
[18] Ind. Election Comm'n, Order No. 2020-37, Section 9A.
[19] Ind. Election Comm'n Order No. 2020-37, Section 12.
[20] Ind. Election Comm'n Order No. 2020-37, Section 13 (permitting counties to provide one vote center for every 25,000 active voters instead of 10,000 active voters as provided by IND. CODE § 3-11-18.1-6).

lack of a competitive presidential primary in Indiana for either party in 2020. This surge in mail-in voting led to documented delays in the transmission of ballots to voters as well as from voters back to election officials. Because of these delays, thousands of otherwise valid ballots were rejected in the 2020 Primary Election because they arrived at county election offices after noon on Election Day. For example, in Marion County, Indiana, a total of 1,514 otherwise valid ballots were rejected despite having been postmarked on or before June 2, 2020; in Hamilton County, 435 such ballots were rejected. Prein Decl. ¶¶ 4, 7. These two counties together represent 20% of the population of Indiana.

Marilyn Tawney, Crystal Hammon, and Diana Smith were all among the voters who had their ballots rejected for missing the noon deadline on Primary Election Day. Ms. Tawney, who has used the absentee mail-in ballot process ever since turning 65 years old, requested a mail-in ballot for the June 2020 Primary Election in order to reduce congestion at the polls and avoid potential exposure to the COVID-19 virus. Tawney Decl. ¶¶ 6–11. Although Ms. Tawney mailed her ballot approximately four days before the election, it was not received until after the noon deadline and was therefore not counted. *Id*. ¶¶ 12–15. Ms. Hammon requested a mail-in ballot because she knew she would be out of town on the day of the 2020 Primary Election. Hammon Decl. ¶¶ 6–7. Ms. Hammon received her mail-in ballot approximately one week before June 2, 2020, and despite her prompt completion and mailing of her ballot a few days before the election, it was rejected for arriving after the noon deadline. *Id.* ¶¶ 9–12. Ms. Smith is 71 years old and requested a mail-in ballot because she was concerned about being

exposed to the COVID-19 virus if she voted in person, but later learned that her ballot had been rejected for late arrival. Smith Decl. ¶¶ 2, 6–10.

IV. The Impact of COVID-19 and Operational Changes on the USPS

The COVID-19 pandemic has also significantly affected the USPS. Thousands of postal workers have contracted the virus, dozens have died, and tens of thousands have had to quarantine for two weeks after being exposed. The combination of this staffing strain on the USPS and the surge in mail-in voting during the pandemic has led to disruptions to mail delivery, including delays and lost or undelivered mail-in ballots in states nationwide, including in Indiana.

Since the June 2, 2020 election, the USPS has also made several significant changes to its operating procedures that have further impacted delivery reliability and speed, thereby increasing the time for a mail-in ballot to travel through the mail system in advance of the November 3, 2020 general election. For example, citing an effort to reduce costs and improve efficiency, Louis DeJoy, on June 16, 2020, less than a month after taking over as Postmaster General, circulated an internal USPS memorandum alerting postal workers to prepare for "difficult" policy changes. Changes that took effect on July 13, 2020 included the elimination of overtime for postal workers and the imposition of limits on other measures local postmasters use to ameliorate staffing shortages, as well as limits on the number of stops individual mail trucks are permitted to make along a route. Postal employees were also instructed to leave mail behind at the end of a workday to be delivered the following day, instead of making multiple trips, if necessary, to ensure timely delivery, as had previously been the USPS's longstanding

policy.[21] Within weeks of the institution of these changes, postal workers nationwide were reporting noticeable delays and election officials began instructing voters to return their ballots in person rather than by mail to ensure they were timely.

On August 4, 2020, the USPS contacted the Indiana Secretary of State by letter, advising her that certain deadlines under Indiana law for requesting and casting mail-in ballots "may be incongruous with the Postal Service's delivery standards" under current conditions. Dkt. 9-1. The letter goes on to state that "to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with [Indiana's] election rules and returned promptly, and yet not be returned in time to be counted." *Id.* at 2. In particular, the letter highlighted "a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under [Indiana's] laws as we understand them." *Id.* at 1.

Three days later, on August 7, 2020, Postmaster DeJoy announced a hiring freeze and a request for voluntary early retirements of postal workers, effectively preventing the alleviation of existing staffing shortages resulting from the pandemic.[22] During the week following this announcement, it was reported that the USPS had begun removing mail sorting machines from postal distribution centers across the country, ultimately

[21] Jacob Bogage, *Postal Service Memos Detail 'Difficult' Changes, Including Slower Mail Delivery*, Washington Post (July 14, 2020), https://www.washingtonpost.com/business/2020/07/14/postal-service-trump-dejoy-delay-mail/.

[22] Press Release, *Postmaster General Louis DeJoy Modifies Organizational Structure to Support USPS Mission*, USPS Postal News (Aug. 7, 2020), https://about.usps.com/newsroom/national-releases/.

decommissioning 671 high-volume sorting machines, together capable of sorting 2.4 million pieces of mail per hour, which accounted for one-eighth of USPS nationwide capacity. This reduction in mail processing capacity included a 20% to 40% reduction in the number of sorting machines located at facilities in the Great Lakes region, including significant reductions in Indiana.[23]

V. Plaintiffs

A. Common Cause Indiana

Plaintiff Common Cause Indiana ("CCI") is the Indiana affiliate of Common Cause, a national non-profit, non-partisan grassroots organization that advocates in favor of ethics, good government, campaign finance reform, constitutional law, and the elimination of voting barriers. Vaughn Aff. ¶ 3. CCI has only one employee, Policy Director Julia Vaughn, who is responsible for policy development, lobbying, grassroots organizing, and coalition building. *Id.* ¶ 7. CCI has at least 15,000 members across Indiana who are eligible to vote in state and federal elections in Indiana and who support CCI in a variety of ways, including lobbying their elected officials in support of CCI's mission, building coalitions with other community organizations in support of CCI's policy goals, volunteering to assist CCI's efforts to protect Indiana voters' access to the ballot on Election Day, and providing financial support. *Id.* ¶ 8. According to Ms.

[23] "Equipment Reduction Plan" at 2-4, 7, 12, USPS, May 15, 2020, https://assets.documentcloud.org/documents/7035434/USPS-Equipment-Reduction-Plan.pdf. The acronyms in this document correspond with various types of high-volume mail sorting machines employed by USPS. *See* USPS "List of Acronyms/Abbreviations," https://about.usps.com/publications/pub32/pub32_acn.htm.

Vaughn, CCI anticipates that at least some of its 15,000 members will have their mail-in absentee ballots rejected as untimely because of delays caused by county election boards being faced with pandemic conditions and vastly greater volumes of absentee ballot applications and USPS delivery challenges. *Id.* ¶ 20.

As part of CCI's core mission, it works on a nonpartisan basis to expand and protect equal access to voting for all Indiana citizens in a variety of ways, including lobbying for nonpartisan election reforms, such as the expansion of early voting, the implementation of no-excuse absentee voting, increasing the number of voting locations, and ensuring a fair, nonpartisan redistricting process, among other reforms; working with state and local election officials in advance of the November 2020 general election to address and remedy certain election administration issues experienced in the June 2020 primary election; partnering with other community organizations to provide education and training to on-the-ground voting rights activists around the state; and working with other community organizations to track problems at voting sites on Election Day, fielding calls from voters who experience burdens in their efforts to exercise their right to vote, and providing assistance to such voters by lobbying local election officials and/or facilitating their access to counsel. *Id.* ¶ 5.

On Election Day, CCI and its volunteers work with the nonpartisan Election Protection Project, which manages an Election Day hotline for voters to call if they face barriers at their polling locations. CCI spends time and resources training its volunteers to assist such voters on Election Day, including providing written materials for volunteers to use as well as training its volunteers in advance of Election Day, either in person, by

phone, or virtually. *Id.* ¶ 10. Because of the vast increase in numbers of voters choosing to vote by absentee ballot in light of the COVID-19 pandemic, CCI devoted additional time and resources toward educating volunteers about the effects of the noon Election Day receipt deadline in advance of its efforts to protect eligible Indiana residents' right to vote in the June 2, 2020 primary election (and expects to do the same for the November 3, 2020 general election), thereby diverting such time and resources from other activities CCI would have otherwise undertaken to advance its mission. *Id.* ¶ 11.

Before the primary election, Ms. Vaughn received a number of telephone calls from voters seeking advice because they were concerned their ballots would not be received by noon on Election Day and thus would not be counted. Beginning a week before the primary election, CCI posted on social media, including Twitter and Facebook, messages intended to warn voters not to mail their ballots but instead to hand deliver them to the election office or county courthouse. Following the primary election, she received additional calls from voters wondering if their votes had been counted. In response, Ms. Vaughn was required to revamp the Election Protection Project training, devoting an inordinate amount of time to educating volunteers on how to assist voters facing problems with mail-in ballots, including those ballots arriving too late to return by mail for fear of missing the noon Election Day deadline. Ms. Vaughn and CCI volunteers spend considerable time developing the curriculum and presentation materials for these educational sessions, and the time and resources devoted to updating such training to address the effects of the noon Election Day receipt deadline has diverted from

CCI's other advocacy efforts. Ms. Vaughn anticipates being required to engage in similar efforts in advance of the November 3, 2020 general election. *Id.* ¶ 12, ¶ 15.

CCI has also worked with others to persuade the Governor, Secretary of State, and Indiana Election Commission to relax the noon deadline to avoid similar levels of disenfranchisement that occurred by virtue of its enforcement in the primary election. This advocacy has included attending coalition meetings, sending letters to these elected officials, sharing information on social media, and sending messages to its members to encourage them to contact the Governor and Secretary of State. CCI will continue its efforts to educate its members and the public about the noon Election Day receipt deadline for mail-in absentee ballots in the runup to the general election. *Id.* ¶ 13, ¶ 19.

CCI has a limited budget to engage in its advocacy efforts and promote its mission; thus, it is required to make difficult choices regarding the uses of its limited resources. *Id.* ¶ 9. By increasing the risk that some voters will have their mailed absentee ballots rejected because they arrived belatedly, the noon Election Day receipt deadline harms CCI's mission of reducing barriers to voting and imposes additional burdens on CCI that divert time and resources from lobbying and advocacy efforts on other issues, including, but not limited to, no-excuse absentee voting, nonpartisan redistricting reform, and expanding access to early voting. *Id.* ¶ 14.

B. Indiana State Conference of the NAACP

The Indiana State Conference of the NAACP is a nonpartisan, nonprofit organization chartered in 1940 by the NAACP Board of Directors and currently based in Gary, Indiana. The NAACP was founded by a racially and religiously diverse group of

people with the purpose of assisting African-American citizens to ensure political, educational, social, and economic equality of rights for all persons and to fight against racial discrimination. The Indiana State Conference of the NAACP currently has approximately 5,000 members, the majority of whom are residents of Indiana, registered to vote in Indiana, and participate in many aspects of the political process. National NAACP members affiliate with a local unit, and all local units in Indiana are members of the Indiana State Conference. Bolling-Williams Aff. ¶¶ 5–6.

Barbara Bolling-Williams is the President of the Indiana State Conference of the NAACP, a position she has occupied since 2003, and serves on the 64-member board of the NAACP National Board of Directors. Her responsibilities as President include coordinating the statewide activities of Indiana's local units, including the local branches, college chapters, and youth council; supporting the civic engagement work of local units, including their voter education and outreach, and communicating regularly with local units about their voter registration and education activities. *Id.* ¶¶ 2–4.

The Indiana State Conference of the NAACP is run entirely by volunteers. Members promote the NAACP's mission in a variety of ways, including by lobbying elected officials to support or oppose relevant pending legislation; staffing committees that support the NAACP's work on specific issue areas, such as health, economic empowerment, environmental climate justice, criminal justice, political action, education, and youth services; providing NAACP-led trainings in these areas, including trainings related to civil empowerment; and providing financial support. *Id.* ¶ 7.

With regard to voting rights, throughout its history, the NAACP's mission has been to promote civic engagement by educating voters, monitoring polls, and facilitating voter registration. Local units of the NAACP have supported this mission through a myriad of activities, including, *inter alia*, training and coordinating volunteers to identify problems at polling places and Election Day and following up with local election boards or national vote watch groups to address such issues; hosting nonpartisan candidate forums and providing information regarding how well various candidates are responding to issues important to the NAACP; offering rides to the polls on Election Day; providing voter education trainings to churches and community groups; assisting elderly voters with applying for absentee ballots; conducting voter registration drives at high schools; assisting voters with verifying their registration status to ensure they have not been purged from voter rolls; conducting door-to-door voter outreach efforts; and litigating to protect voters' rights. *Id.* ¶ 8. With no paid staff and a limited budget, the NAACP always faces challenging decisions regarding the manner in which to expend its limited financial resources, decisions made even more difficult in the midst of the COVID-19 pandemic. *Id.* ¶ 15.

The COVID-19 pandemic has resulted in conditions that have made it potentially unsafe for many voters to vote in person, including many members of the NAACP who are African-American and are disproportionately impacted by the disease, resulting in a heavier reliance on the absentee ballot process to provide a safe, alternative means to exercise the right to vote. Before the June 2020 primary election, the NAACP expended time and resources beyond what it had planned and what it had expended in the past to

educate voters about the mail-in option and encourage its use. *Id.* ¶ 10. According to Ms. Bolling-Williams, as a result of the noon Election Day deadline and uncertainties related to USPS mail delivery speeds, the NAACP must now reeducate its members and other voters about the risks associated with voting by mail in advance of the November 3, 2020 general election, diverting its resources away from its other voter education and protection activities. *Id.* ¶ 14.

Traditionally, the NAACP's voter education and volunteer training programs have focused on topics such as voter intimidation, stemming voter misinformation, the use of provisional ballots, and resources for addressing problems or issues faced on Election Day. Now, however, the NAACP must reduce time spent on these topics to instead explain how best to ensure a mail-in absentee ballot gets counted. Because of the COVID-19 pandemic, the NAACP has had to alter its traditional methods of conducting outreach and educating voters because schools and churches, where the NAACP generally engages in such activities, are not in session. The NAACP has pivoted to other methods of sharing its information that are often time-restricted, including the use of robocalling and radio spots, and have had to disproportionately focus their messaging on the noon Election Day deadline with the aim to decrease the disenfranchisement caused by the deadline in the June 2020 primary. *Id.* ¶¶ 14, 16–18.

The NAACP plans to conduct virtual trainings for volunteer pollwatchers before the November 3, 2020 general election. Although it has never before included such information in these trainings, this year it will be required to include information regarding absentee ballots and the noon Election Day deadline, which will divert time

from other important training topics. *Id.* ¶ 21. In addition, the NAACP will be asking its members to contact the Governor, Secretary of State, and the Indiana Election Commission, asking that the noon deadline be relaxed in the general election, which will require the engagement of additional volunteers. *Id.* ¶ 22.

The NAACP also anticipates engaging in additional work on November 3, 2020 in response to the noon Election Day deadline that will decrease its ability to engage in other voter protection activities. For example, the NAACP anticipates needing to use its volunteers to drive out to voters' residences to pick up absentee ballots that would otherwise not be timely received by the county election board and deliver those ballots to the county board before noon. Volunteers may need to be diverted from watching the polls to provide such carrier services, incurring gas costs, along with their lost time. *Id.* ¶ 19.

According to Ms. Bolling-Williams, given the pandemic conditions and the resulting increase in the filing of absentee ballot applications in Indiana, the Indiana Conference of the NAACP expects that some of its 5,000 members will receive their mail-in ballots too late to successfully complete and return them before noon on Election Day, as a result of delays in processing the applications and in delivery by the USPS. *Id.* ¶ 24.

VI. The Instant Litigation

Plaintiffs filed their complaint in this action on July 30, 2020, alleging that Indiana's requirement that mail-in ballots be received by noon on Election Day in order to be counted results in the disenfranchisement of thousands of voters, who, through no

fault of their own, have their ballots disallowed. As such, the "in by noon to count" deadline constitutes an undue burden on the fundamental right to vote in violation of the First and Fourteenth Amendments to the United States Constitution. On August 17, 2020, Plaintiffs moved for a preliminary injunction enjoining Defendants from enforcing the noon deadline for mail-in ballots and requiring that all mail-in ballots postmarked on or before November 3, 2020, and received on or before November 13, 2020, be counted, if otherwise valid. That motion is now before the Court.

Legal Analysis

I. Preliminary Injunction Standard

To obtain a preliminary injunction, the moving party must demonstrate: (1) a reasonable likelihood of success on the merits; (2) no adequate remedy at law; and (3) irreparable harm absent the injunction. *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 972 (7th Cir. 2012). If the moving party fails to demonstrate any one of these three threshold requirements, the injunctive relief must be denied. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008) (citing *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 11 (7th Cir. 1992)). At this stage of the analysis, "the court decides only whether the plaintiff has any likelihood of success—in other words, a greater than negligible chance of winning …." *AM Gen. Corp. v. DaimlerChrysler Corp.*, 311 F.3d 796, 804 (7th Cir. 2002).

If these threshold conditions are met, the Court must then assess the balance of the harm—the harm to Plaintiffs if the injunction is not issued against the harm to

Defendants if it is issued—and determine the effect of an injunction on the public interest. *Girl Scouts*, 549 F.3d at 1086. "The more likely it is that [the moving party] will win [their] case on the merits, the less the balance of harms need weigh in [their] favor." *Id.* at 1100. The public interest consideration is particularly significant in this case as the Supreme Court has cautioned that, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion …. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). We have moved with haste to hand down a decision in this case in an effort to reduce such a risk of voter confusion.

II. Discussion

A. The *Anderson-Burdick* Test

Our assessment of Plaintiffs' claim is governed by the two-step analysis set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which the Supreme Court has stated applies to all First and Fourteenth Amendment challenges to state election laws. *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992); *see also Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (recognizing that the Supreme Court in *Burdick* emphasized that the standard set forth in *Anderson* "applies to *all* First and Fourteenth Amendment challenges to state election laws") (emphasis in original). Under the *Anderson-Burdick* standard, a court addressing a challenge to a state election law "must weigh 'the character and magnitude of the asserted injury to the rights protected by First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,'

taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

Under this standard, the level of scrutiny applied to the challenged restriction "depends on the extent of its imposition: 'the more severely it burdens constitutional rights, the more rigorous the inquiry into its justifications.'" *Acevedo*, 925 F.3d at 948 (quoting *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 523–24 (7th Cir. 2017)). "'Nondiscriminatory restrictions that impose only slight burdens are generally justified by the need for orderly and fair elections,' whereas severe burdens must be 'narrowly tailored to serve a compelling state interest.'" *Id.* (quoting *Scholz*, 872 F.3d at 524). Nevertheless, "[h]owever slight [the] burden may appear, … it must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008)).

The Seventh Circuit recently applied the *Anderson-Burdick* test to a series of challenges to Wisconsin's election laws in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). "Fundamentally, the *Luft* court cautioned that the burden of a specifically challenged election provision must be considered against 'the state's election code as a whole'—that is, by 'looking at the whole electoral system,' rather than 'evaluat[ing] each clause in isolation.'" *Democratic Nat'l Committee v. Bostelmann*, ___ F. Supp. 3d ___ , 2020 WL 5627186, at *14 (W.D. Wis. Sept. 21, 2020) (quoting *Luft*, 963 F.3d at 671), *appeal docketed*, Nos. 20-2835 & 20-2844 (7th Cir. Sept. 23, 2020), *stay conditionally granted* (Sept. 27, 2020). However, *Luft* also reaffirmed that "the right to vote is personal"; thus,

"the state must accommodate voters" who are unable to meet the state's voting requirements "with reasonable effort." 963 F.3d at 669.

B. Likelihood of Success on the Merits

Here, Plaintiffs challenge Indiana's requirement that mail-in absentee ballots, in order to be counted, be received by noon on Election Day. They claim that requiring receipt of mail-in ballots specifically by *noon* on Election Day, while rejecting those received later in the day, is an arbitrary and anachronistic practice, originally instituted when Indiana law required mail-in ballots to be validated and counted at each individual precinct on Election Day, which requirement arguably supported an interest in the early receipt of such ballots so as to facilitate their transport to numerous locations throughout each county. However, effective July 1, 2019, Indiana now requires that each county count mail-in absentee ballots at a central location, thereby eradicating the need for transportation of the ballots and the noon-receipt deadline.

This requirement, Plaintiffs argue, takes on a heightened significance in the context of the ongoing challenges presented by the COVID-19 pandemic, including the well-publicized delays in USPS mail delivery, as thousands of Indiana voters are at risk of being disenfranchised through no fault of their own because, even if they comply with Indiana's absentee ballot application deadline and diligently complete and return their ballot upon receipt, there is still a significant likelihood that the ballot will not reach their county election board by noon on Election Day. Thus, Plaintiffs claim that, in this context, the noon Election Day receipt deadline constitutes an undue burden on the

fundamental right to vote, in violation of the First and Fourteenth Amendments to the United States Constitution.

Defendants rejoin that deadlines are necessary in the election context to ensure the orderly and effective administrative of elections in the State, and, here, the burden imposed by the noon Election Day receipt deadline is mitigated by other voter-friendly provisions in Indiana's election code, particularly the numerous alternatives apart from mailing that absentee voters may use to return their ballots so as to ensure their timely receipt. Defendants further claim that, whatever the severity of the burden, the State cannot be held responsible for disallowed ballots arriving after the noon deadline because it is the COVID-19 pandemic and the USPS that are its cause, not the absentee ballot receipt deadline. Moreover, Defendants argue, the insubstantial burden placed on voters is outweighed by the State's interests in promoting the public's confidence in the electoral system by ensuring prompt election results and not overburdening local election officials and county election boards.

We address the parties' respective arguments in turn below.

1. Severity of the Burden

We turn first in our analysis to address the severity of the burden at issue. Plaintiffs argue that the burden imposed by the noon Election Day deadline is substantial, and, on the preliminary record before us, we agree with that assessment. There is no dispute that a record number of absentee ballots were requested and cast in Indiana's June 2, 2020 primary election, and, although the State has not extended the privilege of no-excuse absentee voting for the November 3, 2020 general election, the parties agree that

an unprecedented number of those statutorily eligible to do so are expected to cast their ballots again by mail in the general election as a result of the COVID-19 pandemic. Plaintiffs have presented evidence, which Defendants have not materially challenged, that this surge in mail-in absentee voting, coupled with delays and disruptions in USPS mail delivery, resulted in well-documented delays in the primary election, both in the delivery of blank absentee mail-in ballots to voters and the return of completed ballots to election officials, and it is likely to result in similar delays in the November 3, 2020 general election.

Plaintiffs have further shown, at least on this preliminary record, that, as a result of these delays, Indiana voters can be—and in fact have been—disenfranchised by the noon Election Day receipt deadline, despite complying with the deadline imposed by Indiana law for requesting absentee ballots and promptly completing and returning their ballots upon receipt. In the 2020 primary election, in Marion County and Hamilton County alone (two out of Indiana's 92 counties which together represent 20% of Indiana's population), 1,949 otherwise valid mail-in absentee ballots postmarked on or before the date of the election were rejected for not having arrived by noon on Election Day. Reasonably extrapolated, this evidence suggests that the burden on thousands of Indiana voters who are at risk of being disenfranchised in the November 3, 2020 general election based on factors largely outside their control is very substantial. The USPS itself has warned the State that it cannot guarantee delivery of mail within a specific time frame and that "certain [of Indiana's] deadlines for requesting and casting mail-in ballots may be incongruous with the Postal Service's delivery standards. This mismatch creates a risk

that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them." Dkt. 9-1 at 1.

Defendants' rejoinder regarding the severity of the burden at issue is threefold. Specifically, Defendants first argue that Plaintiffs' claim fails at the outset because they have not shown that Indiana's election code as a whole is overly burdensome, as required by the Seventh Circuit in *Luft v. Evers*; second, that, even if considered in isolation, the burden imposed by the noon Election Day receipt deadline is reasonable because it is mitigated by the fact that Indiana law permits alternative methods for returning absentee ballots that allow voters to ensure their ballots are timely received, regardless of mail delivery delays; and third, that it is only those burdens on the right to vote imposed by the State that are actionable, and here, whatever burden has been imposed is attributable to the COVID-19 pandemic and/or the USPS, not the State. We address these arguments in turn below.

With regard to Defendants' first argument, to the extent that Defendants claim that the Seventh Circuit held in *Luft* that successfully challenging any specific provision of a state's election code requires a plaintiff to show that the state's entire electoral system is too burdensome, we do not understand that to be an accurate interpretation of the court's holding or the relevant legal standard.[24] Rather, *Luft* instructs that, in assessing the

[24] In *Luft*, where various provisions of Wisconsin's electoral system were at issue, the Seventh Circuit affirmed certain parts of the lower court's ruling invalidating specific portions of Wisconsin's election code, despite recognizing that the electoral system as a whole "has lots of rules that make voting easier," including several provisions more lenient than Indiana's which entitle employees to three hours off from work to vote, provide for longer poll hours, and permit voters to register at the polling place immediately before casting a ballot. 963 F.3d at 672.

burden imposed by a specific election rule, the challenged provision must be considered in "interaction … with the election system as a whole" to assess whether other, more lenient, provisions in the code help to ameliorate that burden. 963 F.3d at 671.

Applying this standard to the facts before us leads us to Defendants' second argument in defense of the constitutionality of the noon Election Day receipt deadline, to wit, that the burden imposed by the deadline is mitigated by other provisions in Indiana's election code, particularly those sections affording absentee voters alternative means of returning their ballots apart from the mail, and is thus a reasonable requirement. Defendants highlight various general provisions of Indiana law that facilitate voting, including those that permit all voters to cast an "in-person absentee ballot" within 28 days before Election Day and requiring county election offices to be open for such early voting, Ind. Code §§ 3-11-4-1, 3-11-10-26, 3-11-10-26.3; that empower counties to create "vote centers" to provide voters additional locations to cast an in-person ballot regardless of precinct, *id.* § 3-11-18.1-13; and that offer online voter registration and assistance to voters with disabilities and those unable to understand English, *id.* §§ 3-11-9-2, 3-7-26.7-5.

More importantly, Defendants argue, Indiana's election rules allow voters who are eligible and choose to vote by mail-in absentee ballot to ensure that their ballots are received by the current noon Election Day deadline, even accounting for USPS delivery delays, as long as such voters promptly complete and return their ballots upon receipt and do not wait until the end of the statutory window provided under Indiana law for

requesting absentee ballots.[25] If absentee voters are still concerned that their mail-in absentee ballot will not reach the county election board by noon on Election Day, Indiana law permits such voters to return their absentee ballot in person to the county clerk or the appropriate polling location on Election Day and either cast it or surrender it and vote in person. IND. CODE §§ 3-11-10-1(a)(6), 3-11-10-31, 3-11.5-4-18. Alternatively, a member of the voter's household or the voter's attorney may return the voter's sealed ballot, along with a supporting affidavit, on the voter's behalf. *Id.* § 3-11-10-24(c)–(d). Finally, Defendants point to the fact that, at noon on Election Day, absentee voters can either call their county election board or check https://indianavoters.in.gov to determine whether their ballot has been received, and if it has not arrived, the voter may obtain a certificate to that effect from the county election board and then vote in-person at the appropriate polling place to prevent being disenfranchised. IND. CODE §§ 3-11.5-4-13, 3-11.5-4-21.

Although it is true, as Defendants highlight, that Indiana's electoral system provides a number of alternatives to voting by mail-in absentee ballot, the problem is that

[25] As discussed above, the statutory period to apply for mail-in absentee ballots has already begun and Indiana law requires county election boards, beginning on September 19, 2020 and continuing through October 22, 2020, the last date on which a voter may request an absentee ballot under Indiana law, to send out mail-in absentee ballots to eligible voters on the same day such voters' applications are received. Accordingly, Defendant argues, even presuming a one-week mailing delay, if a voter eligible to vote by mail submitted their application on September 18, for example, it would have been received by the county election board on September 25 and sent back out that same day, with the ballot arriving to the voter by October 2. Assuming the voter were to take a few days to complete the ballot, sending it back to the county election board on October 5, it would be received by the board on October 12, in plenty of time to be counted. This hypothetical of course assumes that the voter applied for their absentee ballot more than one month before the State's deadline.

all the alternative methods of voting or returning an absentee ballot cited by Defendants require the voter (or another member of the household, assuming there is one, or the voter's attorney, assuming the voter has one) to go in person to a polling place or to the county clerk's office. Appearing in person is an option not available to many absentee voters, who may be disabled, seriously ill, homebound, out of the state, or remaining sequestered at home to avoid COVID-19's devastation. Indeed, as Plaintiffs point out, these are often the very circumstances that render such voters eligible to and desirous of voting by mail in the first place.

Even for those absentee voters who are physically able to travel to a county office or polling place, the earliest point at which such a voter could learn that their mail-in ballot had not been received by the statutory deadline, at least without the aid of a real-time ballot tracking system, would be noon on Election Day, and that assumes there is no lag time in updating that information on the State's website. We find it highly unlikely that a voter in that position, who was eligible to vote by absentee ballot and thus presumably unavailable to vote in person for one of the enumerated statutory reasons, could, immediately upon learning that their mail-in ballot had not been received, travel in person to their local election office to obtain the necessary certification that their ballot was not received on time, and then travel to their precinct polling location to vote in person by 6:00 p.m. Even if technically possible, this clearly is not a workable solution for the vast majority of the potentially thousands of voters at risk of being disenfranchised by the noon on Election Day receipt deadline.

It is obviously possible, as Defendants argue, for mail-in absentee voters to ensure that their ballots are received in time, even accounting for USPS delivery delays, by requesting their absentee ballots weeks in advance of the State's deadlines and then promptly completing and returning their ballots. Indeed, voters nationwide are being encouraged to do just that[26] and, hopefully Hoosier voters eligible to and desirous of voting by mail-in absentee ballot will follow that advice. However, given the unprecedented number of mail-in ballots expected to be cast in the November 3, 2020 election, there can be little doubt that a significant number of "seemingly prudent, if unwary, would-be voters will not request an absentee ballot far enough in advance to allow them to receive it, vote, and return it for receipt by mail before the election day deadline despite acting well in advance of the deadline for requiring a ballot." *Bostelmann*, 2020 WL 5627186, at *21. Defendants do not materially dispute this.

Still others may intentionally wait until closer to Indiana's October 22, 2020 statutory deadline for requesting their absentee ballot, not as a result of dilatoriness, but because they are undecided and therefore not ready to vote well in advance of the end of the presidential campaign or because Indiana's deadline "is giving them a false sense of confidence in timely receipt." *Id.* Defendants' attempt to minimize the burden imposed by the noon Election Day receipt deadline on such voters by arguing that they could have prevented the problem by requesting their absentee ballot weeks in advance of the

[26] The USPS, for example, has taken steps to address concerns regarding slow mail service, including sending postcards to voters across the country recommending they "plan ahead" and submit their absentee ballot application at least fifteen days before Election Day and mail their absentee ballots at least seven days before Election Day. King Decl., Exh. D.

statutory deadline or by choosing instead to vote or return their ballot in person is unavailing. As Plaintiffs argue, the State cannot offer absentee voting by mail and then tell voters who choose it and abide by the statutory rules that they should have chosen differently because of delays over which they have no control. For these reasons, we are not persuaded that the burden on voters imposed by the noon Election Day receipt deadline is mitigated by other provisions in Indiana's election code.

Nor are we persuaded by Defendants' third and final argument, to wit, that Plaintiffs' claim fails because, regardless of the severity of the burden imposed by the noon Election Day receipt deadline, it is the COVID-19 pandemic and the vagaries of the USPS mail delivery schedule, not the State, that have caused the burden. As discussed above, the undisputed record demonstrates in this case that voters eligible to vote by mail-in absentee ballot who wait even up to several days before Indiana's October 22, 2020 deadline to request an absentee ballot, whether because they are unaware of the potential risk of doing so, were undecided earlier in the presidential campaign, or for some other reason, face a significant likelihood that their ballots, even if timely returned upon receipt, will not be received by election officials on or before the current deadline. Thus, Indiana's "election system sets [such voters] up for failure in light of the near certain impacts of this ongoing pandemic." *Id.* Under these circumstances, we cannot say that the State bears no responsibility for the burden caused by the current absentee ballot receipt deadline or the voter's disenfranchisement.

In sum, the undisputed evidence, at least at this preliminary stage of these proceedings, establishes that the burden imposed by Indiana's noon Election Day receipt

deadline, which threatens to disenfranchise thousands of eligible absentee voters for reasons that, because of the COVID-19 pandemic, are outside their control, is very substantial. That burden is not sufficiently mitigated even when considered against Indiana's election code as a whole because voters who either must or choose to use a mail-in ballot in the November 3, 2020 general election have no practical alternative to vote if their ballot has not been received by noon on Election Day.

2. State Interests

Against this burden, we must balance the interests of the State in enforcing the challenged deadline. Regarding the State's interests, Defendants argue that *some* deadline for receiving ballots must exist and that the noon Election Day receipt deadline Indiana imposes is both in line with other of its deadlines in the election context, many of which are set at noon on the relevant day, and one which also permits the vast majority of ballots cast to be counted on Election Day. Defendants maintain that the challenged deadline is therefore not arbitrary and promotes public confidence in elections by allowing most races to be called on Election Day, rather than days or weeks later. Given the unprecedented number of absentee ballots expected to be cast in the general election this year, Defendants claim that if Plaintiffs' requested relief is granted, and a significant portion of those ballots are not received by noon on Election Day, it could make many races impossible to call by the end of the night, potentially undermining the public's faith in the electoral process.

Additionally, Defendants cite their concern that counting all eligible mail-in ballots if they are postmarked by Election Day and arrive by November 13 runs a

substantial risk of overburdening absentee ballot counters and county election boards, who are responsible for authenticating and counting the absentee ballots by noon on November 16. The burden imposed by the noon Election Day receipt deadline is thus reasonable and justified under the *Anderson/Burdick* test, Defendants argue, because it balances "an array of competing interests in promoting participation, deterring and detecting fraud, and achieving finality at the earliest reasonable opportunity in the vast majority of races." Defs.' Resp. at 24.

For the following reasons, we find these interests as identified by Defendants to be insufficient in outweighing or justifying the burden the challenged deadline places on mail-in absentee voters' fundamental right to vote. Initially, while the State's interests in promoting voter participation and detecting and deterring fraud are no doubt significant, it is neither self-evident nor have Defendants presented any evidence to establish how the noon Election Day receipt deadline either promotes such participation or assists in preventing voter fraud. Nor is there any evidence before us to support the conclusion that extending the current deadline as Plaintiffs request would result in decreased voter participation or an increased risk of voter fraud. Such a claim is further belied by the fact that the State has long-counted provisional ballots and overseas voters' absentee ballots during the ten-day period following Election Day, apparently without incident. Defendants "may not simply invoke the phrase 'election integrity' without further explanation" and expect those incantations to carry the day. *Common Cause Ind. v. Lawson*, ___ F. Supp. 3d ___, 2020 WL 5671506, at *6 (S.D. Ind. Sept. 22, 2020); *see also Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020), *petition for cert. filed*, (U.S.

Aug. 3, 2020) (No. 20-109) (holding that, while the State clearly has an interest in preventing voter fraud, there must be evidence "that such an interest made it necessary to burden voters' rights").

We turn next to address Defendants' stated interest in prompt election results, which Defendants contend promotes the public's confidence in the electoral system. Initially, we note that Defendants' concern that granting Plaintiffs' requested relief will prevent races from being called on the night of the election, even considering the expected increase in the number of mail-in absentee voters, will arise only in close races. More importantly, Defendants have not shown how ensuring that all otherwise valid absentee ballots cast by Election Day are counted threatens to undermine public confidence in the legitimacy of the final results; rather, it should in fact help assuage such concerns. Granting Plaintiffs' requested relief will not require an extension of the State's current deadlines for finalizing and certifying election results, within which time Indiana law already permits provisional ballots and overseas absentee ballots postmarked by Election Day and arriving within ten days following the election to be counted. Defs.' Resp. at 11 ("Indiana law provides for an approximately two-week period to finalize the election results."). Moreover, in the 2020 primary election, while the noon Election Day receipt deadline was not extended, the time period for counting mail-in absentee ballots received by the deadline was extended past Election Day by the Commission, apparently without the concern that undecided races would lower the public's confidence in the electoral process.

Nor will Indiana be "an anomaly" if Plaintiffs' requested relief is granted as several states count absentee ballots that arrive within a specified period of time following the election, if timely postmarked. *See Bostelmann*, 2020 WL 5627186, at *21 ("[S]ome fourteen states, other than Wisconsin and the District of Columbia, follow a postmark-by-election-day rule (or a close variant) and count ballots that arrive in the days following the election, so long as they are timely postmarked."). In any event, in light of the high volume of absentee ballots expected nationwide because of the COVID-19 pandemic, it is likely that election results will not be final on Election Day in many states, and the fact that Indiana could be among them is not a sufficient concern to justify the level of disenfranchisement likely to be caused by the noon Election Day receipt deadline.

Finally, while we acknowledge and appreciate Defendants' concern that election officials and county election boards will be overwhelmed and greatly burdened by the requirement that otherwise valid mail-in absentee ballots postmarked by Election Day and received by November 13 be counted before the November 16 certification deadline, this burden is lessened by the fact that Indiana county election boards will not need to create a process for doing so out of whole cloth; rather they need only expand procedures already employed to process and count provisional ballots and mail-in ballots cast by overseas voters during the ten days following an election. We acknowledge, as Defendants argue, that there are comparatively few overseas absentee ballots; thus, counting such ballots within ten days after the election is a fairly modest undertaking. However, even assuming that some county election boards will be required to retain

additional staff to assist in counting the additional mail-in absentee ballots postmarked by Election Day and arriving by November 13, we find that this additional administrative strain is not so compelling as to outweigh the burden faced by voters who, even if they comply with Indiana's statutory deadline for requesting absentee ballots and promptly return those ballots, may still be disenfranchised by the enforcement of the challenged law.

Election Day is set by law as November 3—*all day* on November 3 until the polls officially close. Any voter casting a ballot has the right to do so within that time frame. The noon Election Day receipt deadline disadvantages—indeed, disenfranchises—voters who vote by mail-in ballot by cutting short the time period within which they are permitted to exercise this right even though, due to the COVID-19 pandemic, ensuring the timely delivery of their ballots is outside their control. To do so without a sufficiently weighty state interest constitutes an undue burden on the fundamental right to vote in violation of the First and Fourteenth Amendments. The State's asserted interests here are insufficient to justify such disenfranchisement, given that the system already has a built-in safety valve timeframe within which to receive and process all otherwise valid mail-in ballots cast on Election Day and arriving by November 13. Accordingly, we hold that Plaintiffs have shown a likelihood of success in demonstrating the risk of disenfranchisement of thousands of Indiana votes due to the noon Election Day receipt deadline outweighs any interest of the State during the COVID-19 pandemic and is therefore unconstitutional as applied in this context.

B. Irreparable Harm and Inadequate Remedy at Law

Having established a likelihood of success on the merits of their claim that the noon Election Day deadline places an undue burden on the fundamental right to vote in violation of the First and Fourteenth Amendments, Plaintiffs now must show that, without preliminary injunctive relief, they will suffer irreparable harm for which there is no adequate remedy of law. "[H]arm is considered irreparable if it 'cannot be prevented or fully rectified by the final judgment after trial.'" *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1045 (7th Cir. 2017) (quoting *Girl Scouts of Manitou Council, Inc.*, 549 F.3d at 1089). To establish that they have no adequate remedy at law, Plaintiffs must show that any award would be "seriously deficient as compared to the harm suffered." *Foodcomm Int'l v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003).

Plaintiffs argue they will be irreparably harmed absent preliminary injunctive relief on two fronts: first, through the likely disenfranchisement of Indiana voters who are members of each organization, and second, through the diversion of their limited resources away from their usual voter-protection activities to focus instead on voter education and other efforts to mitigate the disenfranchising effect of the noon Election Day deadline. Both organizations represent that they have already had to divert valuable time and resources from other efforts so as to focus on educating their volunteers and members regarding the risk of mail-in absentee ballots being rejected for failure to meet the absentee ballot receipt deadline.

It is well-established that "[t]he existence of a continuing constitutional violation constitutes proof of an irreparable harm…." *Preston v. Thompson*, 589 F.2d 300, 303 n.3

(7th Cir. 1978). Moreover, the Seventh Circuit has long held that First Amendment violations presumptively cause irreparable harm, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006), and "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases). Plaintiffs also have no adequate remedy at law because neither the diversion of resources nor the infringement on the fundamental right to vote can be redressed by money damages or other traditional legal remedies. *Christian Legal Soc'y*, 453 F.3d at 859 ("The loss of First Amendment freedoms is presumed to constitute irreparable injury for which money damages are not adequate…."); *League of Women Voters of N.C.*, 769 F.3d at 247 ("[O]nce the election occurs, there can be no do-over and no redress."). Accordingly, Plaintiffs have satisfied their burden to show that, absent injunctive relief, they will suffer irreparable harm for which no adequate legal remedy exists.

C. Balancing of Harms and the Public Interest

Finally, "the court must compare the potential irreparable harms faced by both parties to the suit—the irreparable harm risked by the moving part in the absence of a preliminary injunction against the irreparable harm risked by the nonmoving party if the preliminary injunction is granted," *Girl Scouts of Manitou Council, Inc*, 549 F.3d at 1100. This balancing also requires consideration of whether an injunction would be in the public interest. *Id.*

Here, the irreparable harms that Plaintiffs will suffer absent an injunction, namely, likely member disenfranchisement and diversion of resources away from critical voter-

protection activities, are, as discussed more fully above, very significant. On the other hand, Defendants claim that issuance of an injunction requiring the counting of all mail-in absentee ballots, if they are postmarked by Election Day and received by November 13, 2020, would both undermine the public's confidence in election results on the eve of Election Day and overburden absentee ballot counters and county election boards, who are responsible for authenticating and counting the absentee ballots by noon on November 16, 2020.

Regarding Defendants' first contention, as discussed above, rather than undermining the public's confidence in the election results, ensuring that all otherwise valid absentee ballots cast by Election Day are counted should instead *strengthen* the public's confidence in the legitimacy of the final results. As to Defendants' second argument, while we appreciate that there will be an increased burden placed on election officials by the requirement that otherwise valid mail-in absentee ballots postmarked by Election Day and received by November 13 be counted, as we previously explained, this burden is lessened by the fact that Indiana county election boards will need only to expand procedures already used to process and count provisional ballots and mail-in ballots cast by overseas voters during the ten days following an election. Accordingly, this additional administrative strain does not outweigh the irreparable harm faced by Plaintiffs.

Finally, we find that an injunction is in the public interest. It is well-established that, as a general matter, "[e]nforcing a constitutional right is in the public interest," *Whole Women's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019), and "[t]he public

interest … favors permitting as many qualified voters to vote as possible." *Obama v. Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012). Defendants argue, however, that an injunction altering Indiana's longstanding absentee ballot receipt deadline would not be in the public interest here given the proximity of the November 3, 2020 general election, which, as of the date of this entry, is 35 days away. Defendants claim that, in light of the large number of mail-in ballots that will undoubtedly be cast this year, if the Court were to grant Plaintiffs' requested relief, voters may not know the result of the election until ten days later, "a significant departure from the norm that will confuse voters and possibly lead to disillusionment and decreased confidence in the election system." Defs.' Resp. at 26.

We are mindful, as Defendants emphasize, that the Supreme Court has cautioned that courts considering whether to issue injunctive relief altering election rules are "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). This is because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5. Accordingly, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citations omitted); *accord Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251, at *4 (7th Cir. Aug. 20, 2020) ("[F]ederal courts should

refrain from changing state election rules as an election approaches."); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014), *mot. to vacate stay den'd*, 135 S.Ct. 9 (2014) (holding that courts "should carefully guard against judicially altering the status quo on the eve of an election").

However, the primary concern addressed in *Purcell*, namely, that altering election rules or issuing conflicting court orders, particularly close to an election, can create voter confusion and lead to decreased turnout at the polls (or, in this case, a disincentive to vote by absentee ballot), is not implicated by the injunction requested here by Plaintiffs. An order extending the noon Election Day receipt deadline for mail-in absentee ballots is straightforward and does not affect the procedure a voter must follow to properly submit an absentee mail-in ballot. Rather, the change in the receipt deadline affects only what occurs *after* a voter has submitted their absentee ballot by mail. Accordingly, there is no impact on the voting process itself, nor any real risk of voter confusion or dissuasion from casting a ballot. *See Self-Advocacy Sols. N.D. v. Jaeger*, No. 3:20-cv-00071, 2020 WL 2951012, at *11 (D.N.D. June 3, 2020) ("[T]here is no potential for voter confusion or dissuasion from voting because the process for submitting an absentee ballot will remain unchanged."). To the contrary, as other district courts addressing this issue have observed, *Purcell*'s concern about "safeguarding public confidence in election integrity" is in fact advanced by procedures that ensure valid mail-in ballots are not rejected for reasons beyond voters' control. *See, e.g., Richardson v. Tex. Sec'y of State*, No. 5A-19-cv-00963-OLG, 2020 WL 5367216, at *29 (W.D. Tex. Sept. 8, 2020), *appeal docketed*,

No. 20-50774 (5th Cir. Sept. 10, 2020) (citing *Self-Advocacy Sol.*, 2020 WL 2951012, at *10).

Accordingly, we hold that the balance of harms weighs in Plaintiffs' favor and the public interest supports the issuance of the injunction they seek.

III. Conclusion

For the reasons detailed above, Plaintiffs' Motion for Preliminary Injunction [Dkt. 9] is GRANTED and Defendants are preliminarily enjoined from enforcing the noon Election Day receipt deadline for mail-in absentee ballots, codified at Indiana Code §§ 3-11.5-4-3 and 3-11.5-4-10, in the November 3, 2020 election. The specific language of the injunction will be set forth in a separate order as required by the Seventh Circuit.

IT IS SO ORDERED.

Date: 9/29/2020

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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Ex. D

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2022
(3:20-cv-01730-JMC)

KYLON MIDDLETON; DEON TEDDER; AMOS WELLS; CARLYLE DIXON; TONYA WINBUSH; ERNESTINE MOORE; SOUTH CAROLINA DEMOCRATIC PARTY; DNC SERVICES CORPORATION/DEMOCRATIC NATIONAL COMMITTEE; DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE,

Plaintiffs – Appellees,

v.

MARCI ANDINO, in her official capacity as Executive Director of the South Carolina State Election Commission; JOHN WELLS, in his official capacity as Chair of the South Carolina State Election Commission; CLIFFORD J. ELDER, in his official capacity as member of the South Carolina State Election Commission; SCOTT MOSELEY, in his official capacity as member of the South Carolina State Election Commission,

Defendants – Appellants,

JAMES H. LUCAS, Speaker of the South Carolina House of Representatives; HARVEY PEELER, in his capacity as President of the South Carolina Senate,

Intervenors/Defendants – Appellants,

SOUTH CAROLINA REPUBLICAN PARTY,

Intervenor – Appellant.

STATE OF SOUTH CAROLINA,

Amicus Supporting Appellants.

O R D E R

Upon en banc consideration of submissions relative to appellants' emergency motion to stay the district court's injunction, the court denies the motion for a stay pending appeal. Chief Judge Gregory and Judges Motz, King, Keenan, Wynn, Diaz, Floyd, Thacker, and Harris voted to deny the motion for stay. Judges Wilkinson, Niemeyer, Agee, Quattlebaum, and Rushing voted to grant the motion for stay. Judge Richardson is recused in the case. Judge King and Judge Wynn filed opinions concurring in the denial of a stay. Judge Wilkinson and Judge Agee filed a dissenting opinion.

Entered at the direction of Chief Judge Gregory.

For the Court

/s/ Patricia S. Connor, Clerk

KING, Circuit Judge, concurring in the denial of a stay pending appeal:

I write today to emphasize that, by enjoining the witness requirement for absentee voting in the November general election, the district court has preserved the electoral status quo in South Carolina — the status quo of *not* having a witness requirement during the COVID-19 pandemic. In so doing, the court carefully weighed the competing interests and properly concluded that imposing the witness requirement now would likely unconstitutionally burden the fundamental right to vote, irreparably harm voters, and disserve the public interest. Thus, our en banc Court is wholly justified in denying the emergency motion to stay the district court's preliminary injunction pending appeal. Indeed, to stay the injunction so close to the election would engender mass voter confusion and other problems that the Supreme Court warned against in *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006).

The district court's findings of fact and conclusions of law are set forth in its thorough and well-reasoned decision of September 18, 2020. *See Middleton v. Andino*, No. 3:20-cv-01730 (D.S.C. Sept. 18, 2020), ECF No. 109 (the "Order and Opinion"). In short, South Carolina has in the past restricted absentee voting to those with a qualifying excuse. *See* S.C. Code Ann. § 7-15-320. The State has also required that absentee voters have a witness sign their absentee ballot return envelope. *Id.* § 7-15-380. Because of the COVID-19 pandemic, however, South Carolina expanded absentee voting to all voters during this year's June primary and November general elections. Meanwhile, pursuant to a prior, unappealed decision of the district court, the State was enjoined from enforcing the witness requirement with respect to absentee ballots cast in the June primary.

The June primary was thus the first election for thousands of South Carolinians to vote by absentee ballot, and those citizens have only voted absentee when no witness was necessary. In these circumstances, as the district court explained in enjoining the witness requirement for the November general election, there is "a new status quo" in South Carolina. *See* Order and Opinion 39. The court underscored that for the voters who may expect the witness requirement, it would not "pose any difficulty not to have to comply with it." *Id.* at 40 (internal quotation marks omitted). But the witness requirement "would likely . . . confuse and deter voters" who, based on the rules of the June primary, reasonably expect the witness requirement to be suspended for the November general election, too. *Id.* at 39-40 (internal quotation marks omitted).

That voters in the November general election would be blindsided by the witness requirement is all the more probable because, since the Spring, the spread of COVID-19 has worsened in South Carolina. Any absentee voter or witness would "run[] the risk of unwittingly transferring the virus when complying with the [witness requirement]." *See* Order and Opinion 53. Moreover, COVID-19 disproportionately endangers Black and elderly citizens, who are more likely to live alone and lack ready access to a witness for absentee voting. *See id.* at 54 (highlighting evidence that "voting by mail carries less risk than voting in person" and that, "[f]or those voters who live alone, casting [an absentee] ballot without a witness signature carries less risk than casting a ballot with a witness signature"). Strikingly, if the witness requirement were enforced during the November general election, even voters known to be sick with COVID-19 would have to procure a witness in order to vote absentee.

Relying on this and other evidence, the district court determined that reinstating the witness requirement for the November general election would constitute "a significant burden" on voters. *See* Order and Opinion 57. As for South Carolina's justifications for enforcing the witness requirement during the COVID-19 pandemic — namely ensuring voter integrity and investigating absentee ballot fraud — the court concluded that they are "undercut by an utter dearth of absentee fraud." *See id.* at 58-59. Significantly, there has been scant evidence of any fraud during the June primary and no "evidence of the type of fraud that could be prevented by the [witness requirement] in the first place." *Id.* at 59 (internal quotation marks omitted).

To be sure, a longtime member of the state police testified that the witness signature could be "a significant investigative lead" when investigating absentee ballot fraud. *See* Order and Opinion 58-59. But state election administrators — including the lead defendant here, South Carolina Election Commission Executive Director Marci Andino — have conceded that they do not use the witness requirement to combat fraud, as the Election Commission has no ability to verify witness signatures. Andino has repeatedly recommended against the witness requirement as being not only ineffective to deter fraud, but also a barrier to lawful voting. Furthermore, the Election Commission has already verified a voter's identity before sending an absentee ballot, there are no qualifications as to who may serve as a witness for absentee voting, and a witness may not even know the identity of the voter whose ballot return envelope the witness signs. In the words of the district court, the witness requirement apparently "provides ineffectual support towards solving an insubstantial problem in South Carolina." *Id.* at 62.

Weighing the competing interests, the district court concluded that "the character and magnitude of the burdens imposed on [voters] in having to place their health at risk during the COVID-19 pandemic likely outweigh the extent to which the [witness requirement] advances [South Carolina's] interests of investigating voter fraud." *See* Order and Opinion 62. Accordingly, the court ruled that the plaintiffs have shown a strong likelihood of success on the merits, as well as a likelihood that, without a preliminary injunction, they would suffer irreparable harm. The court also ruled that the balance of the equities and the public interest favor enjoining the witness requirement for the November general election. *See id.* at 64 (explaining that "[t]he public interest is clearly in remedying dangerous or unhealthy situations and preventing the further spread of disease," particularly "in the context of the worst pandemic this state, country, and planet has seen in over a century" (internal quotation marks omitted)).

Put simply, the decision of the district court is measured, compelling, and soundly supported both factually and legally. It protects countless lawful voters who otherwise would have to choose between avoiding needless exposure to a deadly virus and exercising their fundamental right to vote. As such, the extraordinary relief of a stay pending appeal is in no way warranted under the controlling legal principles that are applicable here. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion . . . ."). Accordingly, I commend our en banc majority for acting

swiftly to deny the requested stay of the district court's injunction.*

* On a final note, I recognize that my dissenting colleagues see the district court's injunction and our Court's decision not to stay it as some sort of illegitimate intrusion into South Carolina's prerogatives to set election rules. The dissent, however, refuses to acknowledge that the district court has preserved the electoral status quo in South Carolina for the November general election. Instead, the dissent asserts that the court improperly changed the rules shortly before the election — when the court was actually enjoining the State's effort to change the rules shortly before the election. The dissent also disregards the ample evidence underlying the court's conclusion that reinstating the witness requirement now, while COVID-19 continues its devastating spread, would significantly burden voters. Rather, the dissent invokes other, preferred evidence downplaying the difficulty and health risks of securing a witness and then declares that the witness requirement would be no burden at all. Lastly, the dissent accuses the district court of improperly minimizing South Carolina's interest in preventing voter fraud, but without acknowledging much of the evidence that led the court to its cogent observation that the witness requirement apparently "provides ineffectual support towards solving an insubstantial problem in South Carolina." *See* Order and Opinion 62.

At bottom, the dissent urges unquestioning acceptance of the State's dubious justification for the witness requirement, along with essentially unfettered power of the state government to make voting harder in the name of "preventing voter fraud." I simply will not abide such an abdication of the courts' authority and obligation to protect the precious and fundamental right to vote. *See United States v. Anderson*, 481 F.2d 685, 699 (4th Cir. 1973) (pronouncement by our Judge Russell that "[n]o right is more precious than the right of suffrage"), *aff'd*, 417 U.S. 211 (1974).

WYNN, Circuit Judge, concurring in the denial of a stay pending appeal:

Today, this Court wisely reinstates the district court's order and so helps South Carolinians of all political persuasions exercise their constitutionally guaranteed right to vote. I write separately because I deeply disagree with my dissenting colleagues' description of our Court's action as a "[s]elective intervention[] by the courts [that] will create the appearance of partisanship." Dissenting Op. at 13.

Our Court does not selectively intervene in election cases for partisan reasons: we resolve justiciable controversies. Put simply, this Court resolves disputes based on legal principles, not political preferences. And despite our dissenting colleagues' unfortunate rhetoric to the contrary, this case illustrates that basic proposition. The legal dispute here arises because the majority has one understanding of what constitutes the applicable status quo in this case for *Purcell* purposes, the dissent another. That single, principled difference explains why today's divided vote is based on legal principles, not political preferences.

WILKINSON and AGEE, Circuit Judges, dissenting from the denial of a stay:

We would stay the district court's order enjoining enforcement of a witness signature requirement for absentee ballots in S.C. Code §7-15-380. That order represents a stark interference with South Carolina's electoral process right in the middle of the election season.[1]

To merit a stay pending appeal, appellants must show they are likely to succeed on the merits, that they will be irreparably injured absent a stay, that the equitable balance favors a stay, and that a stay benefits the public. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

Appellants are likely to succeed on appeal because appellees have a legally unsupportable case. The Constitution makes it clear that the principal responsibility for setting the ground rules for elections lies with the state legislatures. U.S. Const. art. I, §4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."). Thus, "the federal Constitution provides States—not federal judges—the ability to choose among many permissible options when designing elections." *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (per curiam). The district court's order upends this whole structure and turns its back upon our federalist system.

The majority's disregard for the Supreme Court is palpable. The Supreme Court has repeatedly cautioned us not to interfere with state election laws in the "weeks before an

[1] This opinion modifies our earlier opinion of September 25, 2020, dissenting from the grant of rehearing *en banc*. The modification is to the extent necessary to respond to Judge King's concurring opinion on the motion for a stay now before the *en banc* court.

election." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). The district court failed to give this command proper weight. Although we share the district court's concerns about COVID-19's potential impact on elections, the pandemic does not give judges "a roving commission to rewrite state election codes." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 394 (5th Cir. 2020).

The majority is wrong to claim that enjoining a state law plainly in place for the election is somehow not disruptive. It equates primary voting with the far different and larger operation of a general election. The State has a right to defend its laws under which it has decided that its election should be conducted and its interest in ensuring the integrity of a general election presents much different questions from those posed by an intra-party primary. As further evidence that the district court's preliminary injunction did in fact change the rules shortly before the election, we can look to the language of the district court's judgment, which orders the State to launch a publicity campaign notifying voters that this requirement will not be enforced. *See* J.A. 147 (ordering Appellants to "immediately and publicly inform South Carolina voters about the elimination of the witness requirement for absentee voting" in coordination with election officials and to do so through various specified social media outlets and websites). This hardly sounds to us like some ordinary defense of the "status quo." *See* Concurring Op. 3.

Finally, even if an election were not a few weeks away, South Carolina's law is commonplace and eminently sensible. It is designed to combat voter fraud, a fight which "the State indisputably has a compelling interest" in winning. *Purcell*, 549 U.S. at 4

(quoting *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 231, (1989)). That is not an abstract concern. Just last year, the election in North Carolina's 9th Congressional district was overturned on the basis of absentee ballot fraud. *See* Ely Portillo & Jim Morrill, *Mark Harris calls for new election in 9th District*, Charlotte Observer (Mar. 7, 2019), https://www.charlotteobserver.com/news/politics-government/article226550555.html.

Just think of all the areas in which the law requires witnesses and notaries to inspire trust in official documents and acts and to convey their authenticity. It is therefore unsurprising that the courts of appeals have resisted overturning these laws. *See Democratic Nat'l Comm., et al. v. Bostelmann, et al.*, No. 20-1538, 2020 WL 3619499 (7th Cir. Apr. 3, 2020) (reversing district court's preliminary injunction against witness requirement for absentee ballots); *see also Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 16 (1st Cir. 2020) (per curiam) (stating it would be "inclined" to stay the preliminary injunction against a requirement that absentee voters have *two* witnesses absent "two unique factors" present in that case).[2]

[2] We wish to express our respect for the able district judge who like all of us is dealing with sensitive issues in challenging circumstances. Although we would ordinarily ascribe considerable weight to a district court's factual findings, the district court made two legal errors that undermine them. First, the district court gave inadequate weight to *Purcell*'s command that it not interfere with a state voting procedure shortly before an election. It erred in relying on the First Circuit's decision in *Gorbea*, J.A. 60, which was materially different because Rhode Island had agreed in a consent decree to eliminate a requirement that absentee voters obtain *two* signatures and no branch of Rhode Island's government sought to defend the requirement *Gorbea*, 970 F.3d at 16. None of those essential facts are present here.

Second, appellants will suffer irreparable injury in the absence of a stay. All three branches of South Carolina's government have addressed whether absentee voters should be required to have a witness. The General Assembly passed two pieces of legislation on the subject, the Governor signed both bills, and the South Carolina Supreme Court heard a case challenging the witness requirement. No member of our Court now holds elected office, much less an elected or appointed office of the State of South Carolina. By substituting its own policy choice for that of the representatives of the Palmetto State, the district court's injunction robs South Carolina of its sovereign prerogative to determine the rules for its elections. Enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

Third, it is clear that the equitable balance favors appellants. This law is not

Second, the district court legally erred in minimizing South Carolina's interest in preventing voter fraud, suggesting this interest is not legitimate because of "an utter dearth of absentee voter fraud." J.A. 80. South Carolina is not required to produce evidence of voter fraud to demonstrate it has a legitimate interest in maintaining the integrity of its elections. The Supreme Court has *repeatedly* held that a State "indisputably has a compelling interest" in combatting voter fraud. *Purcell*, 549 U.S. at 4 (quoting *Eu*, 489 U.S. at 231); *see also John Doe No. 1*, 561 U.S. 186, 197 (2010) ("The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well . . . ."). Indeed, the Supreme Court stated that "[t]here is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters" in a case where the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194–96 (2008). The district court thus erred by suggesting the State lacked a compelling interest in combatting voter fraud based on its failure to prove it is a major problem. J.A. 80. However, we also note that South Carolina *did* present evidence of voter fraud, even though it did not need to. *See, e.g.*, J.A. 408–26 (showing evidence of voter fraud in South Carolina).

burdensome to appellees. Only a single witness is required. Most people can easily call upon a family member or friend to be their witness. Dr. Cassandra Salgado, the division director for infectious diseases at the Medical University of South Carolina, testified that the witness requirement would not "pose a significant risk" because it takes little time and can be done with facemasks, social distancing, and proper hygiene. J.A. 406.

Indeed, enjoining the witness requirement might result in absentee voting becoming *more* difficult. The legislature chose to make absentee balloting widely available in response to COVID-19, but it also specifically debated whether to maintain the witness requirement to increase confidence in the election's integrity. Both houses of the General Assembly rejected proposals to eliminate the requirement. *See* S. Journal No. 47 (Sept. 2, 2020); H. Journal No. 40 (Sept. 15, 2020); H. Journal No. 39 (June 24, 2020). If the courts ignore these legislative compromises and strip away safeguards, legislatures will be tempted to rescind their expansion of absentee voting.

Fourth, the district court's preliminary injunction is not in the public interest. More and more it appears, political parties seem to be bringing these election law challenges in an effort to gain partisan advantage. This trend is deeply disturbing. Selective interventions by the courts in these cases will create the appearance of partisanship. They undermine our most valued asset, the public's trust and confidence in the judiciary. They also create confusion and make it more difficult for the States to run their elections. It is a challenging enough task to run an election in these trying circumstances without the uncertainty and upheaval of injunctions, stays, appeals, etc. This "judicially created confusion" is one reason why the Supreme Court has prohibited lower courts from changing voting rules

shortly before elections. *See Republican National Committee*, 140 S. Ct. at 1207.

A smoothly run election is a beautiful thing. But it does not just happen. Electoral boards and commissions have to design and print ballots, instruct voters on correct procedures, train workers who staff the precincts and tabulate results, and make sure that mail-in balloting and early and election-day voting are all running with scrupulous impartiality and unimpeachable competence. And yet here we come, gumming up the works and making a hard task even harder. The majority is right to be sensitive to the importance of ensuring that all eligible voters be able to cast their ballots. But that cannot mean that neutral rules neutrally applied in the interest of honest elections can just be tossed aside every time an election-eve plaintiff alleges an adverse effect. Such challenges would be endless, consume scarce time and resources, and lead to open season on state election laws in federal court.

It matters not which party brings this challenge, or from which State it comes. What matters is that confusion and disruption will beset the States' electoral processes if this sort of pre-election litigation becomes commonplace. Appellants should seek to vindicate promptly their constitutional prerogatives before the only tribunal that can finally and definitively bring an end to this mischief: the United States Supreme Court.

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

No. 20-CVS-8881

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through counsel, respectfully move this Court, pursuant to North Carolina Rules of Civil Procedure 7(b) and 65, for entry of an order granting a preliminary injunction. Plaintiffs show the Court as follows:

1. This is an action for declaratory and injunctive relief to enjoin North Carolina laws that unconstitutionally burden the right to vote, and to ensure that North Carolinians have access to safe and reliable methods of voting, both in-person and by mail, during the current public health crisis caused by the novel coronavirus ("COVID-19").

2. The complaint in this action was filed on August 10, 2020 and served on all

Defendants on August 14, 2020. On August 12, Philip Berger, President Pro Tempore of the North Carolina Senate, and Timothy Moore, Speaker of the North Carolina House of Representatives, filed a Notice of Intervention. On August 18, Plaintiffs filed an Amended Complaint contemporaneously with this Motion, which has also been served on all Defendants and Intervenor-Defendants.

3. Plaintiffs seek a preliminary injunction (i) enjoining the enforcement of the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the November general election, and ordering Defendants to count all otherwise eligible ballots that are postmarked by Election Day and received by county boards of elections up to nine days after Election Day; (ii) enjoining the enforcement of the witness requirements for absentee ballots set forth in N.C.G.S. § 163-231(a), as applied to voters residing in single person or single-adult households; (iii) enjoining the enforcement of N.C.G.S. § 163-231(b)(1) to the extent that it requires voters to pay for postage in order to mail their absentee ballots, and ordering Defendants to provide postage for absentee ballots submitted by mail in the November election; (iv) ordering Defendants to provide uniform guidance and training for election officials engaged in signature verification and instruct county election officials not to reject absentee ballots due to perceived non-matching signatures until the county officials receive such guidance and undergo training; (v) enjoining the enforcement of N.C.G.S. §§ 163-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; (vi) enjoining the enforcement of N.C.G.S § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering Defendants to allow county election officials to

expand early voting by up to an additional 21 days for the November election.

4. Plaintiffs are likely to succeed in demonstrating that the barriers to voting by mail and in-person in the November election violate the Free Elections Clause, Art. I, § 10, and the Equal Protection and Law of the Land Clauses of the North Carolina Constitution, Art. I, §§ 12, 14 and 19. First, the ballot receipt deadline, as USPS has recognized, is incompatible with postal delivery standards. In light of mail delivery delays caused by the COVID-19 pandemic and the recent operational changes within the Postal Service, enforcement of the receipt deadline will result in the disenfranchisement of eligible voters who request and mail their ballots in accordance with State law. Second, the witness requirement forces voters, particularly those in single-adult households, to risk their health in order to vote by mail. Third, the postage requirement forces voters to incur monetary and transaction costs that far exceed the price of a stamp and unduly burden voters who do not have ready access to postage. Fourth, the absence of any uniform guidance or training in signature comparison has resulted in a patchwork of error-prone, signature matching practices that significantly burden, and in many cases disenfranchise, voters arbitrarily. Fifth, polling places draw large numbers of individuals within enclosed spaces. In light of the current barriers to voting by mail, the inevitable reduction in early voting sites and hours due to the COVID-19 pandemic, and the resulting risk of daily congestion, the in-person voting options for the November election create public health risks that unduly burden and deter North Carolinians from exercising their constitutional right to vote.

5. Finally, notwithstanding the risks of in-person voting and the barriers to voting by mail, North Carolina law also denies voters the option to seek assistance from individuals or organizations of the choice, with few limited exceptions, to submit their absentee ballots or to fill out and submit their absentee ballot applications.

6. These barriers to the franchise individually and cumulatively impose severe burdens on the right to vote and deny voters access to a free and fair election, particularly when applied in a general election held during the COVID-19 pandemic. And these burdens cannot be justified by any countervailing State interest.

7. Absent injunctive relief, Plaintiffs will suffer irreparable harm from the violation of their constitutional right to vote and to participate in a free and fair election, as well as the unconstitutional burdens imposed by the added costs and risk of exposure to COVID-19 created by the State's current voting procedures—even for those who manage to cast an effective ballot.

8. Finally, the equities weigh in Plaintiffs' favor. Plaintiffs, along with all eligible North Carolina voters, have a strong interest in safely exercising their constitutional right to vote. All North Carolinians are entitled to an electoral process that truly ascertains the will of the people. The State has no interest in holding an election under laws and practices that fall short of these constitutional mandates.

WHEREFORE Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.

Dated: August 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The November 3 election is two months away, and the country is in the throes of an unprecedented public health crisis with no end in sight. North Carolina's election officials, like many across the country, are struggling to administer the election in a manner that will provide all eligible voters with the opportunity to safely cast a ballot and have it counted. As requests for absentee ballots skyrocket and counties prepare for unsafe crowds during one-stop early voting, judicial intervention is urgently needed to protect North Carolina voters' fundamental rights.

The North Carolina State Board of Elections ("State Board") itself recognizes the dire threat of the pandemic to the State's electoral processes. Earlier this year, it issued a plea to the Governor and legislative leaders, requesting several critical changes to North Carolina election law, including modifications to make absentee voting safer and more accessible, and to allow county-level flexibility in setting one-stop early voting hours. The General Assembly adopted a half measure that reduced the State's requirement from two absentee ballot witnesses to one and appropriated matching funds to access emergency federal aid. The June 23 primary proved these slight modifications to be insufficient. Consistent with the experiences of election officials across the country, counties were forced to reduce the number of polling locations as venues refused to open their doors to voters and poll workers abandoned their posts out of fear for their health. Those who cast absentee ballots were forced to risk exposure to the virus to comply with the witness requirement, as well as other burdensome restrictions that threatened their fundamental right to vote. In July, the U.S. Postal Service ("USPS") took the astonishing step of sending a letter that expressly warned North Carolina that its laws as currently on the books are "incongruous with the Postal Service's delivery standards," creating "a significant risk" that "ballots may be requested in a manner that is consistent with [North Carolina's] election rules and returned promptly, *and yet*

not be returned in time to be counted." *See* July 30, 2020 USPS Letter, Ex. 1. USPS similarly warned that, under North Carolina's current elections regime, for any number of voters who timely request absentee ballots, "there is a risk that the ballot will not reach the voter before Election Day, and accordingly that the voter will not be able to use the ballot to cast his or her vote." *Id.*

In Governor Cooper's own words, "much more work is needed to ensure everyone's right to vote is protected."[1] Plaintiffs brought this suit to do just that and respectfully ask this Court to promptly enter an injunction in advance of the November election that will:

- Suspend limits on the number of days and hours of one-stop voting that counties may offer, a restriction that currently denies county boards of elections the flexibility to provide adequate early voting options to keep the electorate safe and enable voters to cast an in-person ballot to ensure their ballot is counted;

- Extend the deadline by which absentee ballots must be received to be counted to require election officials to count ballots that are postmarked by Election Day and received by close of business on the day before the county canvass, to ensure that thousands of voters are not disenfranchised by North Carolina's current "incongruous" deadlines as the USPS has explicitly warned they otherwise likely will be;

- Suspend the requirement that absentee ballot envelopes must be signed by a witness for voters who live in a single-adult household, which forces voters to defy recommendations from health experts, the federal government, and the North Carolina government that all residents should practice social distancing and minimize unnecessary contact with individuals outside of the home;[2]

- Require Defendants to provide prepaid postage for absentee ballots and ballot request forms during the pandemic;

- Suspend the restriction prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request form; and

[1] Press Release, *Governor Cooper Signs Five Bills into Law*, (June 12, 2020), https://governor.nc.gov/news/governor-cooper-signs-five-bills-law.

[2] Plaintiffs' challenge to the witness requirement is an as-applied challenge and thus not affected by the recent ruling in *Chambers v. North Carolina*, Order on Injunc. Relief, File No. 20 CVS 500124 (Gen. Ct. of Justice Wake Cty. Super. Ct. Sept. 3, 2020). Plaintiffs request that the Court permit individuals who live alone to submit a cure affidavit along with their ballots indicating that they did not complete the witness requirement for that reason.

- Suspend the restriction prohibiting voters from receiving assistance from the vast majority of individuals and organizations in delivering their marked and sealed absentee ballot and imposing criminal penalties for providing such assistance.[3]

Individually and collectively, these restrictions burden North Carolina voters by making voting more burdensome, and sometimes inaccessible, even under normal circumstances. Yet, these are not normal times—the unprecedented challenges posed by the pandemic threaten to disenfranchise countless voters unless this Court acts to ensure access to the ballot box. Even worse, the impact of these restrictions is not distributed equally. They will be felt most severely among elderly voters, who are especially vulnerable to COVID-19. And there is mounting evidence that the mortality and infection rates among minority communities far outweigh those groups' share of the State's population. Unless these burdensome impediments to voting are promptly suspended, the result will be the unconstitutional restriction of the exercise of the right

[3] The laws and practices that Plaintiffs challenge in this litigation are laid out in their Complaint, ¶¶ 5, 58-94, 104-22, but briefly are: (1) limitations on the number of days and hours of early voting that counties may offer, N.C.G.S. § 163-227.2(b); (2) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, notwithstanding USPS's well-documented mail delivery delays and operational difficulties, *id.* § 163-231(b)(2) (the "Receipt Deadline"); (3) the requirement that all absentee ballot envelopes must be signed by a witness, despite recommendations from medical professionals and the government that all residents should practice social distancing and minimize unnecessary contact with individuals outside of the home, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (4) the State's failure to provide prepaid postage for absentee ballots and ballot request forms during the pandemic, N.C.G.S. § 163-231(b)(1) (the "Postage Requirement"); (5) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (6) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C.G.S. § 163-226.3(a)(5) (the "Ballot Delivery Ban"). Though it is not encompassed within this motion for preliminary injunction, Plaintiffs preserve their challenge to the arbitrary rejection of absentee ballots for signature defects, or based on an official's subjective determination that the voter's signature on the absentee ballot envelope does not match the signature on file with election authorities, without providing sufficient advance notice and an opportunity to cure (the "Signature Matching Procedures").

to vote and to have free elections, with heightened burdens imposed on North Carolina's minority and elderly communities, subjecting them to disproportionately higher risk of disenfranchisement or illness when they attempt to exercise their most fundamental right.

II. BACKGROUND

A. The pandemic has upended daily life in North Carolina and made it unsafe to vote in person without significant and substantial accommodations.

The COVID-19 pandemic is sweeping through the country, with known domestic infections surpassing 6.1 million and fatalities approaching 186,000. *See* Affidavit of Dr. Catherine Troisi ("Troisi Aff.") ¶ 10 (attached hereto as Ex. 2). As of the date of this filing, North Carolina has more than 170,000 confirmed cases and nearly 2,800 reported deaths from the virus, with cases currently and rapidly increasing. *Id.* ¶¶ 10, 27. The crisis has no end in sight.

In North Carolina, the number of confirmed COVID-19 cases has increased 27% during the last 14 days and the testing positivity rate is at 6%—above the 3-5% goal that would indicate infection is under control. *Id.* ¶ 27. Cases are skyrocketing on North Carolina college campuses as students return for the fall semester; just a week after students returned to campus, the University of North Carolina at Chapel Hill was forced to move entirely back online after more than 130 students tested positive.[4] The latest projections indicate that the spread of COVID-19 infections will persist into the fall and social distancing may be required for the next 18 months, until a vaccine is developed and distributed. Troisi Aff. ¶¶ 22-26. Indeed, the Director of the Centers for Disease Control and Prevention ("CDC") and other experts have cautioned that this fall's wave of

[4] Tammy Grubb & Martha Quillin, *UNC-Chapel Hill moves all classes online after 130 more students infected with COVID-19*, News & Observer (Aug. 17, 2020, 3:33 PM), https://www.newsobserver.com/news/local/education/article245014185.html.

coronavirus may "be even more difficult than the one we just went through."[5] Experts anticipate that the State's case numbers will continue to rise, and COVID-19 will still be present in North Carolina through November. *See* Troisi ¶ 29.

COVID-19 is an infection caused by the novel coronavirus. *See id.* ¶¶ 10-11. It can cause severe illness and death, including from organ failure and cardiac damage. *See id.* ¶ 12. Concerningly, individuals can be infected and show no symptoms, but continue to infect others. *See id.* ¶ 15. Although anyone can be infected with COVID-19 and experience serious outcomes, certain groups are at higher risk of severe illness and death, including those over 65 years of age, pregnant women, and those with a number of preexisting conditions, including asthma, chronic heart disease, diabetes, obesity, chronic kidney disease, and liver disease. *See id.* ¶ 13. A significant portion of North Carolina's population falls into these at-risk categories: 16.7% of residents are 65 or older, 12.5% have diabetes, 23.7% have heart disease, 33% are obese, and 17.4% smoke. *Id.* The virus does not impact all communities equally; racial minorities are significantly more likely to be infected and experience more serious outcomes. *See id.* ¶ 14. For example, in North Carolina, Hispanics comprise just 9.6% of the population but 37% of COVID-19 cases. *Id.* ¶ 28.

North Carolina is currently under a state of emergency and a "Safer at Home" Order issued by the Governor as a result of the pandemic. *See* Exec. Order No. 141, Safer at Home Order, Ex. 3; Exec. Order No. 155, Ex. 4 (extending the Order). The Order, which was extended on August 5, "very strongly encourage[s] . . . people 65 years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes." Exec. Order No. 141, § 2 (emphasis in original). The Order strongly urges all North

[5] Lena Sun, *CDC director warns second wave of coronavirus is likely to be even more devastating*, Wash. Post (Apr. 21, 2020 3:41 PM), https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/.

Carolinians to social distance, wear cloth masks when leaving the home and "in all public settings," carry hand sanitizer, and wash hands frequently. *Id*. Though the Order permits the reopening of certain businesses, it also sets strict limitations for occupancy and social distancing. Masks are also required in many retail spaces. *See* Exec. Order No. 147 § 2, Ex. 5; Exec. Order No. 155 (extending the Order). "Mass gatherings" of more than ten people indoors and 25 people outdoors are prohibited. Exec. Order No. 141, § 7. There are limited exceptions, including for receiving governmental services. *Id.* Members of state government agencies are required to wear masks. *See* Exec. Order No. 147 § 2.

Many North Carolina residents have continued to stay home for fear of the virus's threat to their health including those at high risk for severe outcomes from COVID-19. *See, e.g.*, Affidavit of Rebecca Johnson ("Johnson Aff.") ¶ 3 (attached hereto as Ex. 6); Affidavit of Caren Rabinowitz ("Rabinowitz Aff.") ¶ 5 (attached hereto as Ex. 7); Affidavit of Rosalyn Kociemba ("R. Kociemba Aff.") ¶¶ 4-5 (attached hereto as Ex. 8); Affidavit of Tom Kociemba ("T. Kociemba Aff.") ¶¶ 5-6 (attached hereto as Ex. 9); Affidavit of Lynne Newsome ("Newsome Aff.") ¶ 7 (attached hereto as Ex. 10); Affidavit of Judith Coggins ("Coggins Aff.") ¶ 4 (attached hereto as Ex. 11); Affidavit of Nancy Clark ("Clark Aff.") ¶ 5 (attached hereto as Ex. 12); Affidavit of Margaret Curtis ("Curtis Aff.") ¶ 3 (attached hereto as Ex. 13); Affidavit of Patricia Matos Aguilera ("Matos Aff.") ¶ 4 (attached hereto as Ex. 14). Many government operations are also largely functioning remotely. A recent Order of the Chief Justice of the State Supreme Court "declare[s]" that "catastrophic conditions resulting from the COVID-19 outbreak have existed and continue to exist in all counties of this state," and limits in-person proceedings. Order of the Chief Justice of the Supreme Ct. of N.C., Ex. 15. Some county boards of elections, while functioning, are not permitting the public to enter their doors. *E.g.*, Affidavit of Kristin Scott ("Scott Aff.") ¶ 5 (attached hereto as Ex. 16).

Beyond posing a direct threat to individual and public health, the pandemic has upended elections. Over the last several months, voters across the country (including in North Carolina) have gone to the polls, with often disastrous results. *See* Affidavit of Dr. Kenneth R. Mayer ("Mayer Aff.") at 5-8 (attached hereto as Ex. 17). In Wisconsin, Ohio, Georgia, and Florida, for example, voters clad in masks and gloves waited for hours to cast their ballots due to pandemic-related poll worker shortages and polling place closures that forced election officials to consolidate polling places, cramming thousands of voters into woefully inadequate sites. *Id*. North Carolina's own primary for the 11th Congressional District, delayed to June 23, was plagued with similar problems. As cases surged, planned polling places across the District were unwilling or unable to open their doors to voters and poll workers dropped out due to health concerns. *Id.* at 5.[6]

Earlier this year, the State Board sent letters to Governor Cooper, House Speaker Tim Moore, Senate President Pro Tempore Phil Berger, and several legislative committees, explaining the challenges of conducting an election during the pandemic. State Bd. Mar. 26, 2020 Letter, Ex. 18; State Board Apr. 22, 2020 Letter, Ex. 19. The State Board warned that to protect the franchise, various changes to North Carolina's voting laws and practices were urgently needed, including (1) altering early voting sites and hours requirements to allow counties to better accommodate in-person voters during the pandemic; (2) relaxing or eliminating the Witness Requirement and restrictions on third-party assistance of voters in care facilities; (3) establishing a fund to pay for absentee ballot postage; (4) creating an online option for requesting absentee ballots, and allowing them to be submitted by fax and email; and (5) enabling county boards of elections to assist voters by prefilling their information on absentee ballot request forms. State Bd. Mar. 26, 2020 Letter.

[6] *See, e.g., North Carolina sees record COVID-19 hospitalizations for 4th day in a row, large increase in cases also reported*, ABC11 (June 11, 2020), https://abc11.com/coronavirus-cases-update-us-coronoavirus-usa/6242164/.

Though the State Board urged the General Assembly to make these changes "to address the impacts of the coronavirus pandemic on our elections," the Board further stated that it "believe[s] that, in order to ensure continuity and avoid voter confusing, the changes should be made permanent . . . ." *Id.* at 2; *see also* State Bd. Apr. 22, 2020 Letter (reiterating same recommendations).

Though the General Assembly took *some* of the action requested by the Board, it has fallen far short of addressing what must be done to protect the right to vote. Through recent emergency legislation, the General Assembly, for example, reduced the Witness Requirement from two to one witness. HB 1169, § 1.(a). But this makes little difference for the 1.1 million North Carolinians who live alone and will still need to leave their homes or invite outsiders in to complete the requirement.[7] Mayer Aff. at 10. Plaintiffs agree with Governor Cooper's assessment: "[m]aking sure elections are safe and secure is more important than ever during this pandemic," and "[t]his legislation makes some [ ] positive changes, but much more work is needed to ensure everyone's right to vote is protected."[8]

In November, the risks associated with potential exposure to the virus will remain far too high for many North Carolinians, who should not be forced to choose between exercising their fundamental right to the franchise and protecting their health and welfare. In-person voting, venturing to a post office to obtain stamps, or having to interact in person with a witness to submit

[7] HB 1169 also appropriates state matching funds necessary to access $10 million in federal funds for election-related expenses through the Help America Vote Act ("HAVA") Coronavirus Emergency Fund passed as part of the CARES Act. HB 1169, § 11.1.(a). The law allocates the funds to various efforts, including creating an online portal for absentee ballot requests, mitigating early one-stop voting-related expenses, providing for increased postage costs for sending out mail-in ballots, recruiting poll workers, and recruiting members of multipartisan assistance teams ("MATs"). *Id.* § 11.1.(b)-(d).

[8] Press Release, *supra* note 1.

an absentee ballot all present significant risks that voters should simply not be forced to undertake. *See* Troisi Aff. ¶¶ 2, 21, 31-34. It is well established that increasing direct or indirect costs associated with voting makes it less likely that a voter can ultimately cast a ballot. Mayer Aff. at 4. The risk of contracting COVID-19 infection exacerbates existing costs of voting and places a greater burden itself on voters, burdening those rights severely for the most vulnerable among the population, and so much so that, for many, it will lead to disenfranchisement. *See generally id.*

B. Inadequate in-person voting opportunities.

Because polling places draw large numbers of people into relatively small, enclosed spaces, often causing long lines, in-person voting during the pandemic creates a risk of transmission between voters, poll workers, and election officials. Troisi Aff. ¶ 32. A voter's risk of contracting or transmitting COVID-19 is directly correlated with the density of individuals in one place and the length of time a person stays there. *Id.* ¶¶ 19-21. Voters in certain age and racial minority groups, as well as those with preexisting conditions, are at higher risk of worse outcomes from COVID-19. *Id*. ¶¶ 13-14. Safety measures necessary to mitigate the risk of transmission at polling places include: (1) reducing the number of people present at any given time and reducing the amount of time voters spend there; (2) ensuring that social distancing is strictly enforced among poll workers and voters; and (3) ensuring poll workers and voters are provided and use personal protective equipment, hand sanitizer, and other appropriate disinfecting products. *See id.* ¶ 17. In North Carolina—where officials will not mandate that voters wear masks at polling places or socially distance, *see* Exec. Order No. 141, § 2 (encouraging but not mandating masks); Scott Aff. ¶ 15—reducing the number of people in polling places is critical. A voting schedule that allows counties freedom to offer in-person voters as many options as possible will help prevent overcrowding and allow voters to maintain social distance more easily. Troisi Aff. ¶ 2.

Providing such options is critical because North Carolinians have historically relied on in-person voting, and many will continue to do so in November. Mayer Aff. at 8-9 (Table 1). But unless Plaintiffs' motion is granted, voters will see just the opposite: fewer voting locations and hours, packed polling places, and long lines. *See id*. at 7-8. In the June 23 primary, for example, Haywood County reduced the number of polling sites from 29 to 11, and Macon County consolidated 15 polling sites into just 3.[9] The State Board's Executive Director has expressed concern that COVID-19 could result in polling place consolidation and relocation in November. *See* Recommendations to Address Election-Related Effects of COVID-19, Apr. 7, 2020, Ex. 20. These changes threaten voters' rights to reasonable and safe access to in-person voting.

The State must permit local jurisdictions to offer additional early voting as necessary to provide their voters safe and reasonable access to cast their ballots in person. This will help protect voters from undue burdens and disenfranchisement that would otherwise follow from the reduction in cumulative voting hours caused by the pandemic, as well the risk of congestion at a more limited pool of polling locations staffed by a more limited group of election volunteers, and enable voters to select an early voting day when they can avoid crowds and engage in adequate social distancing. Troisi Aff. ¶¶ 2, 33-34. Without enough early voting options to ensure proper social distancing, many voters will not feel safe to cast their ballots in person. *See, e.g.*, Affidavit of Sandra Malone ("Malone Aff.") ¶ 4 (attached hereto as Ex. 21); Affidavit of Jade Jurek ("Jurek Aff.") ¶ 6 (attached hereto as Ex. 22); Affidavit of Linda Gardner ("Gardner Aff.") ¶ 6 (attached hereto as Ex. 23); Coggins Aff. ¶ 6. County election officials have also expressed as much. Scott Aff. ¶ 16.

[9] Hannah McLeod, *Second primary, voting in the pandemic*, Smoky Mountain News (May 13, 2020), https://www.smokymountainnews.com/archives/item/29083-second-primary-voting-in-the-pandemic.

The State Board's Emergency Order on July 17, 2020, directing county boards to take certain in-person voting measures "calculated to offset the nature and scope of the disruption from the COVID-19 disaster," is not adequate to protect voters' rights. Numbered Memo 2020-14, Ex. 24. First, the Order's requirement that counties open at least one one-stop early voting site per 20,000 registered voters would actually *decrease* the number of early voting locations in a majority of North Carolina counties, as compared to the 2016 general election. Mayer Aff. at 11. Some counties have already released plans showing that they will reduce early voting sites in response. *Id.* at 37-39 (App'x B; showing, for example, that Wilkes County, population 41,597, which hosted 4 and 5 early voting centers in 2012 and 2016, respectively, is now hosting just 2). Indeed, the data on the number of planned early voting centers for the November election, which the State Board has released for some counties, show that the number of centers goes up in only 16 counties, remains the same in 36, and *decreases* in 48. *Id.* at 11, 37-39 (App'x B).

On top of this, the July 17 Order allows county boards to "apply to the Executive Director for a waiver of the [one-center-per-20,000-registered-voters] requirement . . . if its proposed plan is sufficient to serve the voting population, maintain social distancing and reduce the likelihood of long lines." Numbered Memo 2020-14. And it requires only those counties that have one early voting site to arrange for backup sites and staff. *Id.* Despite the State Board's clear recognition that COVID-19 introduces uncertainty into in-person voting processes, its Emergency Order does not allow counties to maintain flexibility over early voting such that they could *expand* the days to vote, even though it does allow them to seek waivers to *reduce* early voting site requirements. Yet, county officials confirm they would prefer the flexibility to expand early voting hours. Scott Aff. ¶ 16.

C. North Carolina's vote-by-mail system threatens to disenfranchise thousands of voters in this year's election.

North Carolina permits all registered voters to cast a ballot by mail. N.C.G.S. § 163-226(a). In the pandemic, for many voters exercising their right to vote by voting by mail is not a choice; it is a necessity without which they will not be able to exercise their constitutional right to vote. The challenged provisions, however, pose unnecessary barriers to casting a mail ballot in North Carolina, and are likely to disenfranchise those who need mail voting most. The impacts are likely to be wide-ranging and severe: historically, the vast majority of North Carolina's electorate has voted in-person, but as elections in the pandemic have already demonstrated, they are quickly shifting to absentee voting in extraordinarily large numbers. But as these voters attempt to acquaint themselves with a new way of voting, the challenged provisions impose significant burdens, including in information costs, the successful navigation of which can be the difference between casting a ballot that gets counted and one that is rejected. Indeed, from 2016 to 2020, among voters who voted by mail for the first time, North Carolina's rejection rate (4.6%) was nearly 1.4 times the rate for voters who had previously cast two or more mail ballots (3.3%). Mayer Aff. at 28.

1. The Receipt Deadline

Under North Carolina law, a mail ballot must be postmarked by Election Day and received no later than three days after Election Day to be counted. N.C.G.S. § 163-231(b)(2) (the "Receipt Deadline"). As a result, North Carolina disenfranchises voters whose ballots arrive after the Deadline—regardless of whether those voters mailed their ballots on or even before Election Day and despite the fact that timely delivery depends on several factors outside of a voter's control. *See* Affidavit of Ronald Stroman ("Stroman Aff.") ¶ 6 (attached hereto as Ex. 25). In fact, in primary and general elections since 2016, the Receipt Deadline has resulted in the rejection of nearly 5,000 mail ballots, even though those elections were conducted under normal non-pandemic conditions in which only a tiny percentage of North Carolinians returned their ballot

by mail, *see* Mayer Aff. (Tables 1 & 2), and USPS was not under the strain it is today, *id.* at 19-20.

As a result of the pandemic, the number of voters utilizing mail ballots in November's election is expected to be *at least* ten times higher than in 2016. *Id*. at 10. This will put an unprecedented strain on the entire system, from local elections officials who must process a record number of absentee ballot requests and ballots, *id.* at 5, to USPS, which must deliver them all to voters and back again, all while dealing with its own significant operating issues that have arisen as a result of the pandemic and profound changes in its administration. *See* Stroman Aff. ¶¶ 6, 9-13.

This is not conjecture: USPS and North Carolina officials alike have admitted that North Carolina voters acting entirely consistent with North Carolina law are nonetheless at serious risk of disenfranchisement from the Receipt Deadline in November. July 30, 2020 USPS Letter; States' Compl., Ex. 26; *see* Stroman Aff. ¶ 11 (noting that North Carolina filed a lawsuit against USPS, challenging the agency's "recent operational and policy changes," which have exacerbated the burdens imposed by the COVID-19 pandemic, resulting in "significant delays in mail delivery across the country" and revealing that "there have been sustained reports of late delivery—by at least two weeks—of mail and packages, including mail and packages that small businesses depend on and medicines for those in rural communities[,]" demonstrating strain already on the existing mail system). In a letter sent by the General Counsel of USPS, Thomas J. Marshall, to North Carolina's Secretary of State Elaine Marshall on July 30, 2020, USPS warned, in no uncertain terms, that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards. July 30, 2020 USPS Letter; *see* Stroman Aff. ¶ 12. This mismatch *creates a risk that ballots requested near the deadline*

under state law will not be returned by mail in time to be counted." July 30, 2020 USPS Letter at 1 (emphasis added). USPS was clear that "*there is a significant risk*" that "ballots may be requested in a manner that is consistent with your election rules *and* ***returned promptly***, and ***yet not be returned in time to be counted***." *Id.* at 2 (emphasis added); *see* Stroman Aff. ¶ 12. Specifically, "there is a risk that . . . a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state's receipt deadline of November 6." July 30, 2020 USPS Letter at 2. USPS further warned that, in North Carolina, which permits voters to request absentee ballots up to seven days before an election, "there is a risk that ***the ballot will not reach the voter before Election Day***, *and accordingly that* ***the voter will not be able to use the ballot to cast his or her vote***." *Id.* (emphasis added). USPS noted that this "risk is exacerbated by the fact that the law does not appear to impose a time period by which election officials must transmit a ballot to the voter in response to a request," *id.*, and, indeed, evidence from past elections shows that election officials sometimes wait multiple days to send an absentee ballot after receiving a request, Mayer Aff. at 20. Thus, even North Carolinians who timely request an absentee ballot and who put their ballots in the mail to be returned to elections officials well in advance of Election Day are at risk of being disenfranchised through no fault of their own. Stroman Aff. ¶¶ 13, 16-17 (noting that USPS delivery standards of 2-5 days for First Class Mail are aspirational at best).

And, if this were not enough, there are additional questions about USPS's ability to deliver mail even within the time frames outlined in its July letter. On August 21, North Carolina, along with six other states filed a lawsuit challenging USPS procedural changes that will likely delay election mail even further, exacerbating the already "significant risk" that North Carolina voters will be disenfranchised by North Carolina's relevant deadlines governing voting by mail. States' Compl.; *see* Stroman Aff. ¶ 11. These deeply concerning operational changes include removal of

mail sorting technology and mailboxes, as well as restrictions on timely completion of mail delivery. In fact, earlier this month, seven mail sorting machines were removed without explanation from a mail sorting facility in Charlotte.[10] And there have already been sustained reports of mail and package delays in North Carolina.[11] *See* Stroman Aff. ¶ 11; *see also* Coggins Aff. ¶ 7 (describing USPS delays and package loss during pandemic). Election mail has also been severely impacted by mail delays. Plaintiff Barker Fowler was unable to vote in the March 2020 primary because her absentee ballot arrived *four days after* the primary *despite a postmark date nearly three weeks earlier*. Even though she requested a replacement ballot, that, too, took *weeks* to arrive and came *after* Election Day. Affidavit of Susan Barker Fowler ("Fowler Aff.") ¶ 6 (attached hereto as Ex. 27). Conditions are only worsening: since mid-July there have been sharp decreases in the percentage of USPS mail, sent by any method, delivered on time. USPS Service Performance Measurement PMG Briefing, Aug. 12, 2020, Ex. 28 (noting decreases between 7.97% and 9.57% from the baseline for on-time arrivals); *see also* Stroman Aff. ¶ 17 (noting that because health-care experts have predicted a second wave of COVID-19 in the fall, along with the seasonal flu, staffing shortages could be a significant issue leading up to Election Day).

These burdens do not fall equally. In normal years, ballots sent to voters later in the election cycle and closer to Election Day, are more likely to be rejected as being late, subjecting thousands to disenfranchisement. Mayer Aff. (Figure 2). This is especially true in the final two weeks before an election. *See, e.g., id.*, Figures 2 & 6. This year, because USPS advises voters to submit absentee ballot "request[s] early enough so that [they are] received by their election officials *at least 15*

[10] Austin Weinstein & Brian Murphy, *7 mail sorting machines removed in Charlotte officials say, as protests continue*, Charlotte Observer (Aug. 18, 2020, 2:14 PM), https://www.charlotteobserver.com/news/politics-government/article245030145.html.
[11] Michelle Wolf, *Mail delays hurting local small business owners*, Fox 8 (Aug. 9, 2020, 10:59 AM), https://myfox8.com/news/mail-delays-hurting-local-small-business-owners/.

days before Election Day at a minimum, and preferably long before that time[,]" July 30, 2020 USPS Letter (emphasis added), no North Carolinian who requests a mail ballot *less than two weeks* before Election Day will be able to come close to complying with USPS mailing guidance. Mayer Aff. at 20. The Receipt Deadline thus puts local elections officials and voters seeking to return their ballots by mail in an impossible situation. *See* Stroman Aff. ¶ 17. Voters who are unable to send their ballot well before Election Day, or who wait to cast their ballot so that they may consider late-breaking information in the campaign cycle, are likely to be disenfranchised. *Id.* ¶¶ 13, 16. North Carolinians voting by mail for the first time—of which there are likely to be many in November—are significantly more likely to have their ballots rejected because they arrive after the Deadline. Mayer Aff. at 28. Should the Deadline remain in place, it will disenfranchise thousands in November. *See id.* at 29.[12]

USPS delays across the country during primary elections this year confirm that this is not a speculative concern. In California's recent primary, over 70,000 ballots were rejected for arriving after the state's receipt deadline—and like North Carolina, California accepted ballots up to three days after Election Day.[13] This disturbing trend has been consistent across the country. Georgia rejected 8,459 ballots for being late during its July primary. Mayer Aff. at 7-8. Michigan rejected nearly 6,405 for the same reason during its August primary.[14] In Wisconsin, but for a decision of

[12] Dr. Mayer's projections conservatively rely upon rates of late ballots from prior elections; the rate is likely to be much greater this year given postal delays and a dramatic increase in first-time mail voters. *See* Stroman Aff. ¶¶ 17-20.

[13] Associated Press, *100,000 mail-in votes rejected by election officials in CA's March primary due to late arrival, lack of signature*, KTLA5 (July 13, 2020, 7:34 AM), https://ktla.com/news/california/100000-mail-in-votes-rejected-by-election-officials-in-california-march-primary-due-to-late-arrival-lack-of-signature/.

[14] *Rejected absentee ballot numbers highlight need for legislative changes*, Michigan Secretary of State Jocelyn Benson (Aug. 14, 2020), https://www.michigan.gov/sos/0,4670,7-127--536848--rss,00.html.

the U.S. Supreme Court in litigation brought in anticipation of this very problem—which allowed absentee ballots to count so long as they were postmarked by Election Day and received up to *six* days after Election Day—over 79,000 voters would have been disenfranchised. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-cv-249-wmc, 2020 WL 1638374, at *17 (W.D. Wis. Apr. 2, 2020), *stayed in part sub nom. Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538, 20-1546, 2020 WL 3619499 (7th Cir. Apr. 3, 2020), *stayed in part*, 140 S. Ct. 1205 (2020). Even with this extension, Wisconsin rejected over 2,600 ballots that arrived more than six days after Election Day. Mayer Aff. at 5-6. Concerns about these types of systemic problems prompted Ohio's Secretary of State to recently join the chorus of concerned government officials in writing to Ohio's congressional leaders about postal delays in his state:

> As Ohioans rush to submit their vote-by-mail requests, and our boards work overtime to fulfill them, we are finding that the delivery of the mail is taking far longer than what is published by the United States Postal Service (USPS) as expected delivery times. Instead of first-class mail taking 1-3 days for delivery, we have heard wide reports of it taking as long as 7-9 days. As you can imagine, these delays mean it is very possible that many Ohioans who have requested a ballot may not receive it in time.

Id. at 6.

The evidence has become overwhelming that many voters are being disenfranchised due to no fault of their own: election officials are finding themselves unable to keep up with the absentee requests in a timely fashion, and USPS is delayed in delivering election mail. *See* Stroman Aff. ¶¶ 16-17. In Wisconsin's primary, for example, a massive increase in requests for absentee ballots placed a significant strain on election officials and USPS. This resulted in voters *not receiving* absentee ballots in time or in some cases at all (which was the experience of the Minority Leader of the State Assembly). Mayer Aff. at 6. It also resulted in an unusually large number of ballots not returned (including one county where only 1% of one batch of absentee ballots were returned, compared to a 90% return rate for other batches); large numbers of ballots erroneously

sent back to election offices rather than delivered to voters; and bins of undelivered ballots discovered in post office facilities. *Id.*; *see* Stroman Aff. ¶¶ 9-10 (noting tens of thousands of mailed completed ballots arrived at election offices after Election Day, and three tubs of absentee ballots, found at a processing and distribution center after the polls had *already closed*, were *never even mailed* to voters).

It is virtually certain that these same types of delays will lead to disenfranchisement for literally thousands of North Carolina voters who, by no fault of their own, will be unable to receive, cast, and mail their ballot, and guarantee its receipt by the deadline. *See* Scott Aff. ¶ 3 (noting current backlog of applications in Halifax County and concern that "it could take multiple days to process absentee ballot requests and send out absentee ballots"). As of September 1, two months before the general election, North Carolina has already received 591,379 requests for absentee ballots. Mayer Aff. at 10. For comparison, this is more than 16 times the number of applications that had arrived at this point in 2016. *Id.* Moreover, in past years, more than a quarter (26.1%) of North Carolina's requests for absentee ballots were not received by election officials until the final two weeks before Election Day. *Id*. Based on the projections of state officials, at least another *1.2 to 1.7 million applications* will be submitted by North Carolina voters by the October 27 deadline, an average of between 26,000 and 36,000 per day. *Id.* If the 2016 pattern holds for 2020, it would mean that between 475,000 and 600,000 mail ballot applications will arrive at election offices in the last two weeks of the application period—the precise period during which USPS warns voters are at high risk of disenfranchisement resulting from mail delivery issues. *Id.*; July 30, 2020 USPS Letter.

County elections officials confirm that counting mail ballots that come in any time before the canvass, which will take place on November 12 this year, would impose no administrative

burden. Scott Aff. ¶ 6. Indeed, ballots from military and overseas voters are already considered timely if they are transmitted by Election Day and received before close of business on the day before the canvass. In other words, ballots cast by military and overseas voters can be received and counted for an *additional six days* after the receipt deadline imposed on absentee voters in North Carolina in the same election. The same is true for provisional ballots. N.C.G.S. § 163-82.4(f).

2. The Witness Requirement

The Witness Requirement also imposes burdens on voters that are untenable, particularly in the current pandemic. As amended by HB 1169 for the November election, the Witness Requirement requires voters who live alone to find a qualified adult witness from outside their household and complete and sign their absentee ballots in the physical presence of that individual. Mayer Aff. at 10; *see* N.C.G.S. § 163-231(a). 1.1 million North Carolinians live in single-member households, 416,121 of whom are 65 or older and thus at high risk for severe outcomes should they contract COVID-19. *Id*. This number does not include those voters who do not live alone, but also do not live with adults eligible to serve as witnesses under the law.

Finding a witness is burdensome in a normal election; in the current pandemic, it directly threatens the health of voters who have sought to vote by mail precisely to avoid those risks. Voters who live alone must either venture out of self-isolation or invite a third party into their home, at a time when North Carolinians have been ordered to socially distance. To make matters worse, the witness must be physically present for a significant duration of time, including while the voter marks his or her ballot, places it in and seals the return envelope, and affixes his or her own signature to the ballot envelope; the witness must then physically take the envelope from the voter,

transcribe various personal information onto it, and sign it. N.C.G.S. § 163-231(a). These contacts "increase[ ] the possibility of virus transmission." Troisi Aff. ¶ 32.

Because even those who are asymptomatic can transmit the virus, a well-intentioned, seemingly healthy witness poses a risk of unwitting transmission. *Id.* ¶ 21. The same is true of a witness who complies with the CDC's and North Carolina's mask-wearing recommendations. "[C]loth masks" can "offer a certain degree of protection" but they "vary in effectiveness" and "must be worn correctly to offer protection," which cannot be guaranteed. *Id.* ¶ 18. And even if a witness and voter attempt to remain socially distanced, there is increasing evidence that transmission can occur at greater lengths than 6 feet. *Id.* ¶ 19. To make matters worse, a voter can contract the virus through contact with the ballot envelope that his or her witness touched. *Id.* ¶ 31. Because any potential witness, and for that matter, voter, may carry COVID-19, every forced witnessing of a ballot requires North Carolinians to shoulder the risk of contracting the virus—a virus that has already killed 2,683 North Carolinians as of August 29, 2020. *Id.* ¶ 27.

Plaintiff Caren Rabinowitz is one such voter burdened by the Witness Requirement. Ms. Rabinowitz recently moved to North Carolina from New York and lives alone. Rabinowitz Aff. ¶¶ 2, 5. Because she has underlying health conditions that place her at high risk for serious illness if she contracts COVID-19, she plans to vote by mail. *Id.* ¶ 4. To satisfy the Witness Requirement, not only will she have to interact with someone outside of her household to vote, but because she is new to the state, she does not have friends or family nearby who can assist and will have to venture out into the public or invite a stranger into her home. *Id.* ¶¶ 4-5. As a result, the Witness Requirement imposes on Ms. Rabinowitz the same untenable choice as at least a million other North Carolinians: expose herself to the risk of contracting COVID-19 and potentially suffer serious health outcomes or forego her fundamental right to vote. *See* Johnson Aff. ¶¶ 2-3, 5 (73-

year old voter who lives alone and does not have a witness to assist); Affidavit of William Dworkin ("Dworkin Aff.") ¶ 8 (attached hereto as Ex. 29) (many members of the North Carolina Alliance for Retired Americans live alone and do not have easy access to a witness); Curtis Aff. ¶ 4; Clark Aff. ¶ 6. Election officials report receiving concerned calls from voters who are homebound and cannot find a witness. Scott Aff. ¶ 10.

The State Board recognized the severe burdens imposed by the Witness Requirement in the pandemic when it recommended that the General Assembly "[r]educe or eliminate" it in a March 26 letter. State Bd. Mar. 26, 2020 Letter. The State Board explained:

> North Carolina residents are currently being asked to stay at home, and without a timeline for when the disease will be under control, requiring only one witness would reduce the likelihood that a voter would have to go out into the community or invite someone to their [sic] home to have their [sic] ballot witnessed. *Eliminating the witness requirement altogether is another option and would further reduce the risk.*

Id. (emphasis added). In a subsequent letter on April 22, the State Board continued to push for "eliminat[ing] the witness requirement for absentee ballots." State Bd. Apr. 22, 2020 Letter. The Board warned that "[m]ost voters, under current law, would have to invite another adult into [their] home" because they do not live with a sufficient number of potential witnesses. *Id.* In the Board's own words, "[t]his increases the risk of transmission or exposure to disease." *Id.* Health experts agree. Troisi Aff. ¶¶ 21, 31.

Imposing these burdens on voters is even more problematic than it may initially seem, because election officials confirm that the witness signature on a voter's absentee ballot envelope *plays no role* in verifying the voter's identity or confirming whether a ballot is legitimate. Scott Aff. ¶ 10. Election officials have no means of confirming whether the witness was even eligible to sign the ballot, or whether he or she was present when the ballot was marked. *Id.* Nevertheless, the State Board has determined that procedural errors on the part of the witness—like signing on the

wrong line—constitute an uncurable error, disenfranchising the voter. *See* Numbered Memo 2020-19, Ex. 30, § 2.2. As a result, the Witness Requirement forces voters who live alone to risk their health for a procedural requirement that not only serves no purpose, but actually makes it *more* likely that they will be arbitrarily disenfranchised, even if they are able to find someone who will agree to serve as a witness.

3. The Postage Requirement

North Carolina requires voters to provide their own postage for mail ballots. N.C.G.S. § 163-231(b)(1) (requiring vote-by-mail ballots to be "transmitted by mail or by commercial courier service, at the voter's expense") (the "Postage Requirement"). The Postage Requirement imposes both monetary expenses and transaction costs on voting that extend well beyond the price of a stamp. In the midst of an ongoing global pandemic and a suffering economy, the costs of a stamp and the health risks associated with obtaining that stamp are further exacerbated.

A first-class stamp, which is required for mail ballots, costs $0.55. In the 2017 Postal Omnibus Survey, 18-26% of respondents (depending on age group) considered the then $0.49 Forever Stamp to be "expensive." USPS Millennials and the Mail Report, Ex. 31 at 14. Further, for many voters, the $0.55 price of a single stamp does not capture the true cost of securing postage: many do not keep stamps at home and thus must visit a post office or another business that sells stamps risking exposure to COVID-19. Troisi Aff. ¶¶ 2, 21; Fowler Aff. ¶ 8; Affidavit of Sarah Fellman ("Fellman Aff.") ¶¶ 6-7 (attached hereto as Ex. 32). For elderly voters, minority voters, and voters at high risk for serious outcomes from COVID-19, these burdens are significant. Troisi Aff. ¶¶ 13-14, 27-28. Voters may opt to order a book of stamps online, but to do that, they must have internet access, pay $11 plus a service fee, and wait for the stamps themselves to be delivered through an increasingly delayed postal system. Mayer Aff. at 14.

To make matters worse, the postage requirements are far from clear. North Carolina's voters receive conflicting information from numerous sources including the State Board, USPS, county boards, and the news about whether and how much postage is needed. *Id*. at 12. The costs of this conflicting and confusing information are born disproportionately by North Carolinians with less education. *Id.* at 4. These ambiguities create confusion and can drive voters to give up on voting or to make one or more costly—and now dangerous—trips out of their home to try to figure it out. Troisi Aff. ¶¶ 2, 21. Because most North Carolina voters who vote by mail this fall will be doing so for the first time, they are much more likely to be confused. *See* Mayer Aff. at 28. In fact, 94.2% of North Carolinians have never voted by mail. *Id.* Under State Board estimates, that means over 1.5 million North Carolinians will vote by mail for the first time this fall, and many of those voters are unlikely to be familiar with postage requirements. *Id.*

Studies have shown that even seemingly minor expenses can deter action in situations where individuals have a much greater incentive to act; among Medicaid recipients, copays or premiums as low as $1 can deter individuals from seeking medical care. *Id.* at 13. As Dr. Mayer explains: "What is relevant for a comparison to voting is that the potential costs of delaying or avoiding medical care can be vastly greater than the cost of not voting, but small cost burdens—not much more than a stamp—have a measurable effect on behavior." *Id.* Experience confirms these costs prevent voting. Voter participation increases from 4 to 10% when postage is prepaid: "[t]he very fact that turnout increases when absentee ballot return envelopes do not require voters to affix postage confirms that the postage requirement is a barrier for voters." *Id.*

These costs are felt to a greater extent by low-income voters and other marginalized groups. *Id.* at 4. Rates of unemployment have skyrocketed since the pandemic began, and over 1.24 million North Carolinians—almost 30 percent of the workforce—have applied for unemployment benefits

in just five short months.[15] For an increasing number of voters facing these difficult economic circumstances, the cost of a stamp or a book of stamps is significant and heightened. Fowler Aff. ¶ 8. When compounded with the time and costs of transportation to obtain stamps, these costs quickly become insurmountable for many voters. Mayer Aff. at 13.

The State Board recognized these realities earlier this year when it recommended that North Carolina provide prepaid postage for all mail ballots because it would "increase the likelihood that a voter would return [his or her] ballot" and "eliminate the need for a voter to leave [his or her] home to purchase postage" amid an ongoing global pandemic. Mayer Aff. at 13; State Bd. Mar. 26, 2020 Letter; State Bd. Apr. 22, 2020 Letter. The State Board also reasoned that this would "enable residents and patients of facilities such as nursing homes and group homes to return their ballots safely, easily, and with minimal human contact." State Bd. Mar. 26, 2020 Letter at 3. The General Assembly, however, failed to adopt this recommendation; though HB 1169 included appropriations to county boards to cover the cost of mailing absentee ballots *to* voters, legislators failed to provide any funding for prepaid postage on ballot return envelopes. *See* Mayer Aff. at 13.

4. The Application Assistance Ban

To vote absentee, North Carolinians must first obtain and complete an absentee ballot request form. Because of a new restriction this year, only voters, their near relatives or members of county-board-authorized MATs can assist with or submit written requests for absentee ballots.[16] *See* HB 1169, §§ 2.(a), 5; N.C.G.S. § 163-230.2 (the "Application Assistance Ban"). Requests may be submitted by mail, by fax, or in-person. *Id.* As of September 1, 2020, voters or their near relative

[15] Richard Craver, *New unemployment claims at pandemic low in N.C.*, Winston-Salem J. (Aug. 17, 2020), https://journalnow.com/business/new-unemployment-claims-at-pandemic-low-in-n-c/article_ef983184-e095-11ea-be39-97d53b435958.html.

[16] A MAT must consist of at least two registered voters of the county, who represent the two political parties with the highest number of affiliated voters in the State, as determined by January 1 of the current year. HB 1169, § 2.5.(a).

or verifiable legal guardian should be able to submit requests for absentee ballots through an online portal. HB 1169, §§ 7.(a), 7.(d). Because no one other than the above-referenced individuals may assist voters to submit an absentee ballot request, absent an accessible near relative or the help of a MAT member available and willing to endanger his or her own health during the ongoing pandemic, North Carolinians may not even be able to *request* an absentee ballot—let alone receive, complete, and submit their ballot on time.

The Application Assistance Ban was enacted a year after Republican operatives led by Leslie McCrae Dowless engaged in "improprieties . . . and irregularities so pervasive" to corrupt the 2018 general election in North Carolina's Ninth Congressional District. *See* Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District, N.C. State Bd. of Elections, March 13, 2019 ("Order"), at p. 2, Ex. 33. But the prohibitions on third-party assistance in *requesting* ballots would have done nothing to prevent Dowless's fraud and do not serve any state interest in fraud prevention. The State Board found that Dowless engaged in a calculated scheme, carried out over the course of multiple years, involving many individuals and many candidates for office, to "submit forged absentee by mail request forms without voters' knowledge" and collect *unsealed* and *unvoted* absentee ballots—activities which are not regulated by the Application Assistance Ban. *Id.* ¶¶ 46-47, 52, 60, 62-63; *see also* Affidavit of Michael C. Herron ("Herron Aff.") ¶¶ 52, 104-06, 108, 121-22 (attached hereto as Ex. 34) (noting "the improprieties that, per the North Carolina State Board of Elections, occurred in Bladen and Robeson Counties in the 2018 midterm election are not of the type most associated with public concerns about election fraud"). Rather than address Dowless's forgery and impersonation of voters, the Ban takes aim at *non-fraudulent* activities that help ensure that voters are able to vote. In doing so, the Ban acts to prevent lawful voters, including among the very communities who

were disenfranchised by Dowless's scheme, from receiving assistance. Herron Aff. ¶¶ 19-20.[17] Indeed, county boards of elections agree that restrictions on who can return a ballot request form do not serve to detect or prevent fraud, and certainly not the type of fraud in which Dowless engaged. *See* Scott Aff. ¶ 12.

North Carolina's projected increase in absentee voting this year reinforces the need for the State to permit third-party assistance of voters with the electoral process. *See* Mayer Aff. at 1. Nearly 95% of voters who will be voting absentee this year will be voting by mail for the first time, navigating an unfamiliar process in the midst of a global pandemic. *Id.* at 28; *see also* Affidavit of Brett Clarke ("Clarke Aff.") ¶ 4 (attached hereto as Ex. 35).

MATs, which are supposed to partially fill this need by helping voters obtain and complete absentee ballot requests, are not able to do so in much of the State. For November, because of the pandemic, some county boards cannot expand the availability of MATs and will in fact have fewer MATs available than in past elections. Scott Aff. ¶ 11. Many existing MAT members are hesitant to assist due to the pandemic, and many who have previously served on MATs are refusing to do so this year. *Id.*

Other organizations' assistance activities are also being burdened by the Ban. VoteByMail.io, a non-partisan, volunteer-created website, which aims to help registered voters sign up for mail-in ballots, was developed to simplify the absentee ballot request process for voters. Clarke Aff. ¶¶ 3-4. But recently, VoteByMail.io learned that a Wake County voter's ballot request

[17] It is also worth noting that Dowless's criminal conduct—fraudulent completion and signing of blank absentee request forms and absentee ballots to pad vote totals for Dowless's client—was uncovered and corrected before the Ban existed. Herron Aff. ¶¶ 100, 102. Likewise, criminal charges have been brought against Dowless, based on statutes that existed long before the Application Assistance Ban was enacted. Thus, the Ban is clearly not necessary to prevent such fraud.

was rejected because "[a] request form returned using an email address associated with a website is invalid because it was not 'returned' by the voter[,]" even though the voter entered all of the requested information to obtain an absentee ballot. *Id.* ¶¶ 5-6, 9; *see* Ex. A thereto.

In a time when a breathtaking number of North Carolinians are anticipated to turn to absentee voting to exercise their most fundamental right, forbidding third-party assistance with navigating the absentee ballot application process is particularly problematic. Restrictions on the process for obtaining absentee ballots are especially problematic. Without that much needed assistance, countless voters who are attempting to navigate this process will inevitably make mistakes they would not have made had they had guidance, and may restart the application process multiple times, limiting the time frame they have to cast their ballot and ensure its timely delivery to their county board of elections—or even give up on voting all together. Mayer Aff. at 10. Even worse, the Ban's prohibition on third-party assistance could result in voters making mistakes on their absentee ballot return materials, leading to large-scale disenfranchisement. *Id.* at 6, 28-29.

5. The Ballot Delivery Ban

North Carolina imposes strict limitations on how absentee ballots may be returned to county boards of elections. They may only be returned by mail "at the voter's expense," or by in-person delivery by the voter or the voter's near relative or verifiable legal guardian. N.C.G.S. §§ 163-229(b), 163-231(a)-(b); HB 1169 § 1.(a). It is a felony for anyone else to return absentee ballots on behalf of a voter. *Id.*; N.C.G.S. § 163-226.3(a)(5) ("Ballot Delivery Ban").

As discussed, North Carolina is already experiencing severe processing and mail delays that will only be exacerbated in the November election. Even if voters timely receive their absentee ballots, they still risk their ballots being delayed on their return trip and not arriving in time to be counted. *See* N.C.G.S. § 163-231(b)(1), (2)(b). Third-party assistance with ballot delivery

alleviates these burdens that will otherwise disenfranchise voters. Thus, voters are presented with an unconscionable decision: risk their health to vote or stay home.

Ultimately, for voters who have previously cast their ballots in person, changing how they exercise this fundamental right imposes its own set of transaction costs: voters must digest new (and complicated) information, including how to request the ballot and timely deliver it, so that their vote counts. Mayer Aff. at 10. In comparison to voters who vote in person, absentee voters are 400 times more likely to have their ballot rejected than in-person voters due to mistakes. *Id.* at 15. The Ballot Delivery Ban forbids assistance that could prevent such mistakes and disenfranchisement. Were third parties permitted to collect and return these voters' marked and sealed absentee ballots, the possibility of such errors would be reduced.

Dowless's conspiracy is not a reason to impose these additional hurdles to voting, particularly during the pandemic. The Ballot Delivery Ban was in effect when Dowless and his associates perpetrated fraud against North Carolina voters, and yet it failed to serve as a deterrence. Moreover, as discussed above, Dowless's scheme did not involve returning *marked* and *sealed* ballots, but rather forgery and other deceptive practices that are criminalized under other provisions. And in Arizona, Montana, and Wisconsin—states in which third parties are permitted to assist voters in returning their absentee ballots—there have been no instances of significant voter fraud involving absentee voting or voter assistance, and no evidence linking these states' voter assistance laws to systemic voter fraud based on a study of instances of voter fraud from 2012 to 2020. Herron Aff. ¶¶ 203-06. In fact, during this time period, Arizona and Montana changed their voter assistance laws to ban third-party collection of absentee ballots, and there is no evidence that these newly-imposed restrictions on voter assistance lessened or in any way affected rates of voter fraud. *Id.* ¶ 204. Indeed, county elections officials agree that restricting who

can return an absentee ballot does not prevent the type of fraud in which Dowless engaged. *See* Scott Aff. ¶ 12.[18]

III. LEGAL STANDARD

Plaintiffs are entitled to a preliminary injunction because (1) they are likely to succeed on the merits and (2) they will "'sustain irreparable loss unless the injunction is issued [and] . . . issuance is necessary for the protection of [Plaintiffs'] rights during the course of litigation.'" *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856-57 (1990) (quoting *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *Holmes v. Moore*, 840 S.E.2d 244, 266 (N.C. App. 2020) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("*LWV*")). In balancing the equities, a court must "weigh[ ] potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). Here, the balance of equities weighs strongly in favor of protecting the fundamental rights of plaintiffs and countless other North Carolina voters.

IV. ARGUMENT

A. Plaintiffs are likely to succeed on the merits.

Plaintiffs challenge the constitutionality of (1) limitations on expanding early voting, (2) the Receipt Deadline as imposed on voters who use USPS, (3) the Witness Requirement for voters who live in single-adult households, (4) the Postage Requirement, (5) the Application

[18] For ballots that are mailed, there is no way for county elections officials to confirm it was the voter or an authorized person who placed the ballot in the mail. *See* Scott Aff. ¶ 12. For ballots that are returned in person, county elections officials do not verify the identity of the person dropping off the ballots. *See Id.*

Assistance Ban, and (6) the Ballot Delivery Ban, in the context of the ongoing pandemic, which will continue through the November election. *See* Troisi Aff. ¶ 29. Individually and collectively, the challenged provisions impose barriers to voting that make it more difficult for voters to cast their ballots, and will have the effect of disenfranchising thousands of eligible voters. *See* Mayer Aff. at 4. Because no countervailing state interest justifies these burdens, Plaintiffs are likely to succeed on the merits.

1. The challenged provisions, as applied to the upcoming election, violate the Equal Protection, Freedom of Speech, and Freedom of Assembly Clauses of the North Carolina Constitution.

As applied to the ongoing pandemic and to particular groups of individuals, the challenged provisions—individually and collectively—unconstitutionally burden the right to vote. The North Carolina Constitution guarantees citizens the right to equal protection of the laws, N.C. Const. art. I, § 19, the violation of which must be reviewed under strict scrutiny if it "affects the exercise of a fundamental right." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004). The same level of scrutiny applies to violations of the Freedom of Speech and Freedom of Assembly Clauses, which provide that the "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained," N.C. Const. art. I, § 14, and "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." *Id.* § 12. "Voting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression" through which citizens not only "express[ ] support for a candidate" but also "band[ ] together with likeminded citizens in a political party" and thus engage in a "form of protected association." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *119-20 (N.C. Super. Ct. Sept. 3, 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020). Accordingly, North Carolina courts

have recognized that laws burdening such protected expressive and associative conduct are "subject to strict scrutiny." *Id*. at *121.

Because Plaintiffs' claims implicate the fundamental right to vote on equal terms, and the challenged provisions burden constitutionally-protected speech and political association, strict scrutiny applies. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (applying strict scrutiny because "[i]t is well settled in this State that the right to vote on equal terms is a fundamental right." (citation omitted), *stay denied*, 535 U.S. 1301 (2002)). To pass strict scrutiny, "the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest." *Hest Techs., Inc. v. State ex rel. Perdue*, 366 N.C. 289, 298, 749 S.E.2d 429, 436 (2012). But even if the Court applies the balancing test adopted by federal courts when examining constitutional challenges to voting restrictions, *see, e.g.*, *Parson v. Alcorn*, 157 F. Supp. 3d 479, 492 n.20 (E.D. Va. 2016), Plaintiffs would still prevail because the challenged provisions severely burden their constitutional rights, yet fail to advance sufficient legitimate state interests that would justify these burdens.

a. The challenged provisions severely burden the right to vote during the COVID-19 pandemic.

The challenged provisions, individually and together, impose significant hurdles on North Carolinians' exercise of the franchise, especially during an unprecedented pandemic. The urgency of Plaintiffs' requested relief has been further heightened by a USPS on the brink of crisis.

First, USPS has warned North Carolina that the Receipt Deadline poses a substantial risk of disenfranchising countless voters who request their ballots within the time permitted under North Carolina law and "promptly" return them. July 30, 2020, USPS Letter; *see* Stroman Aff. ¶¶ 14-17. This is true even if the delay was entirely outside of the voter's control. *See id.* Even before the onset of the pandemic, when very few North Carolinians cast their votes by mail,

thousands of otherwise eligible absentee ballots were rejected each year for late arrival. Mayer Aff. at 15-16 (Table 2). Based on the projections of state officials, the number of mail absentee ballots cast this November will be in the range of 1.8 million to 2.3 million; if past trends hold, that means that tens of thousands of ballots will be rejected for arriving late. *Id.* at 29. Because of the current state of USPS, this number is likely to be far higher.

As more voters turn to absentee voting and mail delays only grow, courts are recognizing that receipt deadlines must be enjoined, and states are being ordered to accept—and count—ballots mailed by Election Day to prevent widespread disenfranchisement. *See* Stroman Aff. ¶¶ 13-14. For example, the U.S. Supreme Court recently affirmed a federal district court's decision in Wisconsin to extend an election-day receipt deadline by six days, saving the votes of nearly 80,000 citizens who cast valid ballots that were postmarked on or before Election Day but arrived in the days following due to delayed mail service. *See Bostelmann*, 2020 WL 1638374, at *17. The Supreme Court expressed no concerns about "afford[ing] Wisconsin voters several extra days in which to mail their absentee ballots," so long as those ballots were "postmarked by election day." 140 S. Ct. at 1206; *see also Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020) (Ex. 36), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt deadline and recognizing that such a deadline is likely to disenfranchise thousands of voters); Order at 25, *LaRose v. Simon*, No. 62-CV-20-3149 (Minn. Dist. Ct. Aug. 3, 2020) (Ex. 37) (entering consent decree extending Minnesota's receipt deadline). That is precisely the sort of "postmark" rule Plaintiffs seek here.[19]

[19] "Postmark" refers to any type of imprint applied by USPS to indicate the location and date it accepts custody of a piece of mail, including barcodes, circular stamps, or other tracking marks, and, where a ballot does not bear a postmark, requires the State to presume the ballot was mailed on or before Election Day unless the preponderance of evidence demonstrates otherwise. At least

Second, the Witness Requirement mandates that even voters in single-adult households, like Plaintiffs Rabinowitz and Johnson and the Alliance's members, complete their absentee ballots in the physical presence of a qualified adult witness. *See* Rabinowitz Aff. ¶ 5; Johnson Aff. ¶ 5; Dworkin Aff. ¶ 8; Curtis Aff. ¶ 4; Clark Aff. ¶ 6. At a time when interacting with individuals outside of one's household can pose the risk of contracting a highly contagious and dangerous virus, the Witness Requirement forces over a million North Carolinians to choose between protecting their health and exercising their right to vote. The State Board itself admitted in April that the Witness Requirement "increases the risk of transmission or exposure to disease." *Supra* at 21. Since then, the rate of new COVID-19 cases in North Carolina has only increased. Troisi Aff. ¶ 10. One way the virus can be transmitted is by touching an environmental surface, like a ballot envelope, that is contaminated by the virus. *Id.* ¶¶ 11, 31. Moreover, "there is increasing evidence . . . that aerosolized droplets . . . can spread the virus" to individuals over 15 feet away, and that aerosols may play a more important role in transmission than droplets. *Id.* ¶ 11.[20] Indeed, numerous courts have recognized the unjustifiable burdens that witness and notarization requirements place on voters, enjoining or modifying those requirements for at least the duration of the pandemic—exactly the relief Plaintiffs seek here.[21]

10 other states and D.C. follow a "postmark" rule (or close variant) that allows ballots arriving at least 5 days following an election to be counted so long as they are timely postmarked. *See* Nat'l Conference of State Legislatures, *VOPP: Table 11: Receipt and Postmark Deadlines for Absentee Ballots*, (Aug. 17, 2020), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx.

[20] The determination in *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020)—that the Witness Requirement does not unduly burden even high-risk voters—was premised on a misconceived finding that COVID-19 cannot spread during voter-witness interactions. *See* Troisi Aff. ¶¶ 11, 19.

[21] *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) ("Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.") (denying motion to stay consent judgment and decree

Third, the Postage Requirement adds a literal cost to voting, which bears most heavily on economically vulnerable voters, including those who are affected by the devastating economic impact of the ongoing public health emergency. Purchasing stamps online can cost voters more than $11, *see* Mayer Aff. at 14—an unnecessary expense that can be cost prohibitive particularly for financially vulnerable individuals, some of whom are among the 1.24 million North Carolinians whose employment and source of income were eliminated due to the devastating economic impact of the pandemic.[22] Even the cost of a single stamp can be prohibitive for many. *Id.* at 12-13. Beyond the monetary costs, the Postage Requirement imposes other ancillary burdens on voters. In this digital era, many voters, like Plaintiff Barker Fowler, do not regularly keep postage stamps in their homes. Fowler Aff. ¶ 8; *see* Fellman Aff. ¶¶ 6-7. For others, a trip to the post office (or anywhere else that sells stamps) during the present crisis forces them to expose themselves to health risks and incur other transactional costs in order to vote. Mayer Aff. at 14. Finally, even if a voter has postage, mailing his or her ballot may still necessitate a trip to the post office to weigh the envelope and determine the proper amount of postage to affix, which again imposes potentially severe risks. *Id*. at 12.

suspending "notary or two-witness requirement" for mail ballots), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witnessing requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("The Constitution does not permit a state to force" voters to choose "between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election.").

[22] *See* Craver, *supra* note 15.

Fourth, the Application Assistance Ban severely diminishes voters' options for requesting absentee ballots, despite that most absentee voters will be voting this way for the very first time because of the ongoing pandemic. Already, as a direct result of the Application Assistance Ban, 80,000 absentee ballot request forms in the State have been recalled because voters' names and addresses were prepopulated.[23] And some voters' absentee ballot request forms have been rejected simply because they used third-party websites to personally fill their application. *See* Clarke Aff. ¶ 6. Moreover, countless voters who are unfamiliar with the absentee voting process are barred from receiving assistance in filling out or delivering the form from anyone other than MATs, which will not be made available to everyone who needs assistance this year. *See* Scott Aff. ¶ 11. By prohibiting trusted organizations and widely accepted platforms like VoteByMail.io, which merely streamlines information and forms for voters, from providing their services—and in the process, ensuring that request forms are properly filled out—the State has unnecessarily cut off an important avenue of assistance for voters. *See generally* Clarke Aff.

Fifth, the Ballot Delivery Ban imposes an undue burden on voters' ability to ensure safe and timely delivery of their absentee ballot. The Ban erects another barrier to absentee voting for those without access to postage; to voters seeking to avoid the uncertainty of mail delivery and the risk of disenfranchisement imposed by the Receipt Deadline; to voters who do not have access to reliable transportation to polling places or county boards; to voters who are concerned about the health risks of in-person voting and do not have an immediate family member available to assist them in submitting their ballot; and to voters whose ballots arrive too late to return by mail. This assistance is critical for such voters and those who are at high risk of contracting COVID-19, like

[23] Press Release, *Advocacy Group Sends Invalid Absentee Ballot Request Forms to 80,000 Voters*, North Carolina State Board of Elections (June 11, 2020), https://www.ncsbe.gov/news/press-releases/2020/06/11/advocacy-group-sends-invalid-absentee-ballot-request-forms-80000.

Plaintiffs Tom and Rosalyn Kociemba, *see* T. Kociemba Aff. ¶ 7; R. Kociemba ¶ 6; *see also* Coggins Aff. ¶ 8; Curtis Aff. ¶ 6, as other courts have recognized. *See DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785 (Minn. Dist. Ct. July 28, 2020) (finding Minnesota's voter assistance ban imposed undue burden on right to vote); *Driscoll*, No. DV 20-408 (finding Montana's voter assistance ban imposed undue burden on right to vote); *W. Native Voice v. Stapleton*, No. DV-2020-377 (Mont. Dist. Ct. May 20, 2020) (Ex. 38) (same).

Sixth, limitations on the number of days and hours of early voting that counties may offer burdens in-person voting. The COVID-19 pandemic will force counties to offer fewer total early voting locations than they would under normal circumstances, and the resulting fewer cumulative early voting hours will lead to larger crowds and long lines for those who attempt to vote in person. Many voters like Plaintiffs Jade Jurek and Sandra Malone are committed to voting in person and without flexibility for counties to extend additional early voting hours, voters like them will be forced to vote in crowded polling places, risking their health in order to cast their votes. *See* Jurek Aff. ¶ 6; Malone Aff. ¶ 4.

Finally, the combination of the challenged provisions places a more severe burden than any single provision alone. For example, voters who, like many of the Alliance's members, do not have family members available to assist them and are practicing strict social distancing, must *either* risk their health to procure postage and still face the uncertainty of USPS's delays *or* risk their health to personally deliver their ballot or vote in person. *See generally* Dworkin Aff. This is not to mention that some voters have no access to transportation or option to leave their homes at all.

Even before the onset of the ongoing pandemic, North Carolina rejected thousands of ballots a year for being late or lacking a witness signature. Mayer Aff. at 15-16. It is difficult to quantify how many *more* voters did not even return their ballot because they could not find a

witness, lacked postage, or did not receive their absentee ballot in time to deliver it without assistance, but if past rates hold, which are likely drastic underestimates, at least tens of thousands of North Carolinians will be disenfranchised. *Id.* at 29. This year, for the first time, many would-be absentee voters may not even *receive* an absentee ballot because they cannot seek assistance in requesting one. And, given that the November election is taking place within the context of a continued public health crisis and mail delays, the number of unreturned and rejected ballots will only go up, as evidenced by large numbers of rejected ballots in primaries this year across the country. Those numbers will not even tell the whole story: whereas, in the past, the vast majority of North Carolinians chose to vote in person, this year, those who would prefer to do so in the first place *and* those who would be forced to do so because they run into barriers with the absentee voting process, may be unwilling to put their health at risk at crowded voting sites and will thus be forced to forego their fundamental right to vote.

The reality described above—which is the reality Plaintiffs and all North Carolina voters face in just two months' time—is constitutionally inexcusable. "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes *the right to have the ballot counted*." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (emphasis added) (citation omitted). As applied to certain voters and in the context of the pandemic, the challenged provisions prevent eligible voters from having a reliable path to cast a vote. *See Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) ("[T]he right to vote is personal and is not defeated by the fact that 99% of other people" are not seriously impacted.), *aff'd in part, vacated in part, rev'd in part by Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *cf. Luft*, 963 F.3d at 677, 678-79 (holding "each eligible person must have a path to cast a vote[,]" which requires State to "ensure[ ] that every eligible voter can" comply with law with reasonable effort

as part of a "*reliably implemented*" process).[24] Indeed, "[i]f disenfranchising thousands of eligible voters does not amount to a severe burden on the right to vote, then [it is not clear] what does." *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *6 (N.D. Fla. Oct. 16, 2016).

b. No state interest justifies the challenged provisions, as applied to the upcoming November election.

To pass strict scrutiny, "the government must show a compelling interest in the regulation, and the regulation must be narrowly tailored to achieve that interest." *Hest Techs., Inc.*, 366 N.C. at 298. The challenged provisions are not narrowly tailored to achieve a compelling government interest because State Defendants cannot "identify an actual problem in need of solving," nor can they "demonstrate with clarity that [their] purpose or interest is both constitutionally permissible and substantial." *State v. Bishop*, 368 N.C. 869, 877, 787 S.E.2d 814, 819 (2016) (citations omitted).

While the State may point to an interest in the orderly administration of elections, imposing a Receipt Deadline of mailed absentee ballots does little to advance that interest, nor would counting ballots mailed by Election Day and received more than three days after the election interfere with the State's ability to count votes and certify elections. In fact, election officials are already required and frequently called upon to count ballots submitted or finalized well after Election Day: North Carolina voters who submit provisional ballots may provide supporting documentation up until close of business on the day before the county canvass, which cannot occur before 11:00 a.m. on the tenth day after an election to have their ballots counted, *see* N.C.G.S.

[24] These burdens are not be distributed equally, but fall disproportionately on lower income voters, students, minorities, those over 65, and those with other high-risk factors for COVID-19. *See* Mayer Aff. at 4-5; Troisi Aff. ¶¶ 13–14, 28.

§ 163-82.4(f), and military and overseas voters are considered timely if they are transmitted by Election Day and received before close of business on the day before the county canvass, *see* N.C.G.S. § 163-258.12(b). Indeed, the election officials who would count these ballots confirm that doing so prior to the canvass would impose no burden on their operations. *See* Scott Aff. ¶ 6 (explaining county board would have no issue counting a ballot that arrives any time before the canvass on November 12). In any event, the prospect of counting more ballots cannot justify the arbitrary disenfranchisement caused by the receipt deadline. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (holding "administrative convenience" cannot justify the deprivation of a constitutional right); *see also Bostelmann*, 2020 WL 1638374, at *12, n.14.

The Court should also reject any attempt to invoke general interests in fraud prevention to justify any of the challenged provisions—particularly the Witness Requirement, Application Assistance Ban, and Ballot Delivery Ban. None of these restrictions target or combat voter fraud, nor do they address Dowless's criminal scheme in NC-9 in 2018.[25] As detailed above and in the expert report of Dr. Herron, Dowless and his associates did not legitimately assist voters requesting absentee ballots or deliver signed and sealed ballots to county boards on behalf of eligible voters, as Plaintiffs request be permitted. Instead, Dowless coordinated the widespread forgery of absentee ballots—actions which were already prohibited by other criminal laws. *See* N.C.G.S § 163-237(d) (criminalizing fraud in connection with absentee ballots, first adopted as An Act to Amend Certain

[25] Indeed, voter fraud is characterized by (a) improperly acquiring and then submitting an absentee ballot or ballots; (b) voting more than once in an election where this is not permitted; (c) improper actions taken by election officials intended to change validly cast votes, or actions taken to affect voter registration records; (d) participating in a federal election when one is not a U.S. citizen; (e) registering to vote where a person is not a resident; and (f) voting in-person (as opposed to via mail) on an election day in someone else's name, either in the name of a properly registered voter or using the registration records of a fictional individual—not by validly signing his or her ballot affidavit or requesting and returning a ballot *with the permission of the voter*. Herron Aff. ¶¶ 15, 19-20.

Sections of the Election Law of the State, ch. 164, § 40, 1929 N.C. Sess. Laws 180, 201). The enjoinment of these provisions would not engender the activities of Dowless's felonious plot to "obstruct public and legal justice," because none of those laws address Dowless's criminal conduct. Herron Aff. ¶¶ 19-20, 109. And neither the Witness Requirement nor the Ballot Delivery Ban, both of which were in place long before Dowless perpetrated his fraudulent scheme, deterred Dowless's scheme. Moreover, that coordinated criminal conspiracy provides no insight into actual voter fraud, and it is well-documented that the rates of voter fraud, including absentee voter fraud, in American elections are extremely low. *Id.* ¶¶ 26-54. County election officials have themselves confirmed that the Witness Requirement plays no role in their verification process for absentee ballots. *See* Scott Aff. ¶ 10. They likewise confirm that the Absentee Assistance Ban and the Ballot Delivery Ban do not deter or prevent potential voter fraud. *Id.* ¶¶ 12-14.

Notably, North Carolina is one of only five states that imposes a witness requirement, and it does not impose the same Witness Requirement on military or overseas voters registered in North Carolina who vote by absentee ballot. And the State Board's March 26 memo recommended "eliminating the witness requirement altogether," which suggests that the State itself recognizes that the Witness Requirement serves no legitimate interest. State Bd. Mar. 26, 2020 Letter.

Finally, State Defendants can offer no justification for failing to provide prepaid postage on ballots or preventing counties from expanding early vote days and hours. HB 1169 itself allocates federal and state funds for one-stop early voting and postage costs. Moreover, any interest in uniformity across counties or preventing voter confusion is undermined by the State Board's own procedures for certain counties to receive waivers for other statewide requirements—like maintaining at least one site per 20,000 registered voters and offering at least 10 hours at each site

during the two early voting weekends. Numbered Memo 2020-14. And again, the State Board already made these exact recommendations. State Bd. Mar. 26, 2020 Letter.

c. The challenged provisions, as applied to the upcoming November election, likewise fail to pass constitutional muster under *Anderson-Burdick*.

The challenged provisions cannot satisfy strict scrutiny, as demonstrated above, nor would they survive the *Anderson-Burdick* balancing test applied by federal courts and some state courts. This is because the added costs they impose on voting during the pandemic, and the resulting burden on voters, far outweigh (and cannot be justified by) any conceivable governmental interest.

In *Libertarian Party of North Carolina v. State*, the North Carolina Supreme Court adopted a balancing test in examining the constitutionality of ballot access laws, which were challenged under the State Constitution's Free Speech, Free Assembly, and Equal Protection Clauses. 365 N.C. 41, 48, 707 S.E.2d 199, 204 (2011). The Court explained that strict scrutiny applies when the "associational right is severely burdened," *id*. at 205, but recognized that even laws imposing less than severe burdens must still "'be sufficiently weighty to justify the limitation imposed on the party's rights,'" *id*. at 206 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). This framework is analogous to the one federal courts apply, developed in the U.S. Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). These courts "weigh 'the character and magnitude of the asserted injury to the rights . . . the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 788-89). Under this framework, even state regulations that do not impose "severe" burdens on the fundamental right to vote are subject to exacting forms of scrutiny, requiring the state to "articulate specific, rather than abstract state

interests, and explain why the particular restriction imposed is actually necessary, meaning it actually addresses, the interest put forth." *Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 545-46 (6th Cir.), *vacated on other grounds*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also Guare v. State*, 167 N.H. 658, 665, 117 A.3d 731, 739 (2015). In fact, even a "minimal" burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Ohio State Conf. of N.A.A.C.P.*, 768 F.3d at 538 (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.)).

Given that the protections afforded to the right to vote under the North Carolina Constitution are more expansive than those of the U.S. Constitution, *see Common Cause*, 2019 WL 4569584, at *113, state laws that implicate this fundamental right should receive no less scrutiny—and in fact are entitled to *more*. Weighed against the burdens imposed the challenged provisions, any potential justifications are neither precise nor sufficiently weighty to justify the injury to voters, even under an *Anderson-Burdick/Libertarian Party* balancing test.

2. The challenged procedures deny Plaintiffs their constitutional right to participate in a free and equal election.

The State's failure to provide safe, accessible, and reliable means for its citizens to access the franchise during the November election, both in person and by mail, denies Plaintiffs, the Alliance and its members, and all North Carolinians their constitutional rights under the Free Elections Clause. N.C. Const. art. I, § 10 ("All elections shall be free"). As the North Carolina Supreme Court has long recognized, "[o]ur government is founded on the will of the people," and "[t]heir will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). Accordingly, "the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *110. The North Carolina Supreme Court articulated this principle more than a

century ago. *See Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915) ("[T]he object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters."). For this reason, "all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will." *Common Cause*, 2019 WL 4569584, at *109 (same).

The Free Elections Clause is one of the clauses that makes the North Carolina "Constitution more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Common Cause*, 2019 WL 4569584, at *109; *see also Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Since its adoption in 1776, North Carolina has twice "broadened and strengthened" the Free Elections Clause, most recently to add mandatory language to "make it clear that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights are commands and not mere admonitions." *Common Cause*, 2019 WL 4569584, at *111 (citation omitted).

The constitutional obligation to ensure that elections are both free and fair and reflect the will of the people, at a minimum, requires that the State ensure that all North Carolinians have a reasonable opportunity to vote. That is, North Carolinians must both have the opportunity to cast their ballots and have their ballots counted, without undue risk to their health and safety. This means the State has an obligation under the Free Elections Clause to ensure that each step of the voting process, whether by mail or in person, does not unnecessarily endanger voters' health, subject voters to a significant risk of arbitrary disenfranchisement, or force voters to choose between exercising their fundamental right to vote and safeguarding their health and the health of their communities. But each of the challenged provisions on their own and together violate this guarantee and absent court intervention, they will obfuscate the will of the people in November.

The burdens imposed by the challenged provisions, as explained *supra* Section IV(A)(1)(a), are severe and restrict voters' ability to participate freely and fairly in the general election. For example, voters who choose to go to the polls must endure the health risks posed by packing more voters and poll workers into fewer voting sites, for a fixed number of voting days and hours. The same is true for absentee voters, as explained *supra* Section II(B). To complete the burdensome, multi-step process of absentee voting, voters must repeatedly expose themselves to the risk of COVID-19, including to obtain stamps, mail their ballots, and have a witness observe the marking of their ballot. And in many instances, as a result of events outside of a voter's control, for example, voters, who through no fault of their own, receive their absentee ballots close to the election, are left between a rock and a hard place. They must either risk their health or forgo their right to participate in democracy. And one way to alleviate many of these challenges—allowing neighbors, friends, and community organizations to step in and assist voters in delivering their absentee ballot requests and ballots—is yet again foreclosed by the State's restrictions. By forcing North Carolinians to make such unconscionable decisions, the State fails in its constitutional duty to provide its citizens with a free election. N.C. Const. art. I, § 10.

Moreover, even if voters complete all of the burdensome steps to mail their ballots, as a result of USPS service delays and disruptions, the receipt deadline will disenfranchise countless voters who lawfully cast their ballots on or before Election Day—for reasons entirely outside their control. The evidence is clear, and it is not a question of whether lawfully-cast ballots will not arrive in time for counting; it is a question of how many voters will be disenfranchised as a result. Indeed, North Carolina itself is currently suing the USPS over fears of election mail delays. This widespread and arbitrary risk of disenfranchisement makes it impossible to "ascertain, fairly and truthfully, the will of the people." *Common Cause*, 2019 WL 4569584, at *109. At bottom, an

election that subjects voters to unduly burdensome restrictions, health risks, and outright disenfranchisement at every turn is by definition not "free." N.C. Const. art. I, § 10.

Each of these challenged provisions restricts North Carolinians' ability to participate in their democracy and let their will be known at the ballot box. But taken together, these restrictions compound the likelihood that countless North Carolina voters will be deterred from voting or disenfranchised. These barriers to in-person and absentee voting, especially when imposed in the midst of the current public health crisis, will deny the franchise to eligible voters and obfuscate the will of North Carolinians, particularly those who—because of financial insecurity, medical vulnerabilities, living conditions, family care responsibilities, or lack of transportation—are unable to overcome the drastically increased costs and burdens of participating in the political process. North Carolina's failure to eliminate these barriers, or to even adopt its own State Board's recommended safeguards, violates the Free Elections Clause and obstructs the will of North Carolinians.

B. Plaintiffs will suffer irreparable injury absent an injunction.

The challenged provisions inflict irreparable harm on Plaintiffs' fundamental rights. "Courts routinely deem restrictions on fundamental voting rights irreparable injury." *Holmes*, 840 S.E.2d at 266 (citing *LWV*, 769 F.3d at 247). Irreparable harm is not limited to injury "beyond the possibility of repair or possible compensation in damages"; it also includes injury "to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949).

Here, "[t]he injury to these voters is real and completely irreparable if nothing is done to enjoin [the] law." *Holmes*, 840 S.E.2d at 266 (quoting *LWV*, 769 F.3d at 247) (alteration in

original); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (If "constitutional rights are threatened or impaired, irreparable injury is presumed."), *stay denied* 568 U.S. 970 (2012); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1223 (N.D. Fla. 2018) ("irreparable injury is presumed when a restriction on the fundamental right to vote is at issue") (citations omitted); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (explaining that the loss of constitutional "freedoms . . . unquestionably constitutes irreparable injury"). Once the election comes and goes, "there can be no do-over and no redress." *Holmes*, 840 S.E.2d at 266 (quoting *LWV*, 769 F.3d at 247). Unless enjoined, the challenged absentee ballot and early voting restrictions will act individually and in concert to make voting in North Carolina, at best, unduly burdensome, and, at worst, entirely impossible for countless eligible voters during this pandemic.

Indeed, here, there is no need to guess what might happen absent an injunction. The irreparable harm that would befall North Carolinians has already been inflicted on voters across the country, including in Wisconsin, Ohio, Georgia, and even in North Carolina's 12th Congressional District. Thus, issuing an injunction "'is necessary for the protection of [Plaintiffs'] rights during the course of litigation.'" *Triangle Leasing*, 327 N.C. at 227, 393 S.E.2d at 856 (quoting *Ridge Cmty. Invs., Inc.*, 293 N.C. at 701). Without an injunction, based on the State's own projections, millions of voters are likely to be burdened, and tens of thousands are likely to be completely disenfranchised by the challenged provisions.

C. The balance of equities weighs in favor of issuing an injunction.

The balance of the equities weighs heavily in favor of an injunction because "the public interest . . . favors permitting as many qualified voters to vote as possible." *Holmes*, 840 S.E.2d at 266 (citation omitted); *Summit Cty. Democratic Cent. & Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("There is a strong public interest in allowing every registered voter to vote

freely."). Enjoining the challenged provisions would reduce the burdens on voters, prevent arbitrary disenfranchisement, and protect voters' health. This would ensure North Carolinians experience a "fair and honest election[ ] [which] are to prevail in this state." *Common Cause*, 2019 WL 4569584 at *128 (quoting *McDonald v. Morrow*, 119 N.C. 666, 26 S.E. 132, 134 (1896)).

On the other hand, enjoining the challenged provisions will cause no or minimal disruption for the State or local election officials. Enjoinment of the Receipt Deadline would impose no burden at all on the State. The canvass would remain on November 12, 2020, as currently scheduled. And county boards will have no trouble counting ballots during the period leading up to the canvass. Indeed, they are already required to accept and count ballots from military and overseas absentee voters that arrive by the last day before the canvass,[26] and they are processing provisional and absentee ballot cures during that time. *See* Scott Aff. ¶ 6. As such, county officials confirm that they would have no issue with counting ordinary absentee ballots through the day before the canvass. *Id.* And while lifting the Postage Requirement will inevitably involve some additional cost, the State has already appropriated funds—largely federal CARES Act grants—toward postage costs for mailing out absentee ballots, HB 1169, § 11.1.(d); it can certainly do so for returning them, as well. Further, Plaintiffs' request to eliminate state-imposed restrictions on the early voting period imposes no burden on the State, which would be entirely unaffected by this change. Providing additional flexibility would impose no administrative burden on any local election official because it remains in his or her sole discretion to choose to do what is best for his or her county. In fact, the State's own new mandates for minimum early voting requirements are far more burdensome on election authorities than Plaintiffs' requested relief.

[26] *Military and Overseas Voting*, N.C. State Bd. of Elections, https://www.ncsbe.gov/voting/vote-mail/military-and-overseas-voting.

Indeed, much of Plaintiffs' requested relief actually *lessens* elections administration burdens on the State and other election officials. For example, eliminating the Witness Requirement places no burden on the State and relieves county election officials of the procedural step of reviewing every absentee ballot for compliance with a requirement that they do not in fact use for any verification purpose. *See* Scott Aff. ¶ 10. Likewise, enjoining the Application Assistance Ban lessens the demand on county boards to assemble MATs at a time when voters need more help than ever, yet fewer individuals are willing to risk COVID-19 infection to serve on MATs. *See id*. ¶ 11. And lifting the Ballot Delivery Ban does not impose any burden on the State or elections officials and fills a need the State cannot. *See id*. ¶ 5. Thus, the requested injunction will, in fact, provide relief to county boards and ease the burdens of election administration as absentee voting increases at unprecedented rates amid a global pandemic.

Moreover, the State itself has a constitutional interest in, and an obligation to ensure, its citizens can vote and that its elections are free and fair, and an injunction will help guarantee these rights by simplifying the voting process and ensuring eligible North Carolinians can cast ballots that will be counted. The State Board recognized exactly this when it asked that its requested changes—including eliminating the Witness Requirement, pre-paying postage, and offering more flexibility in setting early voting times—"be made permanent" "in order to ensure continuity and avoid voter confusion." State Bd. Mar. 26, 2020 Letter at 2.

With the election fast approaching, this Court should act now to protect Plaintiffs' and all North Carolinians' fundamental rights. For some of Plaintiffs' requested relief, like lifting the Receipt Deadline, the proximity of the election is immaterial. And for all of the challenged provisions, there is still plenty of time to act. In advance of the June 23 primary, the State finalized several election changes, including reduction of the Witness Requirement from two to one

witnesses, on June 12, only 11 days before Election Day.[27] Even now, within the last few weeks, the State Board has continued to issue new guidance, abandoning long-standing signature matching procedures and establishing new requirements for notifying voters of ballot deficiencies just weeks before absentee ballots are sent to voters. *See* Numbered Memo 2020-19.

The balance of equities thus clearly favors Plaintiffs. They will suffer substantial irreparable harm if disenfranchised by the challenged provisions, and the public has a strong interest in ensuring eligible voters can cast their ballots. On the flip side, the State will suffer no harm if the challenged provisions are enjoined; in fact, lifting these restrictions would likely make it easier for the State to administer an unprecedented election amid a global pandemic.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for preliminary injunction.

[27] *See* Press Release, *supra* note 1.

Dated: September 4, 2020

Respectfully submitted,

By: /s/ Burton Craige

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document by email to counsel for defendants, addressed as follows:

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This the 4th day of September, 2020.

Narendra K. Ghosh

THOMAS J. MARSHALL
GENERAL COUNSEL
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UNITED STATES
POSTAL SERVICE

AUG 13 2020

July 30, 2020

Honorable Elaine Marshall
North Carolina Secretary of State
P.O. Box 29622
Raleigh, NC 27626-0622

Dear Secretary Marshall:

Re: Deadlines for Mailing Ballots

With the 2020 General Election rapidly approaching, this letter follows up on my letter dated May 29, 2020, which I sent to election officials throughout the country. That letter highlighted some key aspects of the Postal Service's delivery processes. The purpose of this letter is to focus specifically on the deadlines for requesting and casting ballots by mail. In particular, we wanted to note that, under our reading of North Carolina's election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards. This mismatch creates a risk that ballots requested near the deadline under state law will not be returned by mail in time to be counted under your laws as we understand them.

As I stated in my May 29 letter, the two main classes of mail that are used for ballots are First-Class Mail and USPS Marketing Mail, the latter of which includes the Nonprofit postage rate. Voters must use First-Class Mail (or an expedited level of service) to mail their ballots and ballot requests, while state or local election officials may generally use either First-Class Mail or Marketing Mail to mail blank ballots to voters. While the specific transit times for either class of mail cannot be guaranteed, and depend on factors such as a given mailpiece's place of origin and destination, most domestic First-Class Mail is delivered 2-5 days after it is received by the Postal Service, and most domestic Marketing Mail is delivered 3-10 days after it is received.

To account for these delivery standards and to allow for contingencies (e.g., weather issues or unforeseen events), the Postal Service strongly recommends adhering to the following timeframe when using the mail to transmit ballots to domestic voters:

- **Ballot requests:** Where voters will both receive and send a ballot by mail, voters should submit their ballot request early enough so that it is received by their election officials at least 15 days before Election Day at a minimum, and preferably long before that time.

- **Mailing blank ballots to voters:** In responding to a ballot request, election officials should consider that the ballot needs to be in the hands of the voter so that he or she has adequate time to complete it and put it back in the mail stream so that it can be processed and delivered by the applicable deadline. Accordingly, the Postal Service recommends that election officials use First-Class Mail to transmit blank ballots and allow 1 week for delivery to voters. Using Marketing Mail will result in slower delivery times and will increase the risk that voters will not receive their ballots in time to return them by mail.

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- **Mailing completed ballots to election officials:** To allow enough time for ballots to be returned to election officials, domestic voters should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials. So, for example, if state law requires a mail-in ballot to be postmarked by Tuesday, November 3, and received by Friday, November 6, voters should mail their ballot by Friday, October 30, to allow enough time for the ballots to be delivered by November 6. Voters must also be aware of the posted collection times on collection boxes and at the Postal Service's retail facilities and that ballots entered after the last posted collection time on a given day will not be postmarked until the following business day.

Under our reading of your state's election laws, as in effect on July 27, 2020, certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards and the recommended timeframe noted above. As a result, to the extent that the mail is used to transmit ballots to and from voters, there is a significant risk that, at least in certain circumstances, ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.

Specifically, it appears that a voter may generally request a ballot as late as 7 days before the November general election, and that a completed ballot must be postmarked by Election Day and received by election officials no later than 3 days after the election. If a voter submits a request at or near the ballot-request deadline, and if the requested ballot is transmitted to the voter by mail, there is a risk that the ballot will not reach the voter before Election Day, and accordingly that the voter will not be able to use the ballot to cast his or her vote. That risk is exacerbated by the fact that the law does not appear to impose a time period by which election officials must transmit a ballot to the voter in response to a request. Even if the requested ballot reaches the voter by Election Day, there is a risk that, given the delivery standards for First-Class Mail, a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state's receipt deadline of November 6. As noted above, voters who choose to mail their ballots should do so no later than Friday, October 30.

To be clear, the Postal Service is not purporting to definitively interpret the requirements of your state's election laws, and also is not recommending that such laws be changed to accommodate the Postal Service's delivery standards. By the same token, however, the Postal Service cannot adjust its delivery standards to accommodate the requirements of state election law. For this reason, the Postal Service asks that election officials keep the Postal Service's delivery standards and recommendations in mind when making decisions as to the appropriate means used to send a piece of Election Mail to voters, and when informing voters how to successfully participate in an election where they choose to use the mail. It is particularly important that voters be made aware of the transit times for mail (including mail-in ballots) so that they can make informed decisions about whether and when to (1) request a mail-in ballot, and (2) mail a completed ballot back to election officials.

We remain committed to sustaining the mail as a secure, efficient, and effective means to allow citizens to participate in the electoral process when election officials determine to utilize the mail as a part of their election system. Ensuring that you have an understanding of our operational capabilities and recommended timelines, and can educate voters accordingly, is important to achieving a successful election season. Please reach out to your assigned election mail coordinator to discuss the logistics of your mailings and the services that are available as well as any questions you may have. A list of election mail coordinators may be found on our website at: https://about.usps.com/election-mail/politicalelection-mail-coordinators.pdf.

We hope the information contained in this letter is helpful, and please let me know if you have any questions or concerns.

Sincerely,

Thomas J. Marshall

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILED
2020 AUG 18 P 2:23
WAKE CO., C.S.C.

No. 20-CVS-8881

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

AMENDED COMPLAINT

Plaintiffs, complaining of Defendants, say and allege:

INTRODUCTION

1. The current public health crisis caused by the novel coronavirus (hereinafter, "COVID-19") has upended daily life in North Carolina and threatens to wreak havoc on its electoral system. On March 10, Governor Roy Cooper declared a state of emergency and has since issued orders requiring North Carolinians, consistent with guidance from public health officials, to "[m]aintain at least six (6) feet social distancing from other individuals"; wear face coverings when leaving home; and minimize unnecessary interactions with individuals outside of

their homes in an effort to slow the rapidly increasing number of positive COVID-19 cases.[1] Because there is no known cure for COVID-19, and infections continue to rise, these measures designed to slow the spread of the virus are likely to continue through the November 3, 2020 general election ("November election").

2. For these reasons, the State Board of Elections (the "State Board") has acknowledged that voting by mail will expand dramatically, predicting an 800-percent increase in upcoming elections. The State Board has further acknowledged that in-person voting will be significantly impacted due to a shortage of poll workers and polling sites that can accommodate large numbers of voters while complying with social distancing guidelines. With the November election fast approaching, the State is woefully underprepared, not only for the rapid expansion of absentee voters, but also for voters who will attempt to cast their ballots in person and may be forced to choose between their health and their constitutional right to vote.

3. Plaintiffs Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn and Tom Kociemba, Sandra Malone, and Caren Rabinowitz bring this lawsuit to eliminate the barriers to a free and fair election and to ensure that they, along with all other eligible North Carolinians, have a meaningful opportunity to exercise their constitutional right to vote in November.

4. Specifically, Plaintiffs challenge the State's failure to provide sufficiently accessible in-person voting opportunities that comply with social distancing guidelines during the COVID-19 pandemic, and its continued enforcement of several absentee voting restrictions and procedures that will unduly burden or deny the franchise to countless voters if applied during the November election, while the COVID-19 outbreak still threatens public safety.

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[1] *See* Governor Roy Cooper, Exec. Order No. 141 (May 20, 2020), https://files.nc.gov/governor/documents/files/EO141-Phase-2.pdf [hereinafter Exec. Order No. 141]; Governor Roy Cooper, Exec. Order No. 147 (June 24, 2020), https://files.nc.gov/governor/documents/files/EO147-Phase-2-Extension.pdf.

5. These challenged laws and procedures include: (1) limitations on the number of days and hours of early voting that counties may offer, N.C.G.S. § 163-227.2(b); (2) the requirement that all absentee ballot envelopes must be signed by a witness, despite recommendations from medical professionals and the government that all residents should practice social distancing and minimize unnecessary contact with individuals outside of the home, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) the State's failure to provide pre-paid postage for absentee ballots and ballot request forms during the pandemic, *id.* § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, notwithstanding the United States Postal Service's ("USPS") well-documented mail delivery delays and operational difficulties, *id.* § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects, or based on an official's subjective determination that the voter's signature on the absentee ballot envelope does not match the signature on file with election authorities, without providing sufficient advance notice and an opportunity to cure (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C.G.S. § 163-226.3(a)(5) (the "Ballot Delivery Ban").

6. Taken together, these barriers (the "Challenged Provisions") to in-person and

absentee voting are not only unduly burdensome, as applied to the November election, but they also pose significant risks to voters' health and safety and will result in the disenfranchisement of untold numbers of North Carolinians, especially those who are medically and financially vulnerable. Protecting the safety of all North Carolinians during a public health crisis, while enforcing the constitutional rights to vote and to a free and fair election, will require advance planning and immediate proactive measures and accommodations to ensure adequate opportunities to cast an effective ballot (by mail or in person) notwithstanding the COVID-19 pandemic.

7. Plaintiffs therefore request that this Court issue an Order protecting the rights of North Carolina voters to participate in the November election by: (i) permitting counties to expand the early voting days and hours during the pandemic in order to increase opportunities to vote in person and minimize crowding, long lines, and the risk of exposure to COVID-19; (ii) suspending the Witness Requirement for single-person or single-adult households; (iii) requiring the State to provide pre-paid postage on all absentee ballots and ballot request forms; (iv) requiring election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day, which coincides with the earliest deadline for the receipt of uniformed-service or overseas voters' ballots; (v) enjoining election officials from rejecting ballots based on alleged signature discrepancies or mismatches without adequate guidance and training from the State Board and without providing voters notice and an opportunity to cure their ballots; (vi) allowing voters to obtain assistance from other individuals or organizations of their choice in completing and submitting their absentee ballot applications; and (vii) allowing voters to obtain assistance from other individuals or organizations of their choice in delivering ballots to election officials, and

allow third parties to provide such assistance without fear of incurring criminal penalties.

PARTIES

8. Plaintiff North Carolina Alliance For Retired Americans ("the Alliance") is incorporated in North Carolina as a 501(c)(4) nonprofit, social welfare organization. The Alliance has over 50,000 members across all 100 of North Carolina's counties. Its members are comprised of retirees from public and private sector unions, community organizations, and individual activists. Some of its members are disabled, and many are elderly. It is a chartered state affiliate of the Alliance for Retired Americans. The Alliance's mission is to ensure social and economic justice and full civil rights that retirees have earned after a lifetime of work. The Challenged Provisions frustrate the Alliance's mission because they deprive individual members of the right to vote and to have their votes counted, threaten the electoral prospects of Alliance-endorsed candidates whose supporters will face greater obstacles casting a vote and having their votes counted, and make it more difficult for the Alliance and its members to associate to effectively further their shared political purposes. Because of the burdens on absentee and in-person voting created by the Challenged Provisions, the Alliance will be required to devote time and divert resources from other efforts to educating its members about these requirements and assisting them in complying so that their votes are received by Election Day, accepted, and counted. These efforts will reduce the time and resources the Alliance has to educate its members and legislators on public policy issues critical to the Alliance's members, including the pricing of prescription drugs and the expansion of Social Security and Medicare and Medicaid benefits.

9. The Alliance also brings this action on behalf of its members who face burdens on their right to vote as a result of the Challenged Provisions. Because all of the Alliance's members are of an age that places them at a heightened risk of complications from coronavirus, they are

overwhelmingly likely to vote absentee this year and consequently face the burdens that the Challenged Provisions place on absentee voters. For example, some of the Alliance's members live in parts of the State where access to the Internet is sporadic and therefore cannot easily request an absentee ballot without assistance. Others are likely to face difficulty finding a witness, acquiring postage, or delivering an absentee ballot themselves should they be unable to return it through the mail in sufficient time for their ballot to be counted. Additionally, many of the Alliance's members will be absentee voting for the first time, and thus will be more susceptible to disenfranchisement by the Receipt Deadline and Signature Matching Procedures. Finally, those of the Alliance's members who are committed to voting in person, or forced to because they do not receive their absentee ballots on time, will have to choose between their health and their right to vote due to a shortage of safe, in-person voting opportunities.

10. Plaintiff Barker Fowler is a 22-year-old registered voter in Rowan County, North Carolina. Ms. Fowler is a college senior at the University of Mississippi in Oxford, Mississippi, though she is currently at home in Salisbury, North Carolina with her parents due to the pandemic. She is finishing her degree this summer and is uncertain of where she will be this October and November, as she is applying for seasonal jobs out of state. Ms. Fowler typically votes absentee because she attends school in Mississippi, and she will likely have to do so again for the November election. Nevertheless, she is concerned about her ballot arriving in time to be counted, particularly given her experience attempting to vote absentee in the March 3 presidential primary, for which she requested an absentee ballot a month before the election but did not receive it until approximately five days after the election had already passed. Her ballot was postmarked in early February, meaning that it was in transit for more than three weeks. Given her experience attempting to vote absentee in March, Ms. Fowler is very concerned about

North Carolina's Receipt Deadline, as she is not confident that, even if she were to receive her ballot on time to postmark it by Election Day, that it would arrive within three days. Moreover, she does not typically keep stamps and, as a college student facing economic uncertainty due to the pandemic, is concerned about the added time and expense required to procure proper postage.

11. Plaintiff Becky Johnson is a 73-year-old registered voter in Forsyth County, North Carolina. Ms. Johnson is a dedicated voter who usually casts her ballot in person during the early voting period. Given her age and the risks of contracting COVID-19, Ms. Johnson has been extremely careful and does not regularly leave her home, nor does she invite others into her house. When she needs to venture into the public, she engages in strict social distancing practices and always carries a mask with her. She even orders her groceries online because she does not want to expose herself to the virus through contact with others. For the same reason, Ms. Johnson plans to vote by mail in the November election; she cannot be sure that others at the polls will be as careful as she is, and she does not want to risk exposure to COVID-19. Ms. Johnson is worried, however, that her absentee ballot may not count. She is well aware of the USPS's operational difficulties and the resulting mail delays that have occurred during the pandemic, which could prevent her ballot from being delivered on time, even if she mails it well before Election Day. Given these concerns, Ms. Johnson would prefer to seek contactless assistance from a trusted friend or neighbor to return her sealed ballot. Additionally, Ms. Johnson lives alone, and she is unsure how she will comply with the Witness Requirement. She does not want to risk exposure to COVID-19 in order to have her ballot signed by a third party. Further, Ms. Johnson knows that her signature has changed over time and now looks different each time she signs a document, and she is concerned that her ballot will be rejected if her absentee ballot envelope signature does not exactly match the signature on file with her county board of

elections.

12. Plaintiff Jade Jurek is a 60-year-old registered voter in Wake County, North Carolina. Ms. Jurek has multiple sclerosis which can make voting difficult for her. Though she has voted by absentee ballot a few times in the past, she strongly prefers voting in person. Ms. Jurek usually votes during the early voting period, so that she can cast her ballot when she is feeling her best. Ms. Jurek initially considered voting by mail in the November election, but she is concerned about USPS delays and the risk of disenfranchisement. To ensure that her ballot gets counted, she is committed to voting in person, as she usually does. Ms. Jurek voted in person during the primary election and encountered long lines, a crowded polling place, and extended wait times. Though some voters at the polls were taking necessary precautions to prevent the spread of COVID-19, many were not wearing masks or gloves, and Ms. Jurek found that it was not possible to remain socially distant for the full duration of the voting process. She would be much more comfortable casting her ballot if the State were to expand early voting days and hours, so that she would have the opportunity to select a day and a location that is less crowded, which will allow her to adhere to social distancing guidelines through the entire voting process.

13. Plaintiff Rosalyn Kociemba is a registered voter in Buncombe County, North Carolina. She is a 77-year-old member of the Buncombe County Senior Democrats, and she typically votes absentee so that she can spend Election Day working at the polls. For the past five years, she has served as an official poll worker on Election Day, but this year, she plans to stay home due to the COVID-19 pandemic. Ms. Kociemba and her husband both have underlying health conditions that make them especially vulnerable to COVID-19. Therefore, Ms. Kociemba plans to vote absentee again in the November election. Although she usually hand-delivers her

absentee ballot to her county board of elections, she would prefer a contactless option this year given the potential health risks. Ms. Kociemba is also worried about slowdowns in mail delivery service given the USPS's operational difficulties during the pandemic, which could prevent her ballot from being delivered by USPS before the Receipt Deadline. As a result, she would like to seek assistance from trusted neighbors and community members to return her sealed ballot.

14. Plaintiff Tom Kociemba is a registered voter in Buncombe County. He is 75 years old, a sales and marketing professional, and a member of the Buncombe County Senior Democrats. Mr. Kociemba typically votes absentee because he is busy working at the polls on Election Day. Due to the COVID-19 pandemic, however, Mr. Kociemba does not want to take the unnecessary risk of being at an in-person voting location, particularly because he has underlying health conditions that make him vulnerable to serious illness from a COVID-19 infection. Therefore, Mr. Kociemba withdrew from serving as a poll worker (a role in which he has served for the past seven years) and will vote absentee in November. Although he usually hand-delivers his absentee ballot to his county board of elections, he would prefer a contactless option this year in order to avoid interacting with those who may not be following all the precautions necessary to prevent the spread of COVID-19. Nevertheless, he is worried that his ballot may not be delivered by the Receipt Deadline due to slowdowns in mail delivery service and the operational difficulties that USPS has encountered during the pandemic. Mr. Kociemba would like to seek assistance from trusted neighbors and community members to ensure that his sealed ballot is delivered on time.

15. Plaintiff Sandra Malone is a 53-year-old registered voter in Wake County. Ms. Malone usually votes in person and she would like to continue voting in person this year. However, she is concerned about the safety of polling places during the COVID-19 pandemic,

and the lack of adequate options for early voting sites and hours that would allow her to pick a date and time with fewer voters, which would allow her to follow social distancing guidelines through the entire voting process. Ms. Malone is also concerned that if she opts to vote by mail instead, her absentee ballot may not reach election officials by the Receipt Deadline, given evidence of the USPS's overcapacity and operational difficulties. Moreover, she is worried that her ballot may be rejected for a signature mismatch, as her signature changes every few years and rarely looks exactly the same.

16. Plaintiff Caren Rabinowitz is a 69-year-old registered voter in Guilford County. Ms. Rabinowitz recently moved to North Carolina from New York. As a new resident, this will be her second time voting in the State. She voted in person in the March 3 primary. Because Ms. Rabinowitz has underlying health conditions that place her at high risk for serious illness if she contracts COVID-19, she plans to vote by mail in the November election to avoid exposure to the virus. Dropping off her absentee ballot in person would be especially difficult because she does not drive and must rely on public transportation. Ms. Rabinowitz is concerned that her vote will not be counted if, for reasons outside of her control—like the USPS's ongoing mail delivery delays—her absentee ballot arrives after the Receipt Deadline. Further, Ms. Rabinowitz lives alone, and because she recently moved to the State, she does not have any friends or family nearby and is concerned about having to venture out in public or invite a stranger into her home to satisfy the Witness Requirement.

17. Defendant North Carolina State Board of Elections is an agency responsible for the regulation and administration of elections in North Carolina, including voting absentee.

18. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections. Mr. Circosta is sued in his official capacity.

JURISDICTION AND VENUE

19. This Court has jurisdiction of this action pursuant to Article 26 of Chapter 1 of the General Statutes.

20. Under N.C.G.S. § 1-81.1(a1), the exclusive venue for this action is Wake County Superior Court.

FACTUAL ALLEGATIONS

I. COVID-19 has upended the electoral process in North Carolina.

21. COVID-19 has caused widespread disruption to daily lives and routines across the globe, which has impacted elections around the country and in North Carolina. By March 10, North Carolina had reported five confirmed cases of COVID-19. Since then, the number of confirmed cases in the State has skyrocketed, and the virus has spread to all of North Carolina's 100 counties. *Id.*

22. On March 14, four days after Governor Cooper issued his first executive order declaring a state of emergency—which remains in effect as of this filing—the Governor closed public schools statewide and imposed social distancing guidelines. Since then, the Governor has issued no fewer than 29 executive orders designed to keep North Carolinians safe during the ever-evolving public health crisis.

23. Even as North Carolina gradually begins to reopen, efforts to prevent the spread of COVID-19 remain in place, including executive orders prohibiting mass gatherings—defined as "an event or convening that brings together more than ten (10) people indoors or more than twenty-five (25) people outdoors at the same time in a single confined indoor or outdoor space,

such as an auditorium, stadium, arena, or meeting hall."[2]

24. Governor Cooper has also strongly advised residents 65 years of age and older, or who are immunocompromised, to stay home. *Id.* Visitation to long-term care facilities, including nursing homes, adult care homes, family care homes, mental health group homes, and intermediate care facilities for individuals with intellectual disabilities has been limited to "compassionate care situations." *Id.*

25. Efforts to minimize the spread of the virus or the risk of infection will require North Carolinians to exercise caution by following social distancing guidelines and avoiding large group gatherings, which "offer more opportunity for person-to-person contact with someone infected with COVID-19[.]"[3] The need for such precautions shows no signs of easing as COVID-19 cases continue to rise, even though the State is still experiencing what some have termed the first wave of infections.

26. The State Board has announced that it expects a surge in absentee ballots from approximately four percent during previous elections to 40 percent for the November election, and that it anticipates a total of 4.5 million individuals will vote by mail and in person this November. As a result, the Board has asked the General Assembly to eliminate certain restrictions that reduce access to voting by mail.

27. In a March 26, 2020 letter to Governor Cooper and the General Assembly, the State Board's Executive Director urged the General Assembly to: (1) alter early voting sites and hours requirements to allow counties to better accommodate in-person voters during the COVID-

[2] Governor Roy Cooper, Exec. Order No. 151 (July 16, 2020), https://files.nc.gov/governor/documents/files/EO151-Phase-2-Extension-1.pdf [hereinafter Exec. Order No. 151]; Governor Roy Cooper, Exec. Order No. 147 (June 24, 2020), https://files.nc.gov/governor/documents/files/EO147-Phase-2-Extension.pdf; Exec. Order No. 141 (May 20, 2020).

[3] *See* Exec. Order No. 151.

19 pandemic; (2) relax or eliminate the Witness Requirement, as well as restrictions on third-party assistance of voters in care facilities; (3) establish a fund to pay for outbound and returned absentee ballots; (4) create an online option for requesting absentee ballots, and allow them to be submitted by fax and email; and (5) enable county boards of elections to assist voters by pre-filling their information on absentee ballot request forms.

28. The State Board's Executive Director renewed this plea on April 22, 2020 and April 29, 2020, also requesting funds to account for the unprecedented expansion of absentee voting and to make polling places accessible to voters during the public health crisis—a need which the State is woefully unprepared to meet.

29. Although the General Assembly has reduced the number of signatures necessary to satisfy the Witness Requirement from two to one, allowed the State Board to create an online portal for absentee ballot requests, and permitted voters to return their absentee ballot request forms via email or fax this year, it has yet to adopt any of the above-referenced measures in full.

30. North Carolina's inaction, despite the imminent risk of widespread disenfranchisement under the State's current election procedures, threatens to repeat the chaos and disorder that has played out in one election after another across the country since the pandemic began.

31. In Wisconsin's April 7 primary, for instance, election officials knew ahead of time that in-person voting opportunities would be significantly limited due to the loss of poll workers who were over the age of 65 and feared exposure to COVID-19, and the severe reduction in the number of available polling locations. *See Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *1 (W.D. Wis. Apr. 2, 2020). Like here, the likely consequences of holding an election in that context were clear: "(1) a dramatic

shortfall in the number of voters on election day . . ., (2) a dramatic increase in the risk of cross-contamination of the coronavirus among in-person voters, poll workers and, ultimately, the general population in the State, or (3) a failure to achieve sufficient in-person voting to have a meaningful election *and* an increase in the spread of COVID-19." *Id.*

32. When Wisconsin proceeded to conduct its primary election in April without adequate safeguards to address these issues, chaos and widespread disenfranchisement ensued, and cities throughout Wisconsin were forced to close polling places. In Milwaukee, more than 18,000 voters cast their ballots in person at only five polling locations, resulting in large crowds, long lines, and excessive wait times, often without regard for social distancing protocols. USPS struggled to keep up with the dramatic increase in mail voting, resulting in thousands of voters who did not receive their requested absentee ballots in time to vote and return them by Election Day, and over 100,000 more whose ballots were submitted by mail but were not delivered to election officials until well after Election Day. The disruptions in the mail delivery of absentee ballots—both in the initial distribution to voters and their return to municipal clerks' offices—were so extensive that Wisconsin's U.S. Senators wrote to the Inspector General for the USPS seeking an investigation into "absentee ballots [not] reach[ing] Wisconsin voters in time for the spring election."[4]

33. Ohio encountered similar issues in its April 28 primary. The Ohio Secretary of State reported that election officials were experiencing "missed mail deliveries" as well as delivery times "in excess of ten days" for first-class mail.[5]

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[4] WBAY.com, *Senators Johnson, Baldwin call for investigation of Wisconsin absentee ballots* (Apr. 9, 2020), https://www.wbay.com/content/news/Senators-Johnson-Baldwin-call-for-investigation-of-Wisconsin-absentee-ballots-569521331.html.

[5] Letter from Frank LaRose, Ohio Sec'y of State, to Ohio Congressional Delegation (Apr. 23, 2020), *available at* https://www.dispatch.com/assets/pdf/OH35713424.pdf.

34. In Pennsylvania's June 2 primary, USPS's operational difficulties delayed the delivery of mail ballots in both directions—from election officials to voters and from voters back to county election offices. As one county elections department explained, "[t]he source of this slowdown is a combination of systems operating at a slower rate due to the circumstances created by the COVID-19 pandemic and USPS prioritizing official election mail coming from [the County] in a manner that is not consistent with protocols that the County was informed would be in place."[6] Some county election officials went so far as to advise voters to avoid mailing back their ballots altogether and instead to hand-deliver them directly to their county board of elections, or risk disenfranchisement.

35. Pennsylvania's primary was also marred by long lines and confusion over consolidated polling places, and tens of thousands of vote-by-mail ballots that never made it to voters, which led the Governor to issue an executive order on the eve of the election, granting a seven-day extension of the deadline for the receipt of mail ballots in six counties.

36. In Georgia's June 9 primary, polling place consolidations and closures due to COVID-19 combined with malfunctioning voting machines created long lines at polling places throughout the State, with some voters casting their ballots after midnight.

37. In Kentucky's June 23 primary, the city of Louisville—with a population of approximately 600,000, 20 percent of whom are Black—had only one polling place. Long lines and traffic jams predictably followed, and a court order was required to re-open the lone polling place after it had closed for the day to allow voters who were stuck in traffic to cast their ballots.

38. In Washington, D.C.'s primary on June 2, some voters waited in line for over four

[6] Harri Leigh, *A record number of mail-in ballot applications, but will they arrive in time?* FOX43 (May 26, 2020), https://www.fox43.com/article/news/politics/elections/a-record-number-of-mail-in-ballot-applications-but-will-they-arrive-in-time/521-de6f5ff0-38eb-47a5-a935-313e6a6a1ee3.

hours, many of whom had requested absentee ballots but did not receive them in time to submit them by Election Day.

39. Michigan's August 4 primary further underscored the effect of mail delays on voting during the pandemic. As of August 6, about 10,000 absentee ballots that had been cast in the primary just two days earlier had been rejected for arriving after Election Day or due to signature mismatch. The Michigan Secretary of State's office said the number of rejected ballots would likely rise as more ballots arrived.

40. Recent statements from the USPS strongly suggest that North Carolinians will face similar challenges in submitting and receiving election mail this fall. A recent report by the Inspector General of the U.S. Postal Service confirmed that USPS "cannot guarantee a specific delivery date or alter standards to comport with individual state election law."[7] Just weeks ago, USPS announced "major operational changes" "that could slow down mail delivery" *even further*.[8] USPS will no longer pay overtime and is slashing office hours. Carriers are being directed, for the first time in USPS history, *to leave mail behind* at distribution centers if it would delay them from their routes instead of "mak[ing] multiple delivery trips to ensure timely distribution of letters and parcels," as they have historically done.[9] Since the announcement, some Americans have gone "upwards of three weeks without packages and letters, leaving them without medication, paychecks, and bills."[10]

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[7] Office of the Inspector General, *Timeliness of Ballot Mail in the Milwaukee Processing & Distribution Center Service Area*, USPS (July 7, 2020), https://www.uspsoig.gov/sites/default/files/document-library-files/2020/20-235-R20.pdf.

[8] Jacob Bogage, *Postal Service memos detail 'difficult' changes, including slower mail delivery*, WASH. POST (July 14, 2020), https://www.washingtonpost.com/business/2020/07/14/postal-service-trump-dejoy-delay-mail/ [hereinafter Bogage, *Postal Service memos detail 'difficult' changes*].

[9] *Id.* Bogage, *Postal Service memos detail 'difficult' changes*.

[10] Ellie Rushing, *Mail delays are frustrating Philly residents, and a short-staffed Postal Service is struggling to keep up*, Philadelphia Inquirer (Aug. 2, 2020),

41. The November election in North Carolina will encounter the same obstacles that have derailed other elections around the country and, unless the Challenged Provisions are enjoined, the result will be widespread disenfranchisement of countless lawful North Carolina voters.

II. The Challenged Provisions impose barriers to in-person voting during the COVID-19 pandemic.

42. Because polling places draw large numbers of individuals into enclosed spaces where, during the pandemic in particular, they have often been required to wait for hours in long lines, in-person voting presently poses a risk of transmission that can be mitigated—though not eliminated—only through the implementation of strict social distancing requirements among other health and safety measures.

43. In-person voting involves certain variables, including the physical space in which the polling place is located and the time it takes for individuals after they arrive at the site to vote their ballots, that directly operate to increase (or decrease) a voter's risk of becoming infected with or transmitting COVID-19 at the polling place.

44. Safety measures necessary to mitigate (although not eliminate) the risk of transmission include: (1) maximizing the number of polling places and expanding voting opportunities to minimize crowding and long lines; (2) ensuring social distancing is strictly enforced among poll workers and voters; and (3) ensuring availability and widespread use of personal protective equipment, hand sanitizer, and other appropriate disinfecting products.

45. Such procedures are essential in ensuring access to the franchise because North Carolinians have historically relied heavily on in-person voting, and many are expected to

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https://www.inquirer.com/news/philadelphia/usps-tracking-in-transit-late-mail-delivery-philadelphia-packages-postal-service-20200802.html.

continue to do so in 2020. In the 2018 general election, for example, less than three percent of all votes were cast by mail.

46. Despite the need for expanded in-person voting opportunities and reduced crowds, voters in the November election will encounter just the opposite: fewer voting locations and hours, packed polling places, and long lines.

47. In the June 23, 2020 Republican primary, for example, Haywood County reduced the number of polling sites from 29 to 11, and Macon County consolidated 15 polling places into just 3 sites. The State Board's Executive Director has also expressed concerns that COVID-19 will result in polling place consolidation and relocation to allow for adequate social distancing.

48. Notably, the State Board has recognized the need for expanded early voting sites to allow county boards to "reduce crowd density, shorten the time voters spend in line and at polling locations, and improve sanitation and cleanliness" so that "every eligible North Carolinian has the ability to vote without endangering herself."

49. As a result, the State Board recently issued an emergency order requiring all county boards to open at least one early voting site for a minimum of 10 hours in the first and second weekends of the early voting period and requiring county boards to offer at least one early voting site per 20,000 registered voters.

50. While these reforms are certainly a step in the right direction, without an expansion of the early voting period, county boards that offer only the minimum required number of early voting sites during the fixed 17-day early voting schedule will not alleviate the crowding, long lines, and attendant health risks that the State Board sought to avoid.

51. The COVID-19 pandemic will force counties to offer fewer polling locations than they otherwise would have under normal circumstances. Faced with poll workers unwilling to

risk exposure and potential voting sites that are either reluctant to open their doors to large crowds or inadequately equipped to follow social distancing guidelines, the State has already seen significant polling place consolidation. Indeed, it will be increasingly difficult for many counties to operate more than a few satellite early voting sites, which means that fewer cumulative early voting hours, larger crowds, and long lines await those who attempt to vote in person, creating public health risks and imposing severe burdens on the right to vote.

52. To alleviate the inevitable crowds and long lines that await in-person voters for the November election, the State must expand opportunities to cast a ballot in person, including by extending the early voting period.

53. Increasing the number of early voting days not only offsets the reduction in cumulative voting hours caused by the COVID-19 pandemic, but also minimizes the risk of daily congestion and affords North Carolinians additional options in selecting an early voting day when their polling site will be less crowded and allow for adequate social distancing.

III. The Challenged Provisions unlawfully restrict access to absentee voting during the COVID-19 pandemic.

54. Adopted in 2001, "no-excuse" absentee voting, which allows any qualified citizen to vote by mail without justification, was one of several measures adopted by the State to alleviate crowds at the polls on Election Day and expand access to the franchise. N.C.G.S. § 163-226(a). Because of absentee voting and other reforms, North Carolina saw a five-percent increase in overall voter participation—from 59 to 64 percent—between the 2000 and 2004 general elections.

55. Under normal circumstances, voting by mail expands access to the ballot box for voters whose work schedules, health conditions, family obligations, or lack of transportation make in-person voting difficult.

56. But these are not normal times. As discussed above, the COVID-19 pandemic has upended daily life in North Carolina, and voters in the upcoming November election will encounter unprecedented barriers to the ballot box, which will require the State to adopt additional safeguards and suspend restrictions that will otherwise deny voters access to a free and fair election.

A. The Witness Requirement forces voters who live alone or in single-adult households to endanger their health in order to vote in the November election.

57. The Witness Requirement mandates that each voter who returns a mail ballot must have the envelope in which that ballot is submitted to elections officials signed by both the voter and another individual 18 years of age or older certifying that they witnessed the voter complete the ballot. N.C.G.S. § 163-231(a)(1)–(4).

58. This means that, once a voter receives their absentee ballot, North Carolina law requires them to complete it in front of another adult—which often requires the voter to solicit a witness from outside their household—notwithstanding the public health risks posed by the ongoing COVID-19 pandemic.

59. As the State Board acknowledged in its March 26 memorandum, which recommended a reduction in the number of witnesses required to cast an absentee ballot from two to one, "[e]liminating the witness requirement altogether . . . would further reduce the risk" to public health posed by COVID-19.[11]

60. In April, the Board reiterated its request to amend the Witness Requirement, recognizing that voters who did not have other available witnesses in the household would be

[11] *See* March 26, 2020 Letter from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to Gov. Roy Cooper, et al. (Mar. 26, 2020), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/SBE%20Legislative%20Recommendations_COVID-19.pdf.

forced to "invite another adult into [their] home to complete the voting process," which "increases the risk of transmission or exposure to disease."[12]

61. While the General Assembly, through HB 1169, reduced the number of required witnesses from two to one (for elections held in 2020 only), the Witness Requirement, even in its current form, still imposes a significant burden on many North Carolinians.

62. More than one-fourth of North Carolina households are one-member households, as is the case for Plaintiff Caren Rabinowitz.

63. Even voters living in multi-member households will struggle to meet the Witness Requirement because it mandates that a witness must be at least 18 years old and not otherwise barred from serving as a witness.[13]

64. The burden of the Witness Requirement is exacerbated by the fact that the witnesses must be present at the time the voter marks their ballot, places it in and seals the container envelope, and completes the envelope's certification. N.C.G.S. § 163-231(a)(1)–(4).

65. Thus, voters who live alone or in a household without eligible witnesses cannot vote until they find a witness, or invite a third party into their home, at a time when it is essential

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[12] *See* April 22, 2020 Letter from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to Gov. Roy Cooper, et al. (Apr. 22, 2020), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/Outreach/Coronavirus/State%20Board%20CARES%20Act%20request%20and%20legislative%20recommendations%20update.pdf. Although the State Board requested a reduction of the number of witnesses required from two to one, its reasoning—that voters "would have to invite another adult into [their] home"—applies equally to even a single witness requirement if the voter does not reside with another adult.

[13] Under N.C.G.S. §§ 163-226.3(a)(4) and 163-237(b), an individual who is a candidate for nomination or election cannot serve as a witness unless the voter is the candidate's near relative. In addition, the following individuals are prohibited from serving as witnesses if the voter is a patient or resident of a hospital, clinic, nursing home, or rest home: An owner, manager, director, employee of the hospital, clinic, nursing home, or rest home in which the voter is a patient or resident; an individual who holds any elective office under the United States, this State, or any political subdivision of this State; and an individual who holds any office in a State, congressional district, county, or precinct political party or organization, or who is a campaign manager or treasurer for any candidate or political party; provided that a delegate to a convention shall not be considered a party officer.

for North Carolinians to minimize unnecessary interactions with individuals outside of their homes and to follow social distancing guidelines, both for their own health and the safety of the general public.

66. Complying with this requirement is impractical for many North Carolinians, and it forces them to choose between either protecting their health or exercising their right to vote.

67. Meanwhile, the State's interest in enforcing the Witness Requirement is minimal at best. Witness signatures are ineffective fraud prevention measures, illustrated by the fact that North Carolina is one of only five states that still enforces them.

68. Notably, North Carolina does not impose the same Witness Requirement upon uniformed-service voters or overseas voters registered in North Carolina who vote mail ballots.

69. It also defies logic to suggest that the Witness Requirement will deter individuals who plan to commit perjury and cast an absentee ballot fraudulently. Such individuals are unlikely to draw the line at forging a witness's signature. Instead, the requirement burdens and punishes those who attempt to follow the letter of the law and are least likely to be engaged in any misconduct.

B. The Postage Requirement imposes monetary and transaction costs which are exacerbated by the pandemic.

70. A significant number of voters will be forced to mail their absentee ballots (because they either lack access to transportation or are unwilling to risk potential exposure to COVID-19 in order to deliver their ballots in person) and must pay a postage fee to do so.

71. Thus, in order to submit their absentee ballots while minimizing the risk of COVID-19 infection, many North Carolinians must incur monetary expenses and other transaction costs that bear most heavily on financially vulnerable members of the electorate who are least able to navigate these burdens.

72. This burden does not fall on all absentee voters in North Carolina. Uniform-service and overseas voters may submit absentee ballot requests by email, thereby avoiding incurring the postage to do so. *Id.* § 163-258.4(c). Moreover, these same voters need not pay for postage to mail back their completed absentee ballots, because "[a]ny American voter living overseas can mail his or her completed ballot back to the United States *free of charge* at the nearest American embassy, consulate, or Diplomatic Post Office (DPO). If the voter has authorized access to a military base, they can mail a ballot *free of charge* at the nearest Army Post Office (APO) or Fleet Post Office (FPO)." *Id.* (emphasis added).[14]

73. As unemployment rates skyrocket in response to COVID-19's devastating impact on the economy, the burden imposed by the Postage Requirement will create obstacles to voting for the growing number of North Carolinians now facing financial hardship.

74. As of this filing, well over 1.2 million North Carolinians have already applied for unemployment insurance with the State since March 15, with a staggering number of applicants citing the COVID-19 crisis as the reason for the loss of their employment. During normal times, North Carolina typically processes around 200,000 unemployment claims per year. Without question, COVID-19-related unemployment and other collateral consequences of the public health emergency will also increase the percentage of North Carolinians living in poverty, which already exceeded 14 percent before the pandemic began.

75. But the monetary cost of stamps is not the only burden that the Postage Requirement will impose upon voters in the November election. Voters who do not already possess stamps must risk their health by either venturing out to the post office or other

[14] *See* U.S. Postal Serv., *Election Mail*, https://about.usps.com/postal-bulletin/2020/pb22539/html/cover_006.htm.

establishments that sell stamps, or by delivering their ballots in person. While there are some services that allow voters to print postage online, these services also require a printer, scale, and paid subscription.

76. And although a voter can order stamps online through the USPS website, delivery of those stamps takes five to seven days under *normal* circumstances, such stamps are not sold individually but must be purchased on a sheet of stamps that costs a minimum of $11.00, and the purchaser must pay for the shipping and handling of the stamps themselves.

77. Unless the State provides pre-paid postage for absentee ballots, both the monetary and transaction costs of submitting a ballot by mail will burden and deter voters in the upcoming election.

C. The Receipt Deadline will result in large-scale disenfranchisement for voters who must rely on USPS to deliver their ballots.

78. After a ballot has been deposited in the mail, the voter has no control over when that ballot arrives, but may nonetheless have their ballot rejected and their right to vote denied if the mail service—in most cases, USPS—fails to deliver the ballot to local election officials by the Receipt Deadline.

79. Under N.C.G.S. § 163-231(b)(1), (2), an absentee ballot is timely only if it is *received* by election officials no later than 5:00 p.m. on Election Day. If the ballot envelope is postmarked by Election Day, then the Receipt Deadline extends to 5:00 p.m. on the third day after the election.

80. In other words, whether an absentee ballot is counted in North Carolina will depend largely on the postal service's delivery timelines, which have been compromised due to the COVID-19 pandemic and large-scale restructuring of USPS.

81. As has been widely reported in the news, USPS is experiencing significant

budgetary shortfalls and personnel shortages that could severely compromise the agency's capacity to process an increasing volume of election mail.

82. The agency is also hard hit by the COVID-19 pandemic. As of July, around 5,400 postal workers across the country, including at least four in North Carolina, had tested positive for COVID-19, at least 75 had died, and more than 6,300 were self-quarantined because of prior exposure to COVID-19.

83. USPS's struggles have serious implications for North Carolina's absentee voters. Over the next few months, the USPS will be called upon to deliver an unprecedented number of absentee ballots across the country—from county election officials to voters, and then back again—yet the agency's ongoing budgetary crisis, which has already led to capacity shortages and delivery delays, means that additional cuts to routes, processing centers, or staff are likely to follow, further exacerbating the ongoing mail processing delays caused by COVID-19.

84. Depending on where in North Carolina the voter resides (for instance, rural areas often have infrequent mail pick-up times), ensuring timely delivery by the Receipt Deadline could require voters to send their ballots more than a week before the election—and even then, they still may not arrive on time.

85. Short of paying for private mail carriers or the USPS's more expensive expedited delivery options, voters who are late deciders or are otherwise unprepared to make their candidate selections and submit their votes weeks before Election Day have little assurance that the USPS will deliver their ballots on time, thus posing a significant risk of disenfranchisement.

86. While some North Carolinians opt to vote early and are prepared to choose their preferred candidates well in advance, others may not be ready to do so until much later in the election cycle. Forcing these voters to cast their ballots weeks in advance just to avoid mail

service disruptions or delays deprives them of the opportunity to participate fully in the political process and restricts their ability to consider additional or late-breaking information they may need to inform their voting choice.

87. Furthermore, voting by mail far in advance of Election Day also requires that the voter receive their absentee ballot in time to do so. Given the unprecedented number of expected absentee ballots in upcoming elections, as well as the USPS's well-documented struggles, that is far from certain.

88. The deadline to request an absentee ballot is seven days before Election Day, and voters who timely request absentee ballots may not receive them until shortly before or even after the election—a complaint common among voters during the March 3 primary. USPS has expressly warned that this seven-day window is likely insufficient for voters to complete and mail their ballots in time for delivery to election officials before state return deadlines.

89. In contrast to the deadlines placed on voters living in North Carolina and elsewhere in the country, ballots from uniformed-service and overseas voters are considered timely if they are transmitted by Election Day and received before close of business on the day before the county canvass, which cannot occur before 11:00 a.m. on the tenth day after an election. *See* N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b).

90. In addition, unlike traditional absentee ballots, uniformed-service and overseas absentee ballots, "[i]f . . . timely received, . . . may not be rejected on the basis that [they have] . . . an unreadable postmark, or no postmark." *Id.* § 163-258.12(b). But a traditional absentee ballot received by the county boards within three days after Election Day is nonetheless invalid if it lacks a legible postmark. *See id.* § 163-231(b)(2).

91. Thus, in the same election, ballots cast by uniformed-service and overseas voters

can be received and counted for an additional *six* days or more after the deadline imposed on absentee voters in North Carolina. And while the uniformed-service and overseas voter receipt deadline is tethered to the county canvass date, the earlier Receipt Deadline for stateside voters is not supported by a sufficient state interest to justify the burden it imposes on access to the franchise during the COVID-19 pandemic, particularly for those affected by delayed USPS mail service.

92. The later deadlines provided for uniformed-service and overseas absentee voters also demonstrate that the State's election apparatus is fully capable of extending the same allowances to resident North Carolinians in the midst of a public health emergency, and the State's failure to do so cannot be justified by any sufficient governmental interest.

93. In fact, the United States Supreme Court, on an application for a stay of a Wisconsin federal court injunction, recently left intact the district court remedy extending Wisconsin's receipt deadline for all mail ballots that were postmarked by Election Day. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020).

D. Signature Matching Procedures will result in the arbitrary rejection of validly-cast ballots.

94. For absentee voters whose ballots happen to be delivered before the Receipt Deadline, another hurdle awaits: arbitrary signature verification procedures. Once received, county election officials must review the sealed container envelopes of all absentee ballots to ensure that the voter signed the certification affirming their right to vote, and that the envelope is signed by a witness. *See* N.C.G.S. § 163-231.

95. Election officials may reject an absentee ballot where the voter's signature beneath the certification is missing; but in some counties, election officials further endeavor to verify whether the voter's signature on the ballot "matches" the signature of the voter on file

with the election office, a process otherwise known as "signature matching."

96. The State Board provides no guidance to county election officials engaged in signature matching, nor is it clear whether signature matching can permissibly occur under current North Carolina law. Thus, counties are left to their own devices in determining whether and how to apply Signature Matching Procedures and, ultimately, if the ballot should be counted.

97. Unsurprisingly, North Carolina counties have developed wildly inconsistent approaches to reviewing and verifying ballot signatures, with some seeming to require only the *presence* of the voter's signature, while others attempt to compare and match signatures on ballot envelopes with voter records. The counties that engage in signature matching do so without uniform standards or training, resulting in a process that varies even from one election official to the next.

98. This lack of guidance or identifiable standards is problematic because signature matching, as one federal court put it, is inherently "a questionable practice" and "may lead to unconstitutional disenfranchisement." *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1030 (N.D. Fla. 2018).

99. Studies conducted by experts in the field of handwriting analysis have repeatedly found that signature verification conducted without adequate standards and training is unreliable, and non-experts are significantly more likely to misidentify authentic signatures as forgeries.

100. Even when conducted by experts, signature matching can lead to erroneous results in the ballot verification context because handwriting can change quickly for a variety of reasons entirely unrelated to fraud, including the signer's age, medical condition, psychological state of mind, pen type, writing surface, or writing position.

101. It is, thus, inevitable that election officials will erroneously reject legitimate

ballots due to misperceived signature mismatches, which, without notice and a reasonable opportunity to cure, will result in the disenfranchisement of eligible voters. And, indeed, in jurisdictions that broadly require elections officials to engage in signature matching, thousands of lawful voters are regularly disenfranchised as a result.

102. In the November election, Signature Matching Procedures will be applied to hundreds of thousands of absentee ballots (and perhaps more), subjecting voters to the risk that their ballots will be rejected erroneously without notice or an opportunity to cure, or that they will be forced to take additional, unnecessary steps to provide supplemental evidence—in the middle of a pandemic, no less—just to have their ballots counted.

E. Voters who need assistance to navigate barriers to absentee voting have extremely limited options.

103. Despite the significant barriers to absentee voting during the COVID-19 pandemic, many North Carolinians will not have any practical means of obtaining assistance to request or submit their absentee ballots.

104. In October 2019, the General Assembly passed the Application Assistance Ban, which imposed new restrictions on the absentee ballot application process.

105. The law states: "A request for absentee ballots is not valid if . . . [t]he completed written request is completed, partially or in whole, or signed by anyone other than the voter, or the voter's near relative or verifiable legal guardian," and requires county boards to invalidate all requests for absentee ballots that are "returned to the county board by someone other than [a near relative, verifiable legal guardian, the multi-partisan assistance team], the United States Postal Service, or a designated delivery service . . . ." SB 683, § 1.3(a) (amending N.C.G.S. § 163-

230.2(c) and (e)).[15]

106. No one else may assist voters to ensure they receive absentee ballots—even if the voter has no near relative or verifiable legal guardian nearby and no accessible multi-partisan assistance team ("MAT") member available.

107. The only exception to this prohibition is limited to voters who need assistance "due to blindness, disability, or inability to read or write" and do not have "a near relative or legal guardian available to assist." SB 683, § 1.3(a) (adding N.C.G.S. § 163-230.2(e1)).

108. The law also prohibits organizations and individuals from assisting a voter in *returning* an absentee ballot request form, stating: "The completed request form for absentee ballots shall be delivered to the county board of elections only by any of the following: (1) The voter. (2) The voter's near relative or verifiable legal guardian. (3) A member of a multipartisan team trained and authorized by the county board of elections . . . ." SB 683, § 1.3(a) (amending N.C.G.S. § 163-230.2(c)).

109. Although recent emergency legislation (HB 1169) now allows voters and a limited group of designated third parties acting on the voter's behalf (i.e., the voter's "near relative or verifiable legal guardian") to submit absentee ballot request forms online beginning in September 2020, these measures fail to address the needs of countless voters who lack the resources to take advantage of them.

110. First, over 20 percent of North Carolina households do not have internet access,

[15] A "multi-partisan assistance team" ("MAT") must consist of at least two registered voters of the county who represent the two political parties with the highest number of affiliated voters in the State, as determined by January 1 of the current year. If a MAT has more than two members, voters who are unaffiliated with a political party or affiliated with a political party different than the top two political parties in the State may be team members. To the extent there are not enough registered voters who are affiliated with the top two political parties to serve on the MAT, the county board may appoint someone who is unaffiliated with a party to serve as a team member. HB 1169 § 2.5.(a).

and over 12 percent do not have a computer. Many of these voters do not have fax machines and would be unable to fax their absentee ballot requests either, leaving them with only two options: (1) mail a completed ballot request form, requiring postage which they may not have at their disposal, and risk not having their request delivered in a timely manner, or (2) submit the form in person, assuming the voter has access to transportation, and risk exposure to COVID-19.

111. Second, any assistance voters may obtain from multipartisan assistance teams ("MATs") is limited at best. HB 1169 requires the North Carolina Department of Health and Human Services ("DHHS") and the State Board to issue guidance on the use of MATs within hospitals, clinics, nursing homes, assisted living, or other congregate living situations, but is silent on whether and how MATs will be accessible to voters who do not reside in any of the above-referenced facilities.

112. North Carolina law also imposes severe limitations on an absentee voter's ability to obtain assistance in submitting their ballot, by prohibiting anyone other than the voter's "near relative or . . . verifiable legal guardian" from "tak[ing] into possession" a voter's absentee ballot "for return to a county board of elections." N.C.G.S. § 163-226.3(a)(5).

113. Thus, voters who do not have near relatives or legal guardians available to assist them may only return an absentee ballot "by mail or by commercial courier service, at the voter's expense, or in person." *Id.* §§ 163-231(a), 163-229(b), 163-231(b).

114. The law does not even allow voters to obtain ballot delivery assistance from MATs, which are only permitted to help voters with absentee ballot requests. In fact, it is a felony for anyone other than a near relative or verifiable legal guardian to possess for delivery another voter's absentee ballot. *Id.* § 163-226.3(a)(5).

115. This leaves voters with limited, if any, reliable options for returning their ballots

without risking disenfranchisement due to mail delivery delays, incurring burdensome transaction and monetary costs, or potentially exposing themselves to health risks by submitting their ballots in person.

116. To justify these restrictions, Defendants will most likely point to the fraudulent scheme orchestrated by operatives working for Republican candidate Mark Harris's campaign in North Carolina's Ninth Congressional District race during the 2018 general election. Following an investigation, the State Board found "overwhelming evidence that a coordinated, unlawful, and substantially resourced absentee ballot scheme operated during the [election] in Bladen and Robeson Counties[,]" and was led by Harris campaign associate Leslie McCrae Dowless.[16]

117. As the Board explained, Dowless's scheme was simple and crude: he and his associates forged absentee ballot request forms, collected unsealed ballots from voters, marked the ballots to pad vote totals for Dowless's clients, and delivered the ballots to election officials by mail. Order ¶¶ 60–65. The Board determined that Dowless "frequently instructed his workers to falsely sign absentee by mail container envelopes as witnesses[.]" *Id.* ¶ 62. "In some cases, Dowless's workers fraudulently voted blank or incomplete absentee by mail ballots at Dowless's home or in his office." *Id.* ¶ 63. And Dowless's fraudulent scheme appeared to have focused on areas of Bladen and Robeson Counties where minority voters are disproportionately concentrated. *See id.* ¶¶ 47, 122, 124–25, 151.

118. Based on the State Board's finding that Dowless and his associates coordinated the widespread forgery of absentee ballot request forms and the collection of *unsealed* and *unmarked* absentee ballots, which they fraudulently marked—all actions which were already

[16] *Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District*, N. C. State Bd. of Elections, March 13, 2019 ("Order"), ¶ 19, https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf.

prohibited by existing laws criminalizing forgery—the State Board "conclude[d] unanimously that irregularities or improprieties occurred" on behalf of the Harris campaign "to such an extent that they taint[ed] the results of the entire election and cast doubt on its fairness." *Id.* ¶ 150.

119. The ban on third-party assistance in submitting absent ballot request forms or sealed absentee ballots would have done little to prevent or uncover Dowless's scheme, and the Ballot Delivery Ban was in place when the fraud occurred. Dowless and his associates forged request forms and ballots and submitted them in the mail as if they had come from the voter. In fact, Dowless's associates ensured that ballots were mailed from post offices that were geographically close to the voters' homes. Neither the Application Assistance Ban nor the Ballot Delivery Ban targets the focal point of Dowless's scheme: forgery and voter impersonation, both of which are already prohibited by State law. Dowless's actions were revealed when voters either complained about unidentified individuals picking up their ballots or voted in person after Dowless's team had attempted to submit their forged ballots.

120. The Ballot Delivery Ban further denies voters access to safe and reliable means of returning their ballots—through an assistor of their choice—and forces those who lack the resources to return their ballots in person to rely on the postal service, notwithstanding the operational difficulties that have impaired the agency's ability to meet its delivery service commitments in the upcoming election. Not only are the restrictions unnecessary to detect or prevent fraud—nor would they have been effective—but they also deprive countless North Carolinians who are especially vulnerable to the effects of COVID-19 of their right to participate in the November election.

121. Rather than simply targeting the Republican operatives' criminal conduct, the General Assembly's Application Assistance Ban significantly hindered efforts to assist voters

and mobilize communities with historically depressed turnout rates, particularly during the pandemic in which a disproportionate number of Black North Carolinians are contracting COVID-19.

CAUSES OF ACTION

COUNT I
Violation of the North Carolina Constitution
Equal Protection, Art. I, § 19
(Unconstitutional Burden on Right to Vote)

122. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

123. Article I, § 12 of the North Carolina Constitution provides in relevant part: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances."

124. Article I, § 14 of the North Carolina Constitution provides in relevant part: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained."

125. Article I, §§ 12 and 14 of the North Carolina Constitution protect the right of voters to participate in the political process, express political views, affiliate with or support a political party, and cast a vote. "Voting, like donating money to a candidate or signing a petition for a referendum, constitutes 'expressive activity' that 'express[es] [a] view' about the State's laws and policies." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *119 (N.C. Super. Sept. 03, 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020) (citation omitted).

126. Article I, § 19 of the North Carolina Constitution provides in relevant part that "[n]o person shall be denied the equal protection of the laws."

127. Collectively, these provisions prohibit the State from imposing burdens on the fundamental right to vote unless they are justified by a sufficiently important state interest.

128. North Carolinians have relied heavily on in-person voting, particularly during the early voting period, to participate in the political process. In-person voting ensures access to the franchise for those who encounter difficulty voting by mail, either due to unreliable mail service, the attendant costs—including the monetary or transactional costs of obtaining postage or securing a witness—or the accompanying risk of disenfranchisement. Moreover, for many North Carolinians, casting a ballot at a polling place will be their preferred method of exercising the franchise due to the historical significance of in-person voting.

129. The COVID-19 pandemic, however, will result in a dramatic expansion of voting by mail, which expands access to the franchise for eligible voters for whom in-person voting is difficult or impossible. For many North Carolinians, voting by mail provides the only feasible opportunity to cast a ballot without putting their health at risk.

130. The barriers to in-person and absentee voting in the November election, which will occur in the midst of a global pandemic, include: (1) limitations on the number of days and hours of early voting that counties may offer; (2) the Witness Requirement, as applied to voters residing in single person or single-adult households; (3) the monetary and transaction costs of the Postage Requirement for absentee ballots; (4) the Receipt Deadline, as applied to voters who submit their ballots by mail through USPS; (5) arbitrary and error-prone Signature Matching Procedures; and (6) restrictions preventing voters from obtaining assistance from most third parties in requesting and submitting absentee ballots. These barriers unconstitutionally burden the fundamental rights of North Carolinians to participate in our democracy, and, when taken together, the cumulative impact of these restrictions creates a severe burden on the right to vote for many eligible citizens.

131. Because the barriers to in-person and absentee voting impose severe burdens on the fundamental right to vote during the COVID-19 pandemic, and because these barriers (and the failure to implement additional safeguards to facilitate access to the franchise) cannot be justified by any sufficiently important state interest, the limitations on in-person voting and the challenged absentee voting restrictions violate the North Carolina Constitution.

COUNT II
Violation of the North Carolina Constitution's
Free Elections Clause, Art. I, § 10

132. Plaintiffs hereby incorporate all other paragraphs as if fully set forth herein.

133. Article I, § 10 of the North Carolina Constitution states, in its entirety, that "[a]ll elections shall be free." This provision has no counterpart in the U.S. Constitution.

134. North Carolina has strengthened the Free Elections Clause since its adoption to reinforce its principal purpose of preserving the popular sovereignty of North Carolinians. The original clause, adopted in 1776, provided that "elections of members, to serve as Representatives in the General Assembly, ought to be free." N.C. Declaration of Rights, VI (1776). Nearly a century later, North Carolina revised the clause to state that "[*a*]*ll* elections ought to be free," expanding the principle to include all elections in North Carolina. N.C. Const. art. I, § 10 (1868) (emphasis added). Another century later, North Carolina adopted the current version which provides that "[a]ll elections *shall* be free." N.C. Const. art. I, § 10 (emphasis added). As the North Carolina Supreme Court later explained, this change was intended to "make [it] clear" that the Free Elections Clause and the other rights secured to the people by the Declaration of Rights "are commands and not mere admonitions" for proper conduct on the part of the government. *N.C. State Bar v. DuMont*, 304 N.C. 627, 639, 286 S.E.2d 89, 97 (1982) (internal quotation marks omitted).

135. "[T]he object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters." *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915). "Our government is founded on the will of the people. Their will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). "[F]air and honest elections are to prevail in this state." *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896).

136. The constitutional obligation to ensure that elections are both free and fair and reflect the will of the people, at a minimum, requires that the State ensure that all North Carolinians have a reasonable opportunity to vote—that is, not only to cast their ballots but to also have their ballots counted—without undue risk to their health and safety.

137. The State has an obligation under the Free Elections Clause to ensure that each step of the voting process, whether by mail or in person, does not unnecessarily endanger voters' health, subject voters to a significant risk of arbitrary disenfranchisement, or force voters to choose between exercising their fundamental right to vote and safeguarding their health and the health of their communities.

138. The State's failure to provide safe, accessible, and reliable means for its citizens to vote in the upcoming November election, both in person and by mail, denies Plaintiffs and all North Carolina voters the rights guaranteed to them under the Free Elections Clause. As state election officials have suggested, the COVID-19 pandemic has all but ensured that safe access to in-person voting will be severely restricted due to a significant reduction in the number of polling places and staff, and the health risks posed by packing more voters and poll workers into a small number of consolidated voting sites, for a fixed number of voting days and hours.

139. At the same time, voting by mail presents a significant risk of disenfranchisement. Absentee voters will encounter several unconstitutional barriers, when attempting to vote in the

November election (in the midst of the COVID-19 pandemic), including: (1) the Witness Requirement, as applied to voters residing in single person or single-adult households; (2) the monetary and transaction costs of the Postage Requirement for absentee ballots; (3) the Receipt Deadline, as applied to voters who submit their ballots by mail through USPS; (4) arbitrary and error-prone Signature Matching Procedures; and (5) restrictions preventing voters from obtaining assistance from most third parties in requesting and submitting absentee ballots.

140. The burdens imposed by these restrictions are exacerbated by the ongoing public health crisis and will subject voters to a significant risk of disenfranchisement in the November election for reasons outside their control.

141. The challenged barriers thus obstruct the will of North Carolinians, particularly those who—because of financial insecurity, health concerns, family care responsibilities, lack of transportation, or medical vulnerabilities—are unable to overcome the dramatically increased costs and burdens of participating in the political process during the COVID-19 pandemic. North Carolina's failure to eliminate these barriers thus violates the Free Elections Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter judgment in their favor and against Defendants, and:

a. Declare, under N.C.G.S. § 1-253, *et seq.*, that North Carolina's failure to provide sufficiently accessible in-person voting opportunities for the November election that comply with social distancing guidelines during the COVID-19 pandemic violates the Free Elections Clause, Art. I, § 10, and the Equal Protection and Law of the Land Clauses, Art. I, §§ 12, 14, and 19;

b. Declare, under N.C.G.S. § 1-253, *et seq.*, that in the context of COVID-19 pandemic and the upcoming November election, the Witness Requirement, as applied to voters residing in single person or single-adult households; the Postage Requirement and Receipt Deadline, as applied to voters who submit their ballots by mail through USPS; the Signature Matching Procedures; and the Application Assistance Ban and Ballot Delivery Ban are unconstitutional, as applied to the November election, and invalid because they violate the rights of Plaintiffs and other North Carolina voters under the Free Elections Clause, Art. I, § 10, and the Equal Protection and Law of the Land Clauses, Art. I, §§ 12, 14, and 19;

c. Require the State Board and all local election officials to expand the early voting period for the November election by an additional 21 days, and preliminarily and temporarily enjoining the enforcement of N.C.G.S. § 163-227.2(b) to the extent that it prevents the State Board or local election officials from extending early voting for an additional 21 days, or any other law that prevents the State Board or local election officials from expanding the number of early voting days;

d. Preliminarily and temporarily enjoin the Witness Requirement, as applied to voters residing in single person or single-adult households, for the November election;

e. Require the State Board to provide uniform standards and training to all election officials that use Signature Matching Procedures to verify absentee ballots;

f. Enjoin the State Board and all county boards of elections from rejecting absentee ballots through signature matching unless the State Board provides uniform

standards and training to all counties engaged in signature matching, and voters receive reasonable notice and an opportunity to cure any alleged signature defect;

g. Require the State Board and all local election officials to provide pre-paid postage for all absentee ballot request forms and absentee ballots for the November election using Qualified Business Reply Mail (QBRM), and temporarily enjoin the enforcement of N.C.G.S. § 163-231(b)(1) to the extent that it requires voters to mail their absentee ballots or applications at their own expense during the COVID-19 pandemic;

h. Require the State Board to extend the Receipt Deadline, for ballots submitted by mail through USPS by Election Day, to mirror the deadline afforded to uniformed-service and overseas absentee voters for the November election; to define the term "postmark," in connection with Plaintiffs' requested relief, to refer to any type of imprint applied by the USPS to indicate the location and date the USPS accepts custody of a piece of mail, including bar codes, circular stamps, or other tracking marks; to require Defendants to ensure that absentee ballots sent to voters, and the return envelopes provided to voters for sending ballots back, include an Intelligent Mail Barcode using Intelligent Mail Full-Service to assist in ensuring that ballots mailed by Election Day are not erroneously rejected if they lack a postmark; and, where a ballot does not bear a postmark date, to require the State Board and county boards of elections to presume that the ballot was mailed on or before Election Day if it arrives within the Receipt Deadline unless the preponderance of the evidence demonstrates it was mailed after Election Day;

i. Preliminarily and temporarily enjoin the enforcement of the Application Assistance Ban and Ballot Delivery Ban, including any laws that impose criminal or other penalties for violations of the Application Assistance Ban and Ballot Delivery Ban.

j. Award Plaintiffs their costs and expenses, under applicable statutory and common law, including N.C.G.S. §§ 6-20 and 1-263; and

k. Grant Plaintiffs such other and further relief as the Court deems necessary.

Dated: August 17, 2020

Respectfully submitted,

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I certify that I served the foregoing document by first-class mail to counsel for the defendants, intervenors, and proposed intervenors, addressed as follows:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Civil Action No. 4:20-CV-182

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The Elections Clause of the Constitution—Article I, Section 4, clause 1—says that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. 1, §4, cl. 1 (emphasis added). The Constitution thus entrusts the power to regulate federal elections in the

first instance to the branch of state government that is closest to the people. In North Carolina that is the General Assembly. The aim of this assignment of authority, as John Jay explained to the New York ratification convention, is to ensure that the rules governing federal elections are determined by "the will of the people." 2 *Debates on the Federal Constitution* 327 (J. Elliot 2d ed. 1836).

2. The North Carolina Board of Elections is not the "Legislature," and it is not Congress, yet the Board released three Memoranda, dated September 22, 2020, to set new "Times" and new "Manners" for elections in North Carolina. These Memoranda effectively gut the Witness Requirement, set by the General Assembly in the Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a); extend the Receipt Deadline for ballots to *nine days* after Election Day, undoing the deadline set by the General Assembly in N.C. GEN. STAT. § 163-231(b)(2)(b); water down the Election Day postmark requirement, also set by the General Assembly in N.C. GEN. STAT. § 163-231(b)(2)(b); and revise the procedures for preventing ballot harvesting by making it easier to drop off ballots illegally. By usurping the General Assembly's constitutional prerogative to "[p]rescribe" the "Times, Places and Manners" of the federal election, the Board is violating the Elections Clause.

3. The Board's ad hoc Memoranda changing the rules regulating the ongoing federal election also violate the Equal Protection Clause. As of filing 239,705 North Carolinians have cast their ballots—including 129,464 Democrats and 39,094 Republicans—and 1,028,648 have requested absentee ballots—including 504,556 Democrats and 185,393 Republicans—the vast majority *before* the Board arbitrarily changed the rules. Absentee Data, North Carolina State Board of Elections (Sept. 26, 2020), *available at* https://bit.ly/33SKzAw. The Board is thus administering the election in an arbitrary and nonuniform manner that inhibits voters who have *already* voted

under the previous rules from "participat[ing] in" the election "on an equal basis with other citizens in" North Carolina. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Bush v. Gore*, 531 U.S. 98, 105 (2000)). And the Board's Memoranda allow otherwise unlawful votes to be counted, thereby deliberately diluting and debasing lawful votes. These are clear violations of the Equal Protection Clause of the Fourteenth Amendment.

4. Plaintiffs seek appropriate declaratory and injunctive relief preventing these imminent, if not already ongoing, violations of law.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 18 U.S.C.§§ 1331, 1343, 1357 and 42 U.S.C. § 1983 because this action arises under the Constitution of the United States. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357 and 42 U.S.C. § 1983.

6. Venue is appropriate in this district under 28 U.S.C. § 1391(b) and under Local Rule 40.1(c)(1) because Plaintiff Bobby Heath is a resident of Pitt County in the Eastern District's Eastern Division, Plaintiff Whitley is a resident of Nash County and Plaintiff Swain is a resident of Wake County, both of which are in the Eastern District's Western Division, and Defendants' official offices are in Wake County, which is in the Eastern District's Western Division.

PARTIES

7. Plaintiff Timothy K. Moore is the Speaker of the North Carolina House of Representatives. He represents the 111th State House District. As the leader of the North Carolina House of Representatives, he represents the institutional interests of that body in this case. He appears in his official capacity.

8. Plaintiff Philip E. Berger is the President Pro Tempore of the North Carolina Senate. He represents the State's 30th Senate District. He has taken an oath to support and defend

the Constitution of the United States and the Constitution of North Carolina. As the leader of the North Carolina Senate, he represents the institutional interests of that body in this case. He appears in his official capacity.

9. Plaintiff Bobby Heath is a resident of Pitt County, North Carolina. He has been a registered voter in North Carolina since March 1980 and has voted in virtually every election since that time. Mr. Heath voted absentee by mail in the November 2020 general election under the rules requiring a single witness for his absentee ballot. Mr. Heath returned his absentee ballot by mail and according to the State Board of Elections' website that ballot was accepted on September 21, 2020.

10. Plaintiff Maxine Whitley is a resident of Nash County, North Carolina. She has been a registered voter in North Carolina since October 1964 and has voted in virtually every election since that time. Mrs. Whitley voted absentee by mail in the November 2020 general election under the rules requiring a single witness for her absentee ballot. Mrs. Whitley returned her ballot by mail and according to the State Board of Election's website that ballot was accepted on September 17, 2020.

11. Plaintiff Alan Swain is a resident of Wake County, North Carolina and is running as a Republican candidate to represent the State's 2nd Congressional District.

12. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections, which is the agency that is charged with administration of North Carolina's election laws and with the "general supervision over the primaries and elections in the State." N.C. GEN. STAT. § 163-22(a). He is named in his official capacity.

13. Defendant Stella Anderson is a member of the North Carolina State Board of Elections. She is named in her official capacity.

14. Defendant Jeff Carmon, III, is a member of the North Carolina State Board of Elections. He is named in her official capacity.

15. Defendant Karen Brinson Bell is the Executive Director of the North Carolina State Board of Elections. She is named in her official capacity.[1]

BACKGROUND

The General Assembly Established the Rules for the Election

16. Article I, Section 4, clause 1 of the U.S. Constitution states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. 1, § 4, cl. 1.

17. The Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id*. The Elections Clause thus does not grant the power to regulate elections to states, but only to the state's legislative branch.

18. Article II, Section 1 of the North Carolina State Constitution creates the North Carolina "Legislature" by vesting the "legislative power" exclusively in "the General Assembly, which shall consist of a Senate and a House of Representatives." *See also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). As the "the legislative branch," the General Assembly "enacts laws

[1] The North Carolina State Board of Elections is generally five members. Two members resigned on September 23, 2020, alleging they had not been properly advised of the consequences of the Board's policy changes as reflected in the Memoranda. *See 'Blindsided': GOP Elections Board Members Resign Over Absentee Ballot Settlement*, WSOCTV.COM (Sept. 24, 2020), https://www.wsoctv.com/news/local/2-gop-members-nc-state-board-elections-resign-report-says/O4OKQMNVWNEEBLQMKGZLGMNXOQ; *see also* David Black Resignation Letter (Sept. 23, 2020) (attached hereto as Ex. 6); Ken Raymond Resignation Letter (Sept. 23, 2020) (attached hereto as Ex. 7).

that protect or promote the health, morals, order, safety, and general welfare of society." *Id.* (internal quotation marks omitted).

19. As North Carolina's "Legislature," the General Assembly is tasked with regulating federal elections in North Carolina. U.S. CONST. art. 1, § 4, cl. 1. Accordingly, the General Assembly has exercised its federal constitutional authority to establish rules governing the manner of federal elections in North Carolina and many options for North Carolinians to exercise their right to vote.

20. Voters may cast their ballots in person at their assigned polling place on Election Day, which this year is November 3, 2020.

21. Voters who are "able to travel to the voting place, but because of age or physical disability and physical barriers encountered at the voting place [are] unable to enter the voting enclosure to vote in person without physical assistance . . . shall be allowed to vote either in [their] vehicle[s] . . . or in the immediate proximity of the voting place." N.C. GEN. STAT. § 163-166.9(a). This is commonly known as curbside voting.

22. Voters can vote early. North Carolina has established a 17-day early voting period beginning the third Thursday before the election through the last Saturday before the election at any early voting site in their county. N.C. GEN. STAT. §§ 163-227.2, 163-227.6. This means early voting starts this year on October 15, 2020. To ensure access, the same curbside voting accommodations are available at early voting sites. *See* Vote Early In-Person, N.C. STATE BD. OF ELECTIONS, https://bit.ly/3082mTf (last accessed Sept. 26, 2020).

23. Further, voters can vote by absentee ballot either early or on Election Day and without any special circumstance or reason necessary. See N.C. GEN. STAT. §§ 163-226, 163-230.2, 163-231.Voters can request an absentee ballot. But so too can the voter's near relative,

verifiable legal guardian, or member of a multipartisan team trained and authorized by the county board of elections on the voter's behalf. N.C. GEN. STAT. § 163-230.2.

24. To return a completed absentee ballot, a voter must have it witnessed and then mail or deliver the ballot in person, or have it delivered by commercial carrier. In addition, the voter's near relative or verifiable legal guardian can also return the ballots in person. N.C. GEN. STAT. § 163-231. But other than the voter's near relative or verifiable legal guardian, the General Assembly has criminally prohibited any other person from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5).

25. In general, absentee ballots must be returned to the local county board of elections by either (a) 5:00 p.m. on Election Day or (b) if postmarked by Election Day, the absentee ballots must be received "no later than three days after the election by 5:00 p.m." N.C. GEN STAT. § 163-231(b)(2)(b). This is the Receipt Deadline.

26. In short, the General Assembly has enacted numerous means for North Carolinians to vote and provided clear rules to regulate those means.

The General Assembly Revises Election Laws in the Bipartisan Elections Act of 2020

27. The General Assembly has also ensured that North Carolina's election laws have been updated to respond to the issues presented by the ongoing COVID-19 pandemic.

28. Governor Cooper declared a state of emergency on March 10, 2020 due to the COVID-19 pandemic. North Carolina elections officials soon understood that it may be appropriate to adjust the State's voting laws to account for the pandemic.

29. North Carolina State Board of Elections Executive Director Karen Brinson Bell submitted a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" on March 26, 2020.

30. In her letter, Director Bell requested that, among other things, the General Assembly "[r]educe or eliminate the witness requirement." Director Bell explained that such action was recommended to "prevent the spread of COVID-19." She further argued that "[e]liminating the witness requirement altogether is another option." N.C. State Board of Elections, *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3 (March 26, 2020), https://bit.ly/369EBOO (attached hereto as Ex. 4).

31. On June 11, 2020, the General Assembly passed bipartisan legislation adjusting the voting rules for the November Election by an overwhelming 142–26 margin. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Governor Cooper signed the duly passed bill into law the next day.

32. The Bipartisan Elections Act made a number of adjustments to North Carolina's election laws, including some of which Director Bell requested. The Act expands the pool of authorized poll workers to include county residents beyond a particular precinct, 2020 N.C. Sess. Laws 2020-17 § 1.(b); allows absentee ballots to be requested online, by fax, or by email, *id.* §§ 2.(a), 7.(a); directs the Board to develop guidelines for assisting registered voters in nursing homes and hospitals, *id.* § 2.(b); gives additional time for county boards to canvass absentee ballots, *id.* § 4; and provides over $27 million in funding for election administration, *id.* § 11.

33. In the Bipartisan Elections Act, the General Assembly also changed the Witness Requirement for absentee ballots. Normally under North Carolina law, absentee ballots require two qualified witnesses. *See* N.C. GEN. STAT. § 163-231.

34. But for the 2020 Election, the Bipartisan Elections Act provides that an "absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of *at least one person* who is at least 18 years of age and is not

disqualified by G.S. 163–226.3(a)(4) or G.S. 163–237(c).” *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added).

35. The one absentee ballot witness is still required to sign “the application and certificate as a witness” and print their “name and address” on the absentee ballot’s return envelope. *Id.*

36. The Bipartisan Elections Act did not accept Director Bell’s recommendation to “[e]liminat[e] the witness requirement altogether.” *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3.

37. The Bipartisan Elections Act also did not change the Receipt Deadline for absentee ballots, which remains set by statute as three days after the election by 5:00 p.m.

38. The Bipartisan Elections Act did not alter the prohibition on “any person” “tak[ing] into that person’s possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter.” N.C. GEN. STAT. § 163-226.3(a)(5). This remains clearly illegal as a matter of North Carolina law.

Director Bell and the Board Attempted to Assert Emergency Powers to Change the Election Laws

39. Director Bell has previously maintained that she is authorized to issue emergency orders to conduct an election where the normal schedule is disrupted “pursuant to [her] authority under G.S. § 163-27.1 and 08 NCAC 01.0106.” N.C. State Bd. of Elections, Numbered Memo 2020-14 at 1 (July 23, 2020), https://bit.ly/2EyXPlt. As relevant here, N.C. GEN. STAT. § 163-27.1 states that the Director “may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by” either “(1) [a] natural disaster” or “(2) [e]xtremely inclement weather.”

40. N.C. ADMIN. CODE 1.0106 explains that, for the purposes of § 163-27.1, a "natural disaster or extremely inclement weather include a . . . catastrophe arising from natural causes resulted [sic] in a disaster declaration by the President of the United States or the Governor."

41. Director Bell does not have sweeping authority to revise the North Carolina's elections statutes for the 2020 Election under the "natural disaster" provision.

42. The North Carolina Rules Review Commission unanimously rejected—by a vote of 9–0, see Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/308WSHW (attached hereto as Ex. 8)—the Board's proposed changes to N.C. Admin Code 1.0106 that would have clarified that

> "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident that makes it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting place or that creates a significant risk of physical harm to persons in the voting place, or that would otherwise convince a reasonable person to avoid traveling to or being in a voting place.

Proposed Amendments to 08 N.C. ADMIN. CODE 01.0106 (Mar. 19, 2020), https://bit.ly/3082lyO.

43. In declining to approve the changes to the rule, the Rules Review Commission explained that the Board "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. Rules Review Commission Meeting Minutes at 4.

44. Accordingly, Director Bell and the Board do not have any delegated authority to rewrite North Carolina's election laws.

The Board Agreed with Private Litigants to Usurp North Carolina's Election Statutes

45. On August 10, 2020, nearly two months after the General Assembly's enactment of the Bipartisan Elections Act, the North Carolina Alliance for Retired Americans, a social welfare organization comprised of retirees from public and private unions, community organizations, and individual activists, together with seven individual North Carolina voters filed

suit in the Wake County Superior Court. *See North Carolina Alliance for Retired Americans, et al. v. North Carolina State Board of Elections* ("*Alliance*"), No. 20-CVS-8881 (Wake Cnty. Super. Ct.).

46. The *Alliance* plaintiffs named as a defendant one of the named Defendants in this action, Board Chair, Damon Circosta.

47. The *Alliance* plaintiffs sought injunctive relief, seeking numerous alterations to North Carolina's election statutes.

48. Among their requested relief, *Alliance* plaintiffs sought to "[s]uspend the Witness Requirement for single-person or single-adult households." Pls.' Compl. at 4, *Alliance*, No. 20-CVS-8881 (Wake Cnty. Super Ct. Aug. 10, 2020).

49. *Alliance* plaintiffs further requested an extension of the Receipt Deadline to "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day." *Id.*

50. *Alliance* plaintiffs also sought to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot. *Id.* at 39.

51. Legislative Plaintiffs Moore and Berger successfully intervened to defend the duly-enacted election regulations, as it is their absolute right to do under State law.

52. But before the state court had an opportunity to decide *Alliance* plaintiffs' motion for a preliminary injunction, the Board and the *Alliance* plaintiffs came to terms on a proposed consent judgment. Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment, *Alliance*, No. 20-CVS-8881 (Wake Cnty. Super. Ct. Sept. 22, 2020) (attached hereto as Ex. 1).

53. The Board released three Numbered Memoranda, at the same time as announcing the consent judgment.[2] Each Memorandum undoes validly enacted statutes passed by the General Assembly's exclusive prerogative to regulate federal elections. Each Memorandum is dated September 22, 2020.

54. Numbered Memo 2020-19 "directs the procedure county boards must use to address deficiencies in absentee ballots." Originally released August 21, 2020, the Board revised this Memo in a manner that eviscerates the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. N.C. State Bd. of Elections, Numbered Memo 2020-19 at 1 (August 21, 2020, revised Sept. 22, 2020), https://bit.ly/333yE3H (original version attached hereto as Ex. 3; revised version attached hereto as Ex. 1 at 32–37).

55. If a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the Board will allow the absentee voter to "cure" the deficiency. A voter cures a Witness Requirement deficiency through a "certification." *Id.* at 2.

56. The Board's "certification" is simply a form sent to the voter by the county board. And the voter can return the form to the county board at anytime until 5:00 p.m., November 12, 2020 and may do so via fax, email, in person, or by mail or commercial carrier. *Id.* at 3–4.

57. For a missing witness, the "certification" does not require the voter to resubmit a ballot in accordance with the Witness Requirement mandated by Section 1.(a) of the Bipartisan

[2] Numbered Memo 2020-19 is available on the Board's Numbered Memo page. *See* Numbered Memos, N.C. STATE BD. OF ELECTIONS, https://bit.ly/367Ffw8 (last accessed Sept. 26, 2020). But Numbered Memos 2020-22 and 2020-23 for some reason are not available. These Memoranda are dated September 22, 2020 and are publicly available through a link to the Board's joint motion in the Board's press release announcing the motion. *See* N.C. State Bd. of Elections, *State Board Updates Cure Process to Ensure More Lawful Votes Count* (Sept. 22, 2020) (attached hereto as Ex. 2) (linking to the Board's joint motion at https://bit.ly/2S5qBNr). Numbered Memo 2020-19 also cross references Numbered Memo 2020-22. *See* Numbered Memo 2020-19 at 4.

Elections Act. Instead, the "certification" lets the voter skip the Witness Requirement altogether. *Id.*

58. All a voter must do is sign and affirm the following affidavit:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

59. Thus, the Board through Numbered Memo 2020-19's "certification" allows absentee voters to be their own witness and vitiates the Witness Requirement. This is directly contrary to clear text of the Bipartisan Elections Act. Notably, in federal litigation challenging the Witness Requirement, Director Bell testified under oath that an absentee ballot with "no witness signature" could not be cured and therefore elections officials would have to "spoil that particular ballot" and require the voter to vote a new one. Evidentiary Hearing Tr. at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. July 21, 2020) (attached hereto as Ex. 5).

60. Director Bell and the Board sought to "[e]liminate" the Witness Requirement earlier this year legislatively. The General Assembly affirmatively declined. Yet the Board has attempted to accomplish what it could not do legislatively via an administrative memo.

61. Numbered Memo 2020-19, together with Number Memo 2020-22, alters the Receipt Deadline in violation of a duly enacted provision of the North Carolina General Statutes. *See* N.C. GEN. STAT. § 163-231(b)(2)(b).

62. Numbered Memo 2020-19 states that a ballot is not late (1) if it is received by 5:00 p.m. on Election Day or (2) "if postmarked on or before Election Day" and "received by 5 p.m. on Thursday, November 12, 2020." Numbered Memo 2020-19 at 4.

63. Election Day is November 3, 2020. Under the Receipt Deadline enacted by the General Assembly, a ballot must be received by November 6 at 5:00 p.m.—in other words within three days of Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b).

64. The Board, through Numbered Memo 2020-19, completely ignores that strict statutory limit and extends the Receipt Deadline to *nine days*—tripling the amount of time for absentee ballots to arrive.

65. Numbered Memo 2020-22 confirms this change in the Receipt Deadline and the Memo on its face points out that it directly contradicts N.C. GEN. STAT. § 163-231(b)(2)(b). In Footnote 1, the Memo invites the North Carolinian voter to compare the Board's new Receipt Deadline of nine days with the now-made-defunct statutory deadline of "three days after the election." The Board has transparently usurped the authority of the General Assembly by overruling the statutory deadline.

66. Numbered Memo 2020-19 and Numbered Memo 2020-22 by overruling a clear statutory deadline have transgressed the General Assembly's sole prerogative to regulate federal elections pursuant to the Elections Clause.

67. Numbered Memo 2020-22 also expands the category of ballots eligible to be counted if received after election day. By statute, such ballots must be "postmarked" by the U.S. Postal Service on or before Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b). Under Numbered Memo 2020-22, however, such ballots may be accepted in certain circumstances if not

postmarked by the Postal Service or not sent by through the Postal Service at all but rather by commercial carrier. *See* Numbered Memo 2020-22 at 1–2 (attached hereto as Ex. 1 at 29–30).

68. Numbered Memo 2020-23 clarifies the procedures for local county officials to confirm that ballots are delivered lawfully. For instance, the Numbered Memo sets out that county officials must confirm with an individual that is dropping off ballots that the individual is either the voter, the voter's near relative, or the voter's legal guardian. But even if the individual is not in one of the three lawful categories of those that can drop off a voter's ballot, the Numbered Memo instructs that "Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot." This undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots. N.C. State Bd. of Elections, Numbered Memo 2020-23 at 2 (Sept. 22, 2020), https://bit.ly/333yE3H (attached hereto as Ex. 1 at 39–43).

69. Moreover, Numbered Memo 2020-23 does nothing to prevent the anonymous and unlawful delivery of votes. After stating that "an absentee ballot may not be left in an unmanned drop box," *i.e.*, a place where county officials are not confirming the identity of the mail deliverer at all, the memorandum plainly discloses the Board's lack of desire to enforce the ban on anonymous deliveries of ballots. To that end, local voting sites that have "a mail drop or drop box used for other purposes . . . must affix a sign stating that voters may not place their ballots in the drop box." "However, a county board may not disapprove a ballot solely because it is placed in a drop box." Thus, Numbered Memo 2020-23 plainly discloses that votes that are illegally placed in a drop box—with only a mere sign saying they should not be so placed—will be counted. This fundamentally undermines the General Assembly's criminal prohibition on the delivery of ballots

by those whom it has not authorized, as it provides a clear avenue for ballot harvesters to submit absentee ballots in drop boxes after hours that will nonetheless be counted. *Id.* at 1, 3.

70. Groups supporting Democratic candidates have brought numerous lawsuits challenging the restrictions on ballot harvesting, and thus will be more involved in delivering completed ballots under these Memoranda than groups supporting Republican candidates. *See* Amended Complaint, *N.C. Alliance for Retired Ams.* (Wake Cnty. Super. Ct. Aug. 17, 2020) (attached hereto as Ex. 9); Amended Complaint, *Stringer v. North Carolina*, No. 20-CVS-5615 (Wake Cnty. Super. Ct. July 8, 2020) (attached hereto as Ex. 10); Second Amended Complaint, *Democracy N.C.* (M.D.N.C. June 18, 2020) (attached hereto as Ex. 11); Second Declaration of Tomas Lopez ¶ 2(d), *Democracy N.C.*, ECF No. 73-1 (attached hereto as Ex. 12).

71. Numbered Memo 2020-19, as amended, Numbered Memo 2020-22, and Numbered Memo 2020-23 are each dated September 22, 2020. These modifications thus come well after North Carolina began mailing out absentee ballots on September 4, 2020. *See* Pam Fessler, *Voting Season Begins: North Carolina Mails Out First Ballots*, NPR.ORG (Sept. 4, 2020) https://bit.ly/2Gb2dY2; N.C. GEN. STAT. § 163-227.10. Director Bell has acknowledged that absentee ballots are sent out on a "rolling" basis. As of September 22, 2020 at 4:40 a.m. (several hours before the three Memoranda were announced), 153,664 absentee ballots had *already been cast*. Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 22, 2020), *available at* https://bit.ly/33SKzAw. Each and every one of those ballots cast with a different set of rules than those which now apply post-September 22, 2020 with the three Memoranda.

72. Two of the ballots that had already been cast when the September 22, 2020 Memoranda issued were of Plaintiffs Heath and Whitley. Both Plaintiff Heath and Plaintiff Whitley requested their absentee ballots, voted their absentee ballots, and returned their absentee

ballots to their respective County Board of Elections under the statutory rules that existed before Defendants altered those rules on September 22, 2020. This means that both Plaintiffs Heath and Whitley, following the statutory requirement and the instructions on their absentee ballots, obtained a witness over the age of 18 who was not otherwise disqualified to witness their ballot and that they returned that ballot by mail before election day. According to the State Board of Election's website Plaintiff Heath's ballot was validly returned on September 21, 2020 and Plaintiff Whitley's ballot was validly returned on September 17, 2020.

The Board's Memoranda Injure the Plaintiffs

73. Implementation of the Board's unconstitutional Memoranda is causing a direct, concrete, and particularized injury to the Legislative Plaintiffs' interest in the validity of the duly-enacted laws of North Carolina and the Legislative Plaintiffs' constitutional prerogative to regulate the federal elections in North Carolina.

74. The arbitrary issuance of unconstitutional memoranda in the middle of ongoing voting by thousands of North Carolina's is a direct, concrete, and particularized injury to Plaintiffs Heath and Whitley who cast their absentee ballots prior to the release of the Memoranda. Since these Memoranda have arbitrarily changed the requirements for lawful casting of ballots, these Memoranda deprive Plaintiffs Heath and Whitley of the Equal Protection Clause's guarantee of the "nonarbitrary treatment of voters." *Bush*, 531 U.S. at 105–06. And since the Memoranda instruct county boards to accept ballots that would be otherwise unlawful under North Carolina's election statutes, each unlawfully cast vote "dilutes" the weight of Plaintiffs Heath's and Whitley's vote. When it comes to "'dilut[ing] the influence of honest votes in an election,'" whether the dilution is "'in greater or less degree is immaterial;'" it is a violation of the Fourteenth

Amendment. *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *see also Baker v. Carr*, 369 U.S. 186, 208 (1962).

75. Implementation of the Board's unconstitutional Memoranda are also causing a direct, concrete, and particularized injury to Plaintiff Swain. The Memoranda instruct county boards to accept ballots that would otherwise be unlawful under North Carolina's election statutes, and North Carolina Democrats are requesting and submitting absentee ballots at a higher rate than North Carolina Republicans, thereby injuring Plaintiff Swain by causing his election race to be administered in an unlawful and arbitrary manner. Additionally, groups supporting Democratic candidates will be more involved in filing ballots under these Memoranda (as these groups requested the changes) than groups supporting Republican candidates, further causing the election race to be administered in an unlawful and arbitrary manner.

CLAIM FOR RELIEF

COUNT I

Violation of the Elections Clause (U.S. CONST. art. I, § 4, cl. 1); 42 U.S.C. § 1983

76. The facts alleged in the foregoing paragraphs are incorporated by reference.

77. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. 1, § 4, cl. 1 (emphasis added).

78. The Elections Clause requires that state law concerning federal elections be "prescribed in each State by the Legislature thereof." That mandate operates as a limitation on how states may regulate federal elections. *See Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia, J., and Thomas, J., dissenting from denial of certiorari). Whatever the scope of the state courts' authority in other contexts, under the United States

Constitution they may not "prescribe[]" "[r]egulations" governing "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."

79. The Board is *not* the Legislature of North Carolina. The General Assembly is. N.C. CONST. art. II, § 1.

80. The Board promulgated three Memoranda that are inconsistent with the General Assembly's duly-enacted elections laws.

81. Numbered Memo 2020-19 allows for absentee ballots without a witness in direct contravention of the General Assembly's duly-enacted Witness Requirement.

82. Numbered Memo 2020-19 and Numbered Memo 2020-22 establish a nine-day deadline for the receipt of absentee ballots in direct contravention of the General Assembly's duly-enacted three-day Receipt Deadline. Numbered Memo 2020-22 also expands the class of ballots that can be accepted if received after Election Day.

83. Numbered Memo 2020-23 undermines the General Assembly's criminal prohibition on the delivery of absentee voters by approving the counting of unlawfully delivered ballots.

84. All three Memoranda thus usurp the General Assembly's sole authority to prescribe the regulations governing federal elections in North Carolina.

85. The Board has and will continue to act under color of state law to violate the Elections Clause.

86. Plaintiffs have no adequate remedy at law, and the Memoranda will continue to inflict serious and irreparable harm to the constitutional right to regulate federal elections in North Carolina unless the Board is enjoined from enforcing them.

COUNT II

Violation of the Equal Protection Clause (U.S. CONST. amend. XIV, § 1); 42 U.S.C. § 1983

87. The facts alleged in the foregoing paragraphs are incorporated by reference.

88. The Equal Protection Clause of the Fourteenth Amendment provides that state laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

89. As relevant here, the Equal Protection Clause protects voters' rights in two ways. First, the Equal Protection Clause ensures that voters may "participate in" elections "on an equal basis with other citizens." *Dunn*, 405 U.S. at 336. To that end, "a State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Bush*, 531 U.S. at 104–05 (internal citation and quotation marks omitted).

90. The Board issued the three Memoranda after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly. This "later arbitrary and disparate treatment" of absentee ballots deprives Plaintiffs Heath and Whitley of the Equal Protection Clause's guarantee because it allows for "varying standards to determine what [i]s a legal vote." *Id.* at 104–105, 107.

91. Second, the Equal Protection Clause ensures voters' rights to have their ballots counted "at full value without dilution or discount." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). After all, "[o]bviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballot and have them counted." *United States v. Classic*, 313 U.S. 299, 315 (1941). "[T]he right to have the vote counted," in turn, means counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

92. Both direct denials and practices that otherwise allow for the counting of unlawful ballots dilute the effectiveness of individual votes, thus, can violate the Fourteenth Amendment. *See id.* at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

93. The Board's Memoranda ensures the counting of votes that are *invalid* under the duly enacted laws of the General Assembly in three ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Numbered Memo 2020-19; (2) by allowing absentee ballots to be received up to nine days after Election Day, *see id.*; *see also* Numbered Memo 2020-22; and (3) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see* Numbered Memo 2020-23.

94. In addition to allowing illegally cast ballots to count, the practices enabled and allowed by the Memoranda are also open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the vote of Plaintiffs Heath and Whitley.

95. The Board has and will continue to act under color of state law to violate the Equal Protection Clause and its guarantees.

96. Plaintiffs Heath and Whitley have no adequate remedy at law and will suffer serious and irreparable harm to their Constitutional right to equal protection of the laws and to participate in federal elections in North Carolina on an equal basis unless the Board is enjoined from enforcing these Memoranda.

PRAYER FOR RELIEF

Plaintiffs respectfully request that:

(a) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-19 is unconstitutional under the Elections Clause and invalid;

(b) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-22 is unconstitutional the Elections Clause and invalid;

(c) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that the Numbered Memo 2020-23 is unconstitutional the Elections Clause and invalid;

(d) The Court grant a declaratory judgment under 28 U.S.C. § 2201 that by issuing Numbered Memo 2020-19, Numbered Memo 2020-22, and Numbered Memo 2020-23, the Board violated the Equal Protection Clause rights of Plaintiffs Heath and Whitley.

(e) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-19 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(f) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-22 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(g) The Court enter a preliminary and a permanent injunction enjoining Defendants from enforcing and distributing Numbered Memo 2020-23 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(h) The Court award Plaintiffs their reasonable costs and attorneys' fees under 42 U.S.C. § 1988; and

(i) The Court grant Plaintiffs such other and further relief as may be just and equitable.

Dated: September 26, 2020

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants,

and

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, BARKER FOWLER, BECKY JOHNSON, JADE JUREK, ROSALYN KOCIEMBA, TOM KOCIEMBA, SANDRA MALONE, and CAREN RABINOWITZ,

(Proposed)
Intervenor-Defendants.

Civil Action No. 5:20-cv-507-D

MOTION TO INTERVENE AS DEFENDANTS

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, (the "Alliance Intervenors") seek to participate as intervening defendants in the above-captioned lawsuit to safeguard the substantial and distinct legal interests of the Alliance Intervenors, which will otherwise be inadequately represented in the litigation. For the reasons discussed in the memorandum in support, filed concurrently herewith, the Alliance Intervenors are entitled to intervene in this case as a matter of right under Federal Rule of Civil Procedure 24(a)(2). In the alternative, the Alliance Intervenors request permissive intervention pursuant to Rule 24(b).

WHEREFORE, the Alliance Intervenors request that the Court grant them leave to intervene in the above-captioned matter and to file their proposed Answer.

Dated: September 30, 2020

Respectfully submitted,

/s/ *Narendra K. Ghosh*

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**Pro Hac Vice Application Forthcoming*

Exhibit 1

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2020 SEP 22 A 11:10

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Defendants Damon Circosta and the North Carolina State Board of Elections ("Executive Defendants"), by and through counsel, respectfully move this Court pursuant to Local Rule 3.4 for entry of a Consent Judgment, filed concurrently with this Joint Motion. In support thereof, Parties show the Court as follows:

1. On August 18, 2020, Plaintiffs filed an Amended Complaint, seeking declaratory and injunctive relief to enjoin North Carolina laws related to in-person and absentee-by-mail voting in the remaining elections in 2020 that they alleged unconstitutionally burden the right to vote in light of the current public health crisis caused by the novel coronavirus ("COVID-19").

2. Also on August 18, Plaintiffs filed a Motion for Preliminary Injunction seeking to:

(i) enjoin the enforcement of the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the 2020 elections, and order Defendants to count all otherwise eligible ballots that are postmarked by Election Day and received by county boards of elections up to nine days after Election Day;

(ii) enjoin the enforcement of the witness requirements for absentee ballots set forth in N.C. Gen. Stat. § 163-231(a), as applied to voters residing in single-person or single-adult households;

(iii) enjoin the enforcement of N.C. Gen. Stat. § 163-231(b)(1) to the extent that it requires voters to pay for postage in order to mail their absentee ballots;

(iv) order Defendants to provide postage for absentee ballots submitted by mail in the November election;

(v) order Defendants to provide uniform guidance and training for election officials engaging in signature verification and instruct county election officials not to reject absentee ballots due to perceived non-matching signatures until the county officials receive such guidance and undergo training;

(vi) enjoin the enforcement of N.C. Gen. Stat. §§ 163-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; and

(vii) enjoin the enforcement of N.C. Gen. Stat. § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering Defendants to allow county election officials to expand early voting by up to an additional 21 days for the November election.

Plaintiffs filed a brief in support of their Motion on September 4, 2020.

3. Since Plaintiffs moved the Court for preliminary injunctive relief, Plaintiffs and Executive Defendants have engaged in substantial good-faith negotiations regarding a potential settlement of Plaintiffs' claims against Executive Defendants.

4. Following extensive negotiation, the Parties have reached a settlement to fully resolve Plaintiffs' claims, the terms of which are set forth in the proposed Consent Judgment filed concurrently with this Joint Motion.

5. As set forth in the Consent Judgment and in the exhibits thereto, (Numbered Memos 2020-19, 2020-22, and 2020-23), all ballots postmarked by Election Day shall be counted if otherwise eligible and received up to nine days after Election Day, pursuant to Numbered Memo 2020-22. Numbered Memo 2020-19 implements a procedure to cure certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses. Finally, Numbered Memo 2020-23 instructs county boards to designate separate absentee ballot drop-off stations at all one-stop early voting locations and county board offices, through which voters and authorized persons may return absentee ballots in person.

6. Plaintiffs and Executive Defendants further agree to each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Defendants, and all such claims Plaintiffs allege against the Executive Defendants in this action related to the conduct of the 2020 elections shall be dismissed.

WHEREFORE Plaintiffs and Executive Defendants respectfully request that this Court grant their Joint Motion and enter the proposed Consent Judgment, filed concurrently with this motion, as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections.

Dated: September 22, 2020

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document by email to counsel for defendants, addressed as follows:

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This the 22nd day of September, 2020.

_____
Narendra K. Ghosh

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

STIPULATION AND CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Executive Defendants Damon Circosta and the North Carolina State Board of Elections (collectively, "the Consent Parties") stipulate to the following and request that this Court approve this Consent Judgment. This Stipulation and Consent Judgment encompasses Plaintiffs' claims, which pertain to elections in 2020 ("2020 elections") and are premised upon the current public health crisis facing North Carolina caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on August 10, 2020, Plaintiffs filed a complaint, and, on August 18, 2020, Plaintiffs filed an amended complaint against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections, of: (1) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b); (2) its requirement that all absentee ballot envelopes must be signed by a witness during the pandemic, as applied to voters in single-person or single-adult households, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) its failure to provide pre-paid postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, as applied to voters who submit ballots through the United States Postal Service, *id*. § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C. Gen. Stat. § 163-226.3(a)(5) (the "Ballot Delivery Ban") (collectively, the "Challenged Provisions");

WHEREAS the Complaint seeks to enjoin enforcement of the Challenged Provisions during the 2020 elections due to the ongoing public health crisis caused by the spread of the novel coronavirus (COVID-19);

WHEREAS the COVID-19 public health crisis is ongoing, and North Carolina remains under Executive Order 163, which contemplates a phased reopening of North Carolina but strongly recommends social distancing, Exec. Order 163, § 2.2, mandates mask wearing in most business and government settings, *id.* § 3.2, imposes capacity limits in most public-facing business and government settings, *id.*, § 3.2(e), prohibits mass gatherings, *id.* § 7, and states that "[p]eople who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes," *id.* § 2.1;

WHEREAS North Carolina remains under a state of emergency, declared by the Governor, "based on the public health emergency posed by COVID-19," Exec. Order 116, and under a federal disaster declaration statewide, 85 Fed. Reg. 20701;

WHEREAS as of September 19, 2020, North Carolina has had more than 192,248 confirmed COVID-19 cases, with more than 3,235 fatalities;

WHEREAS COVID-19 case counts continue to grow across the country, and the director of the Center for Disease Control and Prevention recently warned that the country should brace for "the worst fall from a public health perspective, we've ever had"[1];

WHEREAS the Executive Director of the North Carolina State Board of Elections observed that COVID-19 infections in North Carolina are likely to continue into the fall, through at least Election Day;[2]

[1] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

WHEREAS, on June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[3] The CDC guidance encourages elections officials to:

- "Encourage voters to stay at least 6 feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained;
- Increase the number of polling locations available for early voting and extend hours of operation at early voting sites;
- Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance;
- Minimize lines as much as possible, especially in small, indoor spaces;
- "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility";
- Offer alternatives to in-person voting;
- Offer alternative voting options that minimize exposure between poll workers and voters;

[2] N.C. State Bd. of Elections, *Emergency Order, Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency* (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf.

[3] *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

WHEREAS large crowds at early voting and long lines on Election Day may create public health risks and impose severe burdens on the right to vote, making absentee voting by mail essential to ameliorate these possibilities;

WHEREAS, as of September 18, 2020, more than 889,273 absentee ballots had already been requested by North Carolina voters, more than 14 times the number of absentee ballots that had been requested by this time in 2016;

WHEREAS the absentee voting period for the 2020 elections began on September 4, 2020, N.C. Gen. Stat. § 163-227.10(a), and, as of September 21, 2020, nearly 1,400 absentee ballots had been flagged for incomplete witness information, according to data from the State Board of Elections[4];

WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from "the disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-00457-WO-JLW (M.D.N.C. Aug. 4, 2020) (Osteen, J.), ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." *Id.*

WHEREAS courts in other states have enjoined those states from enforcing witness and notarization requirements, some of which are similar to North Carolina's Challenged Provisions,

[4] *North Carolina Early Voting Statistics*, U.S. Elections Project, https://electproject.github.io/Early-Vote-2020G/NC.html.

for elections occurring this year during the COVID-19 pandemic. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment suspending "notary or two-witness requirement" for mail ballots and finding that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" single-witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become 'both too restrictive and not restrictive enough to effectively prevent voter fraud.'"); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election);

WHEREAS the delivery standards for the Postal Service, even in ordinary times, contemplate at a minimum at least a week for ballots to be processed through the postal system and delivered to election officials[5];

WHEREAS the General Counsel of the Postal Service sent a letter on July 30, 2020 to North Carolina's Secretary of State warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[6] In particular, the Postal Service recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.*;

WHEREAS mail delivery conditions are already leading to greater delays: since mid-July there have been sharp decreases in the percentage of U.S. Postal Service mail, sent by any method, delivered on time;[7]

[5] *State and Local Election Mail—User's Guide*, U.S. Postal Serv. (Jan. 2020), https://about.usps.com/publications/pub632.pdf.

[6] Letter to North Carolina Secretary of State from USPS General Counsel, App'x to Compl., ECF No. 1-1 at 53-55, *Commonwealth of Pennsylvania v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

[7] *Service Performance Measurement PMG Briefing*, U.S. Postal Serv. (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

WHEREAS on August 21, 2020, the State of North Carolina, along with six other states filed a lawsuit challenging the Postal Service's procedural changes that the State alleges will likely delay election mail even further, creating a "significant risk" that North Carolina voters will be disenfranchised by the State's relevant deadlines governing absentee ballots;

WHEREAS increases in absentee voting, coupled with mail delays, threaten to slow down the process of mailing and returning absentee ballots, and appear likely to impact the 2020 elections;

WHEREAS pursuant to N.C. Gen. Stat. § 163-231(b)(2)(c), North Carolina already accepts military and overseas absentee ballots until the end of business on the business day before the canvass which occurs no earlier than the tenth day after the election, *see id.* § 163-182.5(b);

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also extended Election Day Receipt Deadlines in light of the current public health crisis. *See Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (extending ballot receipt deadline for November 2020 election); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (extending ballot receipt deadline for the November 2020 election); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR (N.D. Ga, Aug. 31, 2020) (granting motion for preliminary injunction in part and extending receipt deadline); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt

deadline and recognizing that enforcing the deadline was likely to disenfranchise thousands of voters); *LaRose v. Simon*, No. 62-CV-20-3149 at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's receipt deadline);

WHEREAS multiple courts have found that the enforcement of various other state election laws during the pandemic violate constitutional rights. *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App'x 170, 173 (6th Cir. 2020) (finding ballot-access provisions unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *Garbett v. Herbert*, No. 2:20-CV-245-RJS, 2020 WL 2064101, at *18 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witness requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3490216 (D. Idaho June 26, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560 (2020);

WHEREAS the State Board of Elections has broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c).

WHEREAS the Executive Director of the State Board, as the chief State elections official, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19;

WHEREAS the Consent Parties agree that an expeditious resolution of this matter for the 2020 elections, in the manner contemplated by the terms of this Stipulation and Consent Judgment, will limit confusion and increase certainty surrounding the 2020 elections and is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest;

WHEREAS the Executive Defendants believe that continued litigation over the Challenged Provisions will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina;

WHEREAS the Consent Parties wish to avoid uncertainty about the requirements and obligations of voting in the 2020 elections for State Board officials and non-parties including county board officials, staff, and election workers, and the voting public;

WHEREAS the Consent Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and the Consent Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, other courts across the country have approved similar consent judgments between parties, *see Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4460914 (D.R.I. July 30, 2020) (approving consent judgment to not enforce Witness Requirement in primary and November general elections); Stipulation and Partial Consent

Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election); *League of Women Voters of Va.*, 2020 WL 2158249 (approving consent judgment to not enforce Witness Requirement in primary election); *see also Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (denying motion to stay the consent judgment and judgment pending appeal) *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

WHEREAS the Executive Defendants do not waive any protections offered to them through federal or state law and do not make any representations regarding the merits of Plaintiffs' claims or potential defenses which could be raised in litigation;

WHEREAS the Consent Parties agree that the Consent Judgment promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs' claims regarding the 2020 elections against the Executive Branch Defendants;

WHEREAS Plaintiffs agree to a waiver to any entitlement to damages and fees, including attorneys' fees, expenses, and costs against the Executive Defendants with respect to any and all claims raised by Plaintiffs in this action relating to the 2020 elections;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Consent Parties, that: (i) the terms of this Consent Judgment constitute a fair and equitable settlement of the issues raised with respect to the 2020 elections, and (ii) the Consent Judgment is intended to and does resolve Plaintiffs' claims;

NOW, THEREFORE, upon consent of the Consent Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Consent Judgment, including relinquishment of certain legal rights, the Consent Parties agree as follows:

II.
JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Article 26 of Chapter 1 of the General Statutes, N.C. Gen. Stat. § 7A-245(a)(2), and N.C. Gen. Stat. § 1-493, and has jurisdiction over the Consent Parties herein. Venue for this action is proper in Wake County Superior Court because the Executive Defendants reside in Wake County. *Id.* § 1-82. The Court shall retain jurisdiction of this Stipulation and Consent Judgment for the duration of the term of this Stipulation and Consent Judgment for purposes of entering all orders and judgments that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Consent Judgment applies to and is binding upon the following parties:

A. Damon Circosta, in his capacity as Chair of the North Carolina State Board of Elections;

B. The North Carolina State Board of Elections; and

C. All Plaintiffs.

IV.
SCOPE OF CONSENT JUDGMENT

A. This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Consent Judgment, they are releasing any claims under the North Carolina Constitution that they might have against Executive Defendants with respect to the Challenged Provisions in the 2020 elections. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Consent Judgment.

B. The Consent Parties to this Stipulation and Consent Judgment acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Challenged Provisions for elections held after the 2020 elections.

C. The Consent Parties to this Stipulation and Consent Judgment further acknowledge that by signing this Stipulation and Consent Judgment, the Consent Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Consent Judgment, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Consent Judgment or defenses thereto.

D. By entering this Stipulation and Consent Judgment, Plaintiffs are fully settling a disputed matter between themselves and Executive Defendants. The Consent Parties are entering this Stipulation and Consent Judgment for the purpose of resolving disputed claims, avoiding the burdens and costs associated with the costs of litigating this matter through final judgment, and ensuring both safety and certainty in advance of the 2020 elections. Nothing in this Stipulation and Consent Judgment constitutes an admission by any party of liability or wrongdoing. The Consent Parties acknowledge that a court may seek to consider this Stipulation and Consent

Judgment, including the violations alleged in Plaintiffs' Amended Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT JUDGMENT OBJECTIVES

In addition to settling the claims of the Consent Parties, the objective of this Stipulation and Consent Judgment is to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

VI.
INJUNCTIVE RELIEF

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND JUDGED FOR THE REASONS STATED ABOVE THAT:

A. For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots, as set forth in N.C. Gen. Stat. § 163-231(b)(2), to the deadline set forth in paragraph VI.B below and in Numbered Memo 2020-22 (attached as Exhibit A).

B. Pursuant to Numbered Memo 2020-22, an absentee ballot shall be counted as timely in the 2020 elections if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m. For purposes of this Stipulation and Consent Judgment and as the Numbered Memo requires, a ballot shall be considered postmarked on or before Election Day if it has a postmark affixed to it or if there is information in the Postal Service tracking system (BallotTrax), or another tracking service

offered by the Postal Service or the commercial carrier, indicating that the ballot was in the custody of the Postal Service or a commercial carrier on or before Election Day.

C. For the 2020 elections, Executive Defendants shall institute a process to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19 (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature. If a county board office receives a container-return envelope with such a curable deficiency, it shall contact the voter in writing by mail and, if available, email, within one business day of identifying the deficiency, informing the voter that there is an issue with their absentee ballot and enclosing a cure certification. The written notice shall be sent to the address to which the voter requested their ballot be sent. The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier.

D. Pursuant to Numbered Memo 2020-23, (attached as Exhibit C) Executive Defendants shall institute a process for establishing a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices. Such drop-off stations may be located outdoors subject to the conditions set forth in Numbered Memo 2020-23. In addition, when a person returns a ballot in person, the county board intake staffer shall ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person returning the ballot in person indicates that they are not

the voter or the voter's near relative or legal guardian, the county board intake staffer will also require the person to provide their address and phone number.

E. Executive Defendants shall take additional reasonable steps to inform the public of the contents of Numbered Memos 2020-19, -22, -23 and shall encourage all county boards of elections to do the same.

F. Plaintiffs will withdraw their Motion for Preliminary Injunction, filed on August 18, 2020, and will not file any further motions for relief for the 2020 elections based on the claims raised in their Amended Complaint of August 18, 2020.

G. In accordance with the terms of this Stipulation and Consent Judgment, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to this lawsuit.

H. All remaining claims filed by Plaintiffs against the Executive Defendants related to the conduct of the 2020 elections in this action are hereby dismissed with prejudice. The Court will retain jurisdiction of these claims only as to enforcement of the Stipulation and Consent Judgment.

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The parties to this Stipulation and Consent Judgment may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Consent Judgment that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Consent Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Consent Judgment, or for granting any other relief not inconsistent with the terms of this Consent Judgment, until this Consent Judgment is terminated. The Consent Parties may apply to this Court for any orders or

other relief necessary to construe or effectuate this Stipulation and Consent Judgment or seek informal conferences for direction as may be appropriate. The Consent Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If any Party believes that another has not complied with the requirements of this Stipulation and Consent Judgment, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Consent Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Consent Judgment that requires any Party to file a motion with this Court for enforcement of this Stipulation and Consent Judgment.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Consent Parties acknowledge that no person has exerted undue pressure on them to enter into this Stipulation and Consent Judgment. Every Party is voluntarily choosing to enter into this Stipulation and Consent Judgment because of the benefits that are provided under the agreement. The Consent Parties acknowledge that they have read and understand the terms of this Stipulation and Consent Judgment; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Consent Judgment to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Consent Judgment shall be severable, and, should any provisions be declared by a court of competent jurisdiction to be

unenforceable, the remaining provisions of this Stipulation and Consent Judgment shall remain in full force and effect.

C. Agreement. This Stipulation and Consent Judgment is binding. The Consent Parties acknowledge that they have been advised that (i) no other Party has a duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Consent Judgment may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Consent Judgment if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Judgment constitutes the entire agreement between the Consent Parties relating to the constitutionality and enforcement of the Challenged Provisions as they pertain to the 2020 elections. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Consent Judgment are valid unless they are in writing, identified as an amendment to this Stipulation and Consent Judgment, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Consent Judgment except as herein explicitly contained.

E. Warranty. The persons signing this Stipulation and Consent Judgment warrant that they have full authority to enter this Stipulation and Consent Judgment on behalf of the Party each represents, and that this Stipulation and Consent Judgment is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Consent Judgment may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Consent Judgment is effective upon the date it is entered by the Court.

IX.
TERMINATION

This Stipulation and Consent Judgment shall remain in effect through the certification of ballots for the 2020 elections. The Court shall retain jurisdiction to enforce the terms of the Consent Judgment for the duration of this Consent Judgment. This Court's jurisdiction over this Stipulation and Consent Judgment shall automatically terminate after the certification of all ballots for the 2020 elections.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND CONSENT JUDGMENT AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT JUDGMENT TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA CHAIR, NORTH CAROLINA STATE BOARD OF ELECTIONS

Dated: September 22, 2020

By: /s/ Alexander McC. Peters
Alexander McC. Peters, N.C. Bar No. 13654
Terrance Steed
North Carolina Dept. of Justice
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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ

Dated: September 22, 2020

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IT IS SO ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT JUDGMENT.

Dated: _____ _____

Superior Court Judge

EXHIBIT A

Numbered Memo 2020-22

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Return Deadline for Mailed Civilian Absentee Ballots in 2020

DATE: September 22, 2020

The purpose of this numbered memo is to extend the return deadline for postmarked civilian absentee ballots that are returned by mail and to define the term "postmark." This numbered memo only applies to remaining elections in 2020.

Extension of Deadline

Due to current delays with mail sent with the U.S. Postal Service (USPS)—delays which may be exacerbated by the large number of absentee ballots being requested this election—the deadline for receipt of postmarked civilian absentee ballots is hereby extended to nine days after the election only for remaining elections in 2020.

An absentee ballot shall be counted as timely if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m.[1]

Postmark Requirement

The postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, the USPS does not always affix a postmark to a ballot return envelope. Because the agency now offers BallotTrax, a service that allows voters and county boards to track the status of a voter's absentee ballot, it is possible for county boards to determine when a ballot was mailed even if it does not have a postmark. Further, commercial carriers including DHL, FedEx, and UPS offer tracking services that allow voters and the county boards of elections to determine when a ballot was deposited with the commercial carrier for delivery.

[1] *Compare* G.S. § 163-231(b)(2)(b) (that a postmarked absentee ballot be received by three days after the election).

For remaining elections in 2020, a ballot shall be considered postmarked by Election Day if it has a postmark affixed to it or if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day. If a container-return envelope arrives after Election Day and does not have a postmark, county board staff shall conduct research to determine whether there is information in BallotTrax that indicates the date it was in the custody of the USPS. If the container-return envelope arrives in an outer mailing envelope with a tracking number after Election Day, county board staff shall conduct research with the USPS or commercial carrier to determine the date it was in the custody of USPS or the commercial carrier.

EXHIBIT B

Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

DATE: August 21, 2020 (revised on September 22, 2020)

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.[1]

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

[1] This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name[2]
- Witness or assistant did not print address[3]
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line

[2] If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

[3] Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure certification in accordance with Section 3.

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

If, prior to September 22, 2020, a county board reissued a ballot to a voter, and the updated memo now allows the deficiency to be cured by certification, the county board shall contact the voter in writing and by phone or email, if available, to explain that the procedure has changed and that the voter now has the option to submit a cure certification instead of a new ballot. A county board is not required to send a cure certification to a voter who already returned their second ballot if the second ballot is not deficient.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline, defined in Numbered Memo 2020-22 as (1) 5 p.m. on Election Day or (2) if postmarked on or before Election Day, 5 p.m. on Thursday, November 12, 2020. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.

COUNTY LETTERHEAD

DATE

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE

RE: Notice of a Problem with Your Absentee Ballot

The [County] Board of Elections received your returned absentee ballot. We were unable to approve the counting of your absentee ballot for the following reason or reasons:

- ☐ The absentee return envelope arrived at the county board of elections office unsealed.
- ☐ The absentee return envelope did not contain a ballot or contained the ballots of more than one voter.
- ☐ Other:
  _____

We have reissued a new absentee ballot. Please pay careful attention to ALL of the instructions on the back of the container-return envelope and complete and return your ballot so that your vote may be counted.

If time permits and you decide not to vote this reissued absentee ballot, you may vote in person at an early voting site in the county during the one-stop early voting period (October 15-31), or at the polling place of your proper precinct on Election Day, **November 3**. The hours for voting on Election Day are from **6:30 a.m.** to **7:30 p.m.** To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov.

Sincerely,

[NAME]
_____ County Board of Elections

VOTER'S NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
CIV Number

Absentee Cure Certification

There is a problem with your absentee ballot – please sign and return this form.

Instructions

You are receiving this affidavit because your absentee ballot envelope is missing information. For your absentee ballot to be counted, complete and return this affidavit as soon as possible. **The affidavit must be received by your county board of elections by no later than 5 p.m. on Thursday, November 12, 2020.** You, your near relative or legal guardian, or a multipartisan assistance team (MAT), can return the affidavit by:

- Email (add county email address if not in letterhead) (you can email a picture of the form)
- Fax (add county fax number if not in letterhead)
- Delivering it in person to the county board of elections office
- Mail or commercial carrier (add county mailing address)

If this affidavit is not returned to the county board of elections by the deadline, your absentee ballot will not count. If you decide not to return this affidavit, you may still vote in person during the early voting period (October 15-October 31) or on Election Day, November 3, 2020. To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov.

READ AND COMPLETE THE FOLLOWING:

I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Print name and sign below)

_____

Voter's Printed Name **(Required)**

_____

Voter's Signature* **(Required)**

EXHIBIT C

Numbered Memo 2020-23

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: In-Person Return of Absentee Ballots

DATE: September 22, 2020

Absentee by mail voters may choose to return their ballot by mail or in person. Voters who return their ballot in person may return it to the county board of elections office by 5 p.m. on Election Day or to any one-stop early voting site in the county during the one-stop early voting period. This numbered memo provides guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots.

General Information

Who May Return a Ballot

A significant portion of voters are choosing to return their absentee ballots in person for this election. Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot.[1] A multipartisan assistance team (MAT) or a third party may not take possession of an absentee ballot. **Because of this provision in the law, an absentee ballot may not be left in an unmanned drop box.**

The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it.

Intake of Container-Return Envelope

As outlined in Numbered Memo 2020-19, trained county board staff review each container-return envelope to determine if there are any deficiencies. Review of the container-return envelope

[1] It is a class I felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. G.S. § 163-223.6(a)(5).

does not occur at intake. Therefore, the staff member conducting intake should not conduct a review of the container envelope and should accept the ballot. If intake staff receive questions about whether the ballot is acceptable, they shall inform the voter that it will be reviewed at a later time and the voter will be contacted if there are any issues. Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot.

It is not recommended that county board staff serve as a witness for a voter while on duty. If a county board determines that it will allow staff to serve as a witness, the staff member who is a witness shall be one who is not involved in the review of absentee ballot envelopes.

Log Requirement

An administrative rule requires county boards to keep a written log when any person returns an absentee ballot in person.[2] **However, to limit the spread of COVID-19, the written log requirement has been adjusted for remaining elections in 2020.**

When a person returns the ballot in person, the intake staff will ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person indicates they are not the voter or the voter's near relative or legal guardian, the staffer will also require the person to provide their address and phone number.

Board Consideration of Delivery and Log Requirements

Failure to comply with the logging requirement, or delivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot.[3] A county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized

[2] 08 NCAC 18 .0102 requires that, upon delivery, the person delivering the ballot shall provide the following information in writing: (1) Name of voter; (2) Name of person delivering ballot; (3) Relationship to voter; (4) Phone number (if available) and current address of person delivering ballot; (5) Date and time of delivery of ballot; and (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative.

[3] *Id.* Compare G.S. § 163-230.2(3), as amended by Section 1.3.(a) of Session Law 2019-239, which states that an absentee request form returned to the county board by someone other than an unauthorized person is invalid.

to possess the ballot. The county board may, however, consider the delivery of a ballot in accordance with the rule, 08 NCAC 18 .0102, in conjunction with other evidence in determining whether the ballot is valid and should be counted.

Return at a County Board Office

A voter may return their absentee ballot to the county board of elections office any time the office is open. A county board must ensure its office is staffed during regular business hours to allow for return of absentee ballots. Even if your office is closed to the public, you must provide staff who are in the office during regular business hours to accept absentee ballots until the end of Election Day. You are not required to accept absentee ballots outside of regular business hours. Similar to procedures at the close of polls on Election Day, if an individual is in line at the time your office closes or at the absentee ballot return deadline (5 p.m. on Election Day), a county board shall accept receipt of the ballot.

If your site has a mail drop or drop box used for other purposes, you must affix a sign stating that voters may not place their ballots in the drop box. However, a county board may not disapprove a ballot solely because it is placed in a drop box.[4]

In determining the setup of your office for in-person return of absentee ballots, you should consider and plan for the following:

- Ensure adequate parking, especially if your county board office will be used as a one-stop site
- Arrange sufficient space for long lines and markings for social distancing
- Provide signage directing voters to the location to return their absentee ballot
- Ensure the security of absentee ballots. Use a locked or securable container for returned absentee ballots that cannot be readily removed by an unauthorized person.
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, it is not recommended you keep an outside return location open after dark or during inclement weather.

[4] *Id.*

Return at an Early Voting Site

Location to Return Absentee Ballots

Each early voting site shall have at least one designated, staffed station for the return of absentee ballots. Return of absentee ballots shall occur at that station. The station may be set up exclusively for absentee ballot returns or may provide other services, such as a help desk, provided the absentee ballots can be accounted for and secured separately from other ballots or processes. Similar to accepting absentee ballots at the county board of elections office, you should consider and plan for the following with the setup of an early voting location for in-person return of absentee ballots:

- Have a plan for how crowd control will occur and how voters will be directed to the appropriate location for in-person return of absentee ballots
- Provide signage directing voters and markings for social distancing
- Ensure adequate parking and sufficient space for long lines
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, ensure that there is adequate lighting as voting hours will continue past dark.

Because absentee ballots must be returned to a designated station, absentee ballots should not be returned in the curbside area.

Procedures

Absentee ballots that are hand-delivered must be placed in a secured container upon receipt, similar to how provisional ballots are securely stored at voting sites. Absentee by mail ballots delivered to an early voting site must be stored separately from all other ballots in a container designated only for absentee by mail ballots. County boards must also conduct regular reconciliation practices between the log and the absentee ballots. County boards are not required by the State to log returned ballots into SOSA; however, a county board may require their one-stop staff to complete SOSA logging.

If a voter brings in an absentee ballot and does not want to vote it, the ballot should be placed in the spoiled-ballot bag. It is recommended that voters who call the county board office and do not want to vote their absentee ballot be encouraged to discard the ballot at home.

Return at an Election Site

An absentee ballot may not be returned at an Election Day polling place. If a voter appears in person with their ballot at a polling place on Election Day, they shall be instructed that they may

(1) take their ballot to the county board office or mail it so it is postmarked that day and received by the deadline; or (2) have the absentee ballot spoiled and vote in-person at their polling place.

If someone other than the voter appears with the ballot, they shall be instructed to take it to the county board office or mail the ballot so it is postmarked the same day. If the person returning the ballot chooses to mail the ballot, they should be encouraged to take it to a post office to ensure the envelope is postmarked. Depositing the ballot in a USPS drop box on Election Day may result in ballot not being postmarked by Election Day and therefore not being counted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants,

and

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, BARKER FOWLER, BECKY JOHNSON, JADE JUREK, ROSALYN KOCIEMBA, TOM KOCIEMBA, SANDRA MALONE, and CAREN RABINOWITZ,

(Proposed)
Intervenor-Defendants.

Civil Action No. 5:20-cv-507-D

PROPOSED INTERVENOR-DEFENDANTS ANSWER TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Proposed Intervenor-Defendants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz (collectively "Alliance Intervenors"), by and through their attorneys, answer Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Complaint") as follows:

INTRODUCTION

1. Paragraph 1 of Plaintiffs' Complaint sets contains mere legal conclusions to which no responses are required.

2. Paragraph 2 of Plaintiffs' Complaint sets contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors admit only that the North Carolina Board of Elections is not the Legislature and is not Congress, but otherwise deny the allegations therein.

3. In response to paragraph 3 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

4. In response to paragraph 4 of Plaintiffs' Complaint, Alliance Intervenors deny that Plaintiffs are entitled to declaratory or injunctive relief.

JURISDICTION AND VENUE

5. In response to paragraph 5 of Plaintiffs' Complaint, Alliance Intervenors deny that this Court has subject-matter jurisdiction.

6. In response to paragraph 6 of Plaintiffs' Complaint, Alliance Intervenors deny that venue is appropriate in this district.

PARTIES

7. In response to paragraph 7 of Plaintiffs' Complaint, Alliance Intervenors admit only that Timothy K. Moore is the Speaker of the North Carolina House of Representatives and

represents the 111th State House District.

8. In response to paragraph 8 of Plaintiffs' Complaint, Alliance Intervenors admit only that Philip E. Berger is the President Pro Tempore of the North Carolina Senate and represents the State's 30th Senate District.

9. In response to paragraph 9 of Plaintiffs' Complaint, Alliance Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore deny the same.

10. In response to paragraph 10 of Plaintiffs' Complaint, Alliance Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore deny the same.

11. In response to paragraph 11 of Plaintiffs' Complaint, Alliance Intervenors admit that Alan Swain is running as a Republican candidate to represent the State's 2nd Congressional District. Alliance Intervenors lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations therein and therefore deny the same.

12. In response to paragraph 12 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

13. In response to paragraph 13 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

14. In response to paragraph 14 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

15. In response to paragraph 15 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein, but deny the allegations referenced in the accompanying footnote.

BACKGROUND

16. Paragraph 16 of Plaintiffs' Complaint sets contains mere legal conclusions to which no responses are required.

17. Paragraph 17 of Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required.

18. Paragraph 18 of Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required.

19. Paragraph 19 of Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required.

20. In response to paragraph 20 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

21. Paragraph 21 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret N.C. Gen. Stat. § 163-166.9(a), which speaks for itself. To the extent Plaintiffs' interpretation differs from the text of N.C. Gen. Stat. § 163-166.9(a), Alliance Intervenors deny the allegations.

22. Paragraph 22 of Plaintiffs' Complaint attempts to interpret North Carolina law and thus requires no response. To the extent a response is required, Alliance Intervenors admit that North Carolina has established a 17-day early voting period, which starts on October 15, 2020, but deny that the procedures referenced therein ensure access to early voting, particularly during the ongoing coronavirus pandemic. To the extent Plaintiffs' interpretation differs from the text of the referenced statutory provision or guidance, Alliance Intervenors deny the allegations.

23. Paragraph 23 of Plaintiffs' Complaint attempts to interpret North Carolina law and thus requires no response. To the extent Plaintiffs' interpretation differs from the text of the referenced statutory provisions, Alliance Intervenors deny the allegations.

24. Paragraph 24 of Plaintiffs' Complaint attempts to interpret North Carolina law and thus requires no response. To the extent Plaintiffs' interpretation differs from the text of the referenced statutory provisions, Alliance Intervenors deny the allegations.

25. Paragraph 25 of Plaintiffs' Complaint attempts to interpret North Carolina law and thus requires no response. To the extent Plaintiffs' interpretation differs from the text of the referenced statutory provision, Alliance Intervenors deny the allegations.

26. In response to paragraph 26 of Plaintiffs' Complaint, Alliance Intervenors admit that the General Assembly has enacted different methods of voting, but denies that the current laws provides means to vote safely and reliably during the coronavirus pandemic, or that the rules regulating those means are clear.

27. In response to paragraph 27 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

28. In response to paragraph 28 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

29. In response to paragraph 29 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

30. In response to paragraph 30 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

31. In response to paragraph 31 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

32. In response to paragraph 32 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

33. In response to paragraph 33 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

34. In response to paragraph 34 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

35. In response to paragraph 35 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

36. In response to paragraph 36 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

37. In response to paragraph 37 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

38. In response to paragraph 38 of Plaintiffs' Complaint, Alliance Intervenors admit that the General Assembly did not alter laws concerning the delivery of absentee ballots by third parties. The remainder of paragraph 38 attempts to interpret North Carolina law and thus requires no response. To the extent Plaintiffs' interpretation differs from the text of the referenced statutory provision, Alliance Intervenors deny the allegations.

39. Paragraph 39 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret Numbered Memo 2020-14 and N.C. Gen. Stat. § 163-27.1, which speaks for itself. To the extent Plaintiffs' interpretation differs from the text of Numbered Memo 2020-14 or N.C. Gen. Stat. § 163-166.9(a), Alliance Intervenors deny the allegations.

40. Paragraph 40 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret N.C. Admin. Code 1.0106, which speaks for itself. To the extent Plaintiffs' interpretation differs from the text of N.C. Admin. Code 1.0106, Alliance Intervenors deny the allegations.

41. Paragraph 41 of Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required.

42. Paragraph 42 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret North Carolina Rules Review Commission Meeting Minutes and proceedings, which speak for themselves. To the extent Plaintiffs' interpretation differs from the North Carolina Rules Review Commission Meeting Minutes or proceedings, Alliance Intervenors deny the allegations.

43. Paragraph 43 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret North Carolina Rules Review Commission Meeting Minutes and proceedings, which speak for themselves. To the extent Plaintiffs' interpretation differs from the North Carolina Rules Review Commission Meeting Minutes or proceedings, Alliance Intervenors deny the allegations.

44. Paragraph 44 of Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent the allegations in paragraph 44 require a response, they are denied.

45. In response to paragraph 45 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

46. In response to paragraph 46 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

47. Paragraph 47 of Plaintiffs' Complaint attempts to interpret Alliance Intervenors state court Complaint, which speaks for itself. To the extent the allegations in paragraph 47 require a response, Alliance Intervenors state that their state court Complaint seeks the temporary injunction of certain restrictions on in-person and absentee voting for the November general election.

48. In response to paragraph 48 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

49. In response to paragraph 49 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

50. In response to paragraph 50 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

51. In response to paragraph 51 of Plaintiffs' Complaint, Alliance Intervenors admit that Plaintiffs Moore and Berger were granted intervention in the *Alliance* state court action. Alliance Intervenors deny that the Legislative Plaintiffs' right to intervene is absolute under state law.

52. In response to paragraph 52 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

53. In response to paragraph 53 of Plaintiffs' Complaint, Alliance Intervenors admit that three Numbered Memoranda, each dated September 22, 2020, were attached to Alliance Intervenors and the State Boards' Joint Motion for Entry of Consent Judgment filed in state court. Alliance Intervenors deny the remaining allegations in paragraph 53.

54. In response to paragraph 54 of Plaintiffs' Complaint, Alliance Intervenors admit that Numbered Memo 2020-19 "directs the procedure county boards must use to address deficiencies in absentee ballots." Alliance Intervenors deny the remaining allegations in paragraph 54.

55. Paragraph 55 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret Numbered Memo 2020-19. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-19, Alliance Intervenors deny the allegations.

56. Paragraph 56 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret Numbered Memo 2020-19. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-19, Alliance Intervenors deny the allegations.

57. Paragraph 57 of Plaintiffs' Complaint attempts to quote, paraphrase, or interpret Numbered Memo 2020-19. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-19, Alliance Intervenors deny the allegations.

58. Paragraph 58 of Plaintiffs' Complaint attempts to quote, paraphrase, and interpret Numbered Memo 2020-19. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-19, Alliance Intervenors deny the allegations.

59. Paragraph 59 of Plaintiffs' Complaint attempts to quote, paraphrase, and interpret Numbered Memo 2020-19 and Director Bell's testimony. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-19 or Director Bell's testimony, Alliance Intervenors deny the allegations. Alliance Intervenors further deny that Numbered Memo 2020-19 vitiates the witness requirement.

60. In response to paragraph 60 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

61. In response to paragraph 61 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

62. Paragraph 62 of Plaintiffs' Complaint attempts to quote, paraphrase, and interpret Numbered Memo 2020-19. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-19, Alliance Intervenors deny the allegations.

63. In response to paragraph 63 of Plaintiffs' Complaint, Alliance Intervenors admit the allegations therein.

64. In response to paragraph 64 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

65. Paragraph 65 of Plaintiffs' Complaint contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent the allegations in paragraph 65 require a response, they are denied.

66. In response to paragraph 66 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

67. In response to paragraph 66 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

68. In response to paragraph 68 of Plaintiffs' Complaint, Alliance Intervenors deny that the procedures outline in Numbered Memo 2020-23 would undermine the General Assembly's criminal prohibition of the unlawful delivery of ballots. In further response, Alliance Intervenors state that paragraph 68 attempts to quote, paraphrase, and interpret Numbered Memo 2020-23. To the extent Plaintiffs' interpretation differs from Numbered Memo 2020-23, Alliance Intervenors deny the allegations.

69. In response to paragraph 69 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

70. In response to paragraph 70 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

71. In response to paragraph 71 of Plaintiffs' Complaint, Alliance Intervenors admit that Numbered Memos 2020-19, 2020-22, and 2020-23 are dated September 22, 2020. Paragraph 71 further attempts to quote, paraphrase, and interpret data published by the State Board. To the extent Plaintiffs' interpretation differs from the State Board's official data, Alliance Intervenors

deny the allegations. Alliance Intervenors further deny the allegations in the last sentence of Paragraph 71.

72. In response to paragraph 72 of Plaintiffs' Complaint, Alliance Intervenors lack knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore deny the same.

73. In response to paragraph 73 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

74. In response to paragraph 74 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

75. In response to paragraph 75 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

COUNT I

76. Alliance Intervenors incorporate their responses to the foregoing paragraphs as fully set forth herein.

77. Paragraph 77 contains mere characterizations, legal contentions, and conclusions to which no response is required.

78. Paragraph 78 contains mere characterizations, legal contentions, and conclusions to which no response is required.

79. Paragraph 79 contains mere characterizations, legal contentions, and conclusions to which no response is required.

80. In response to paragraph 80 of Plaintiffs' Complaint, Alliance Intervenors deny the allegations therein.

81. Paragraph 81 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

82. Paragraph 82 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

83. Paragraph 83 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

84. Paragraph 84 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

85. Paragraph 85 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

86. Paragraph 86 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

COUNT II

87. Alliance Intervenors incorporate their responses to the foregoing paragraphs as fully set forth herein.

88. Paragraph 88 contains mere characterizations, legal contentions, and conclusions to which no response is required.

89. Paragraph 89 contains mere characterizations, legal contentions, and conclusions to which no response is required.

90. Paragraph 90 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

91. Paragraph 91 contains mere characterizations, legal contentions, and conclusions to which no response is required.

92. Paragraph 92 contains mere characterizations, legal contentions, and conclusions to which no response is required.

93. Paragraph 93 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

94. Paragraph 94 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

95. Paragraph 95 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

96. Paragraph 96 contains mere characterizations, legal contentions, and conclusions to which no response is required. To the extent a response is required, Alliance Intervenors deny the allegations.

PRAYER FOR RELIEF

Alliance Intervenors deny that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

This Court lacks subject-matter jurisdiction to adjudicate Plaintiffs' claims;

Plaintiffs lack standing to assert their claims;

Plaintiffs fail to state a claim on which relief can be granted;

This Court lacks jurisdiction to grant Plaintiffs the relief they seek;

This matter is not ripe;

This Court must abstain under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); and *Younger v. Harris*, 401 U.S. 37 (1971); and Plaintiffs have failed to join required parties under Federal Rule of Civil Procedure 19.

PROPOSED INTERVENORS' REQUEST FOR RELIEF

Having answered Plaintiffs' Complaint, Alliance Intervenors request the following relief:

1. That Plaintiffs' Complaint be dismissed with prejudice and without costs to Plaintiffs;

2. That Alliance Intervenors be awarded their costs and attorneys' fees incurred in defending against Plaintiffs' claims in accordance with 42 U.S.C. § 1988; and

3. For such further relief as this Court deems just and appropriate.

Dated: September 30, 2020

Respectfully submitted,

/s/ *Narendra K. Ghosh*

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Attorneys for Proposed Intervenor-Defendants

**Pro Hac Vice Application Forthcoming*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants,

and

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, BARKER FOWLER, BECKY JOHNSON, JADE JUREK, ROSALYN KOCIEMBA, TOM KOCIEMBA, SANDRA MALONE, and CAREN RABINOWITZ,

(Proposed)
Intervenor-Defendants.

Civil Action No. 5:20-cv-507-D

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Proposed Intervenor-Defendants North Carolina Alliance for Retired Americans (the "Alliance"), Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz (collectively "Alliance Intervenors") move to intervene as defendants in the above-titled action.

Plaintiffs Timothy K. Moore and Philip E. Berger (collectively "Legislative Plaintiffs") are currently parties to an ongoing state court action in which the Alliance Intervenors challenge several restrictions to in-person and absentee voting as applied in the November general election (the "State Court Lawsuit"). Eight days ago, the Alliance Intervenors and the North Carolina State Board of Elections and its chair, Damon Circosta (collectively, the "State Board") filed a joint motion for entry of a consent judgment in the State Court Lawsuit, which referenced and attached three numbered memos that Plaintiffs now seek to attack in this lawsuit. *See* Pls.' and Executive Defs.' Joint Mot. for Entry of a Consent Judgment, Exhibit 1. The Alliance Intervenors and State Board's motion is still pending before the Wake County Superior Court, which is scheduled to hear it on October 2, 2020. But, rather than lodge their objections in the State Court Lawsuit in accordance with state court procedures, the Legislative Plaintiffs have joined forces with two individual voters and one Republican state congressional candidate in a pre-emptive, collateral attack against the proposed settlement.

Never mind that the Wake County Superior Court has indicated it intends to consider exactly the types of objections that Plaintiffs now seek to raise with this Court instead. By filing this action, Plaintiffs ask this Court to sit in review of the Wake County Superior Court proceedings and effectively enjoin any ruling that would result in the State Court's approval of the proposed Consent Judgment. Not only is this lawsuit procedurally (and legally) improper, Plaintiffs' requested relief would deny the Alliance Intervenors rights guaranteed under the State

Constitution, including the ability to exercise the franchise safely and reliably in the midst of the coronavirus pandemic. Plaintiffs' attempt to preemptively undermine a State Court judgment in the State Court Lawsuit poses a clear and direct threat to Alliance Intervenors' rights and legal interests.

For the reasons set forth below, Alliance Intervenors meet the requirements for intervention as a matter of right under Rule 24(a)(2). In the alternative, the Alliance Intervenors request that the Court grant them permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed Answer is attached as Exhibit 2.

II. BACKGROUND

On August 10, 2020, Alliance Intervenors filed a complaint, which they amended on August 18, in the General Court of Justice, Superior Court Division, Wake County, challenging certain election laws and procedures that impose undue burdens on in-person and absentee voting for the November election, in light of the COVID-19 pandemic, under the Free Elections Clause, art. I, § 10, and the Equal Protection Clause, art. I, § 19, of the North Carolina Constitution. Am. Compl. ¶¶ 122-141. *N.C. All. for Retired Americans v. N.C. State Bd. of Elections*, No. 20-CVS-8881. The State Court Lawsuit names the State Board as defendants. Legislative Plaintiffs intervened in that lawsuit, pursuant to N.C.G.S. § 1-72.2(b) which provides the Speaker of the House of Representatives and the President Pro Tempore of the Senate with "standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." On August 24, the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc., and the North Carolina Republican Party (collectively the "Republican Committees") also moved to intervene as defendants. Both groups were admitted into the case.

Alliance Intervenors moved for a preliminary injunction on August 18, 2020, seeking an order (1) enjoining the enforcement of the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the November general election, and ordering the State Board to count as otherwise eligible ballots postmarked by Election Day and received by county boards of elections up to nine days after Election Day; (2) enjoining the enforcement of the witness requirements for absentee ballots set forth in N.C.G.S. § 163-231(a), as applied to voters residing in single person or single-adult households; (3) enjoining the enforcement of N.C.G.S. § 163-231(b)(1) to the extent that it requires voters to pay for postage to mail their ballots, and ordering the State Board to provide postage for absentee ballots submitted by mail in the November election; (4) ordering the State Board to provide uniform guidance and training for election officials engaged in signature verification and instruct county election officials not to reject absentee ballots due to perceived non-matching signatures until the county officials receive such guidance and undergo training; (5) enjoining the enforcement of N.C.G.S. §§ 162-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; and (6) enjoining the enforcement of N.C.G.S. § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering the State Board to allow county election officials to expand early voting by up to an additional 21 days for the November election. In support of their motion, Plaintiffs filed a memorandum along with over 500 pages of evidence in the form of expert reports, voter and other affidavits, and official documents.

Before the preliminary injunction hearing, Alliance Intervenors and the State Board reached an agreement to potentially resolve Alliance Intervenors' claims and filed a Joint Motion

for Entry of a Consent Judgment, along with the proposed Consent Judgment and three exhibits thereto (Numbered Memos 2020-19, 2020-22, and 2020-23). The express objective of the proposed Consent Judgment is

> to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

Consent Judgment § V.

Under the terms of the proposed Consent Judgment, the State Board would agree to: (1) count ballots postmarked by Election Day, if they are otherwise eligible and received up to nine days after Election Day (the same deadline imposed for military and overseas voters), *see* N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b); (2) maintain a cure process for certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate separate, *manned* absentee ballot drop-off stations at all one-stop early voting locations and county board offices, at which voters and authorized persons may return absentee ballots in person; and (4) take reasonable steps to inform the public of these changes. Consent Judgment § VI. Alliance Intervenors agreed to withdraw their Motion for Preliminary Injunction, and to dismiss their remaining claims upon entry of the Consent Judgment. *Id.*

Four days after Alliance Intervenors and the State Board filed their Joint Motion for Entry of a Consent Judgment, but *before* the state court's October 2, 2020 hearing on the motion, Plaintiffs filed their complaint in this Court. That same day, the other intervenors in the State Court Lawsuit, the Republican Committees, filed a similar lawsuit, also in the Eastern District of North Carolina (Western Division), seeking similar relief: to preemptively enjoin enforcement of the

proposed Consent Judgment currently pending before the Wake County Superior Court. *See Wise v. N.C. State Bd. of Election*, No. 5:20-cv-00505-M, ECF No. 1.

III. ARGUMENT

A. Legal Standard

The Fourth Circuit has stated that "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)).

Rule 24(a)(2) provides that "the court must permit anyone to intervene" as of right who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2).

In the alternative, on timely motion, permissive intervention may be granted to anyone who "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B).

B. Alliance Intervenors have standing.

The Fourth Circuit has not addressed whether a proposed intervenor must establish Article III standing and, "given the silence on the issue by the Fourth Circuit," at least one district court has "decline[d] to impose such a requirement[.]" *N.C. State Conference of NAACP v. Cooper*, 332 F.R.D. 161, 165 (M.D.N.C. 2019). The Supreme Court's decision in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), suggests that Article III standing need not be established where, as here, applicants move to intervene as *defendants* and do not seek "relief that

is different from that which is sought by a party with standing." In any event, even if Article III standing were required to intervene as defendants, Alliance Intervenors readily meet this standard.

At the outset, Alliance Intervenors have concrete, particularized, and legally protected interests in the entry and enforcement of the proposed Consent Judgment or any other relief that the Wake County Superior Court issue in response to Alliance Intervenors' state constitutional claims. The proposed Consent Judgment protects Alliance Intervenors' right to vote and to have that vote counted under the North Carolina Constitution, particularly in light of well-documented postal service delivery delays, and the health risks posed by the COVID-19 pandemic.[1] Potential infringement of constitutional rights is a legally cognizable interest sufficient to constitute injury in fact for purposes of intervention. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962) (finding impairment of the right to vote is a legally cognizable injury).

Plaintiffs' requested relief would also require the Alliance to divert time and resources from its other activities to remedy the suppressive and disenfranchising effects that a temporary restraining order would have on North Carolina voters. Specifically, the Alliance would have to engage in efforts to ensure that its members—the vast majority of whom are over the age of 65, placing them at elevated risk of severe illness from COVID-19—are not disenfranchised by the Election Day receipt deadline or other restrictions to voting by mail, particularly given the risk of conflicting judicial orders. Such an expenditure would necessarily divert resources from the Alliance's other pre-election activities, such as its robust public policy and issue advocacy work, all of which imposes cognizable harm on the organization and its members. *See, e.g.*, *Nat'l Council*

[1] *See, e.g.*, https://about.usps.com/who/legal/foia/documents/election-mail/election-mail-2020-pages-52-75.pdf; https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-14_Emergency%20Order%20of%20July%2017%2C%202020.pdf.

of La Raza v. Cegavske, 800 F.3d 1032, 1040 (9th Cir. 2015) (finding "concrete and particular" injury where plaintiffs alleged that but for defendants' conduct, they "would be able to allocate substantial resources to other activities central to [their] mission[s]" (alterations in original) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982))); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (concluding "new law injure[d] the Democratic Party by compelling the party to devote resources" that it would not have needed to devote absent the new law), *aff'd*, 553 U.S. 181 (2008); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (finding standing where law "require[d] Democratic organizations . . . to retool their [get-out-the-vote] strategies and divert [] resources"), *rev'd on other grounds sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc).

In evaluating standing for purposes of an intervention motion, courts "accept as true the movants' allegations of injury, causation, and redressability, unless the pleading reflects a 'sham' or 'frivolity.'" *Liddell v. Special Admin. Bd.*, 894 F.3d 959, 965 (8th Cir. 2018) (quoting *Kozak v. Wells*, 278 F.2d 104, 109 (8th Cir. 1960)). As Alliance Intervenors have demonstrated, harm to their protected interests is clearly imminent and causally connected to the relief Plaintiffs seek. *See ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1093 (8th Cir. 2011) (holding intervenor satisfied traceability requirement where defendant would have been compelled to cause alleged constitutional injury to intervenor if plaintiff prevailed). Alliance Intervenors therefore have standing to intervene as defendants in this action.

C. Alliance Intervenors are entitled to intervene as a matter of right under Rule 24(a)(2).

Alliance Intervenors satisfy the requirements to intervene in this action as of right. Specifically, (1) the motion is timely; (2) Alliance Intervenors have substantial interests in the subject matter of the action; (3) denial of their motion would impair or impede the Alliance

Intervenors' ability to protect their interests; and (4) their interests are not adequately represented by the existing parties to the litigation. Fed. R. Civ. P. 24(a)(2); *Teague v. Bakker*, 931 F.2d 259, 260–61 (4th Cir. 1991).

1. Alliance Intervenors' motion to intervene is timely.

Filed just four days after the Complaint in this action, the Alliance Intervenors' Motion is unquestionably timely. For this threshold requirement, courts must consider "first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion." *Alt v. U.S. EPA*, 758 F.3d 588, 591 (4th Cir. 2014). Here, the Alliance Intervenors seek to intervene at the earliest possible stage of the lawsuit, when no responsive pleadings have been filed by the Defendants in response to the Complaint; no further action has been taken on the merits of Plaintiffs' claims; nor is there a scheduling order. Because there has been no delay at all, the Alliance Intervenors clearly meet this requirement.

2. Alliance Intervenors have significant, legally cognizable interests in the substance of this litigation, the disposition of which may impair their ability to protect these interests.

Alliance Intervenors meet the third factor for intervention as of right because the disposition of Plaintiffs' collateral attack against the proposed Consent Judgment in the pending state court action may, "as a practical matter," impair or impede the ongoing proceedings concerning the entry of that Consent Judgment, and with it, the rights that it secures for the Alliance Intervenors. *Virginia v. Westinghouse Elec. Corp*, 542 F.2d 214, 216 (4th Cir. 1976); *see* Fed. R. Civ. P. 24(a)(2); *Teague*, 931 F.2d at 260–61 ("This court has interpreted Rule 24(a)(2) to entitle an applicant to intervention of right if the applicant can demonstrate . . . that the protection of this interest would be impaired because of the action.").

To intervene as of right, an applicant must have "a significantly protectable interest" in the outcome of the lawsuit. *Teague*, 931 F.2d at 261 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). In other words, the applicant must "stand[s] to gain or lose" from the "legal operation" of the judgment of that action. *Id.* And an applicant can demonstrate a protectable interest even when its gain or loss is "contingent upon the outcome of other pending litigation." *Id.* As the Fourth Circuit has acknowledged, litigants that obtained a judgment in a prior action are entitled to intervene as of right in a later action that threatens the relief awarded under the prior judgment. *See id*. (finding intervenors' "ability to protect their interest would be impaired or impeded" by a judgment that would put the intervenors' ability to satisfy a prior judgment at risk).

Because Plaintiffs' lawsuit effectively seeks to block a proposed Consent Judgment which is pending approval in an ongoing state court action in which Alliance Intervenors, the State Board, *and Legislative Plaintiffs* are parties, a court order granting Plaintiffs' requested relief will indisputably impede the ability of Alliance Intervenors to enforce their constitutional rights through the Consent Judgment or any other relief the Wake County Superior Court may order. *See Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081–82 (8th Cir. 1999) (finding interest requirement "easily satisfie[d]" where "[t]he disposition of the lawsuit . . . may require resolution of legal and factual issues bearing on the validity of [] agreements" in which proposed intervenor had interests).

Beyond Alliance Intervenors' interests in enforcing the proposed Consent Judgment, they also risk infringement of their constitutional right to vote if Plaintiffs' requested relief is granted. As Alliance Intervenors argued in the state court action, the Election Day receipt deadline imposes a severe burden on voters in the November election who will encounter extended mail delivery timelines which are incompatible with the State's deadlines for the receipt of absentee ballots

postmarked by Election Day, all during a global pandemic that imposes health risks on those who seek to vote in person. Alliance Intervenors—which include both individual voters who risk disenfranchisement and the North Carolina Alliance for Retired Americans, an organization dedicated to promoting the franchise and ensuring the full constitutional rights of its members—have a cognizable interest in protecting the constitutional rights that form the basis of their state court lawsuit and the rights of their members who might lose the ability to have their votes counted. *See, e.g.*, *Crawford*, 472 F.3d at 951 ("The Democratic Party [] has standing to assert the rights of those of its members who will be prevented from voting by the new law."); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 726 (S.D. Ohio 2016) (political party "established an injury in fact" where "the challenged provisions will make it more difficult for its members and constituents to vote"), *rev'd on other grounds sub nom. Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016). Moreover, as discussed in Part III.B *supra*, the disruptive and disenfranchising effects of Plaintiffs' lawsuit would require Alliance to divert resources to protect the rights of their members. Intervenors therefore satisfy the second and third requirements of Rule 24(a)(2).

3. Alliance Intervenors' interests are not adequately represented by the Defendants.

Finally, the Defendants in this case consist of the same parties who are adverse to Alliance Intervenors in the State Court Lawsuit. Under these circumstances, the Alliance Intervenors clearly satisfy the "minimal" burden of "demonstrating lack of adequate representation." *Teague*, 931 at 262. That the State Board is adverse to Alliance Intervenors in ongoing, related litigation is sufficient by itself to demonstrate a lack of adequate representation. *See, e.g.*, *Maxum Indem. Co. v. Biddle Law Firm, PA*, 329 F.R.D. 550, 556 (D.S.C. 2019) (finding intervenors interests were not adequately represented where parties seeking intervention were adverse to defendants in a

related state-court action brought by the intervenors); *Hartford Acc. & Indem. Co. v. Crider*, 58 F.R.D. 15, 18 (N.D. Ill. 1973) (same).

Although Alliance Intervenors and the State Board were ultimately able to reach an agreement in state court, Alliance Intervenors have specific interests implicated by the litigation which they cannot rely on the State Board to adequately protect. Not only were Alliance Intervenors *forced to sue* the State Board to obtain any relief, the proposed Consent Judgment was the product of negotiation and compromise, requiring Alliance Intervenors to forego several of their claims. Accordingly, "there is no assurance that the state will continue to support all the positions taken" by the Alliance Intervenors. To the contrary, "what the state perceives as being in its interest may diverge substantially from" the interests of Alliance Intervenors. *Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 1001 (8th Cir. 1993).

As one court recently explained while granting intervention under similar circumstances,

> Although Defendants and the Proposed Intervenors fall on the same side of the dispute, Defendants' interests in the implementation of the [challenged law] differ from those of the Proposed Intervenors. While Defendants' arguments turn on their inherent authority as state executives and their responsibility to properly administer election laws, the Proposed Intervenors are concerned with ensuring their party members and the voters they represent have the opportunity to vote in the upcoming federal election . . . and allocating their limited resources to inform voters about the election procedures. As a result, the parties' interests are neither "identical" nor "the same."

Issa v. Newsom, No. 2:20-cv-01044-MCE-CKD, 2020 WL 3074351, at *3 (E.D. Cal. June 10, 2020) (citation omitted).

Here, too, the State Board has an undeniable interest in defending both its plans for the November election and its inherent powers as a state agency. Alliance Intervenors have different interests: ensuring that they and their members will be have meaningful and safe opportunities to cast ballots and ensuring that the Alliance's limited resources are not diverted. *See Paher v.*

Cegavske, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2042365, at *3 (D. Nev. Apr. 28, 2020) (concluding "Proposed Intervenors . . . have demonstrated entitlement to intervene as a matter of right" where they "may present arguments about the need to safeguard [the] right to vote that are distinct from Defendants' arguments"). Because Alliance Intervenors cannot rely on the State Board (or anyone else in the litigation) to protect their distinct interests, they have satisfied the fourth requirement and are entitled to intervention as of right under Rule 24(a)(2). *See id.*; *Issa*, 2020 WL 3074351, at *4.

D. In the alternative, Alliance Intervenors request that the Court grant them permission to intervene under Rule 24(b).

Even if Alliance Intervenors were not entitled to intervene as of right, permissive intervention would be warranted under Rule 24(b). "On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The court must consider "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In deciding whether to grant permissive intervention, courts consider factors including "the nature and extent of the intervener's interest, the intervener's standing to raise relevant legal issues, the legal position the intervener seeks to advance, and its probable relation to the merits of the case." *L.S. ex rel. Ron S. v. Cansler*, No. 5:11-CV-354-FL, 2011 WL 6030075, at *2 (E.D.N.C. Dec. 5, 2011) (citing *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). They may also consider "whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit." *Id.* (citing *Spangler*, 552 F.2d at 1329).

For the reasons set forth above, the motion is timely, intervention will not unduly delay or prejudice the adjudication of the rights of the original parties, and the Alliance Intervenors are not adequately represented by the existing defendants. The Alliance Intervenors will undoubtedly raise common questions of law and fact in defending this lawsuit and the proposed state court Consent Judgment, including this Court's authority to enjoin any order that the State Court may enter approving the Consent Judgment. Beyond that, the interests of Alliance Intervenors are constitutional in nature and extend to some of the most fundamental rights protected by the North Carolina Constitution: the right to free elections and to equal protection under the law. Their participation in this action will contribute to the full development of the factual and legal issues in this action and will aid the Court in the adjudication of this matter.

IV. CONCLUSION

For the reasons stated above, Alliance Intervenors respectfully request that the Court grant their motion to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permit them to intervene under Rule 24(b).

Dated: September 30, 2020

Respectfully submitted,

/s/ Narendra K. Ghosh

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**Pro Hac Vice Application Forthcoming*

Exhibit 1

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2020 SEP 22 A 11:10

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Defendants Damon Circosta and the North Carolina State Board of Elections ("Executive Defendants"), by and through counsel, respectfully move this Court pursuant to Local Rule 3.4 for entry of a Consent Judgment, filed concurrently with this Joint Motion. In support thereof, Parties show the Court as follows:

1. On August 18, 2020, Plaintiffs filed an Amended Complaint, seeking declaratory and injunctive relief to enjoin North Carolina laws related to in-person and absentee-by-mail voting in the remaining elections in 2020 that they alleged unconstitutionally burden the right to vote in light of the current public health crisis caused by the novel coronavirus ("COVID-19").

2. Also on August 18, Plaintiffs filed a Motion for Preliminary Injunction seeking to:

(i) enjoin the enforcement of the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), as applied to ballots submitted through the United States Postal Service (USPS) for the 2020 elections, and order Defendants to count all otherwise eligible ballots that are postmarked by Election Day and received by county boards of elections up to nine days after Election Day;

(ii) enjoin the enforcement of the witness requirements for absentee ballots set forth in N.C. Gen. Stat. § 163-231(a), as applied to voters residing in single-person or single-adult households;

(iii) enjoin the enforcement of N.C. Gen. Stat. § 163-231(b)(1) to the extent that it requires voters to pay for postage in order to mail their absentee ballots;

(iv) order Defendants to provide postage for absentee ballots submitted by mail in the November election;

(v) order Defendants to provide uniform guidance and training for election officials engaging in signature verification and instruct county election officials not to reject absentee ballots due to perceived non-matching signatures until the county officials receive such guidance and undergo training;

(vi) enjoin the enforcement of N.C. Gen. Stat. §§ 163-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to fill out and submit absentee ballot request forms; and

(vii) enjoin the enforcement of N.C. Gen. Stat. § 163-227.2(b) and any other laws that prevent county election officials from providing additional one-stop ("early") voting days and ordering Defendants to allow county election officials to expand early voting by up to an additional 21 days for the November election.

Plaintiffs filed a brief in support of their Motion on September 4, 2020.

3. Since Plaintiffs moved the Court for preliminary injunctive relief, Plaintiffs and Executive Defendants have engaged in substantial good-faith negotiations regarding a potential settlement of Plaintiffs' claims against Executive Defendants.

4. Following extensive negotiation, the Parties have reached a settlement to fully resolve Plaintiffs' claims, the terms of which are set forth in the proposed Consent Judgment filed concurrently with this Joint Motion.

5. As set forth in the Consent Judgment and in the exhibits thereto, (Numbered Memos 2020-19, 2020-22, and 2020-23), all ballots postmarked by Election Day shall be counted if otherwise eligible and received up to nine days after Election Day, pursuant to Numbered Memo 2020-22. Numbered Memo 2020-19 implements a procedure to cure certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses. Finally, Numbered Memo 2020-23 instructs county boards to designate separate absentee ballot drop-off stations at all one-stop early voting locations and county board offices, through which voters and authorized persons may return absentee ballots in person.

6. Plaintiffs and Executive Defendants further agree to each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Defendants, and all such claims Plaintiffs allege against the Executive Defendants in this action related to the conduct of the 2020 elections shall be dismissed.

WHEREFORE Plaintiffs and Executive Defendants respectfully request that this Court grant their Joint Motion and enter the proposed Consent Judgment, filed concurrently with this motion, as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections.

Dated: September 22, 2020

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I certify that I served the foregoing document by email to counsel for defendants, addressed as follows:

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This the 22nd day of September, 2020.

_____
Narendra K. Ghosh

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

STIPULATION AND CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Executive Defendants Damon Circosta and the North Carolina State Board of Elections (collectively, "the Consent Parties") stipulate to the following and request that this Court approve this Consent Judgment. This Stipulation and Consent Judgment encompasses Plaintiffs' claims, which pertain to elections in 2020 ("2020 elections") and are premised upon the current public health crisis facing North Carolina caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on August 10, 2020, Plaintiffs filed a complaint, and, on August 18, 2020, Plaintiffs filed an amended complaint against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections, of: (1) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b); (2) its requirement that all absentee ballot envelopes must be signed by a witness during the pandemic, as applied to voters in single-person or single-adult households, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) its failure to provide pre-paid postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, as applied to voters who submit ballots through the United States Postal Service, *id*. § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C. Gen. Stat. § 163-226.3(a)(5) (the "Ballot Delivery Ban") (collectively, the "Challenged Provisions");

WHEREAS the Complaint seeks to enjoin enforcement of the Challenged Provisions during the 2020 elections due to the ongoing public health crisis caused by the spread of the novel coronavirus (COVID-19);

WHEREAS the COVID-19 public health crisis is ongoing, and North Carolina remains under Executive Order 163, which contemplates a phased reopening of North Carolina but strongly recommends social distancing, Exec. Order 163, § 2.2, mandates mask wearing in most business and government settings, *id.* § 3.2, imposes capacity limits in most public-facing business and government settings, *id.*, § 3.2(e), prohibits mass gatherings, *id.* § 7, and states that "[p]eople who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes," *id.* § 2.1;

WHEREAS North Carolina remains under a state of emergency, declared by the Governor, "based on the public health emergency posed by COVID-19," Exec. Order 116, and under a federal disaster declaration statewide, 85 Fed. Reg. 20701;

WHEREAS as of September 19, 2020, North Carolina has had more than 192,248 confirmed COVID-19 cases, with more than 3,235 fatalities;

WHEREAS COVID-19 case counts continue to grow across the country, and the director of the Center for Disease Control and Prevention recently warned that the country should brace for "the worst fall from a public health perspective, we've ever had"[1];

WHEREAS the Executive Director of the North Carolina State Board of Elections observed that COVID-19 infections in North Carolina are likely to continue into the fall, through at least Election Day;[2]

[1] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

WHEREAS, on June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[3] The CDC guidance encourages elections officials to:

- "Encourage voters to stay at least 6 feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained;
- Increase the number of polling locations available for early voting and extend hours of operation at early voting sites;
- Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance;
- Minimize lines as much as possible, especially in small, indoor spaces;
- "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility";
- Offer alternatives to in-person voting;
- Offer alternative voting options that minimize exposure between poll workers and voters;

[2] N.C. State Bd. of Elections, *Emergency Order, Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency* (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf.

[3] *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

WHEREAS large crowds at early voting and long lines on Election Day may create public health risks and impose severe burdens on the right to vote, making absentee voting by mail essential to ameliorate these possibilities;

WHEREAS, as of September 18, 2020, more than 889,273 absentee ballots had already been requested by North Carolina voters, more than 14 times the number of absentee ballots that had been requested by this time in 2016;

WHEREAS the absentee voting period for the 2020 elections began on September 4, 2020, N.C. Gen. Stat. § 163-227.10(a), and, as of September 21, 2020, nearly 1,400 absentee ballots had been flagged for incomplete witness information, according to data from the State Board of Elections[4];

WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from "the disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-00457-WO-JLW (M.D.N.C. Aug. 4, 2020) (Osteen, J.), ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." *Id.*

WHEREAS courts in other states have enjoined those states from enforcing witness and notarization requirements, some of which are similar to North Carolina's Challenged Provisions,

[4] *North Carolina Early Voting Statistics*, U.S. Elections Project, https://electproject.github.io/Early-Vote-2020G/NC.html.

for elections occurring this year during the COVID-19 pandemic. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment suspending "notary or two-witness requirement" for mail ballots and finding that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" single-witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become 'both too restrictive and not restrictive enough to effectively prevent voter fraud.'"); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election);

WHEREAS the delivery standards for the Postal Service, even in ordinary times, contemplate at a minimum at least a week for ballots to be processed through the postal system and delivered to election officials[5];

WHEREAS the General Counsel of the Postal Service sent a letter on July 30, 2020 to North Carolina's Secretary of State warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[6] In particular, the Postal Service recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.*;

WHEREAS mail delivery conditions are already leading to greater delays: since mid-July there have been sharp decreases in the percentage of U.S. Postal Service mail, sent by any method, delivered on time;[7]

[5] *State and Local Election Mail—User's Guide*, U.S. Postal Serv. (Jan. 2020), https://about.usps.com/publications/pub632.pdf.

[6] Letter to North Carolina Secretary of State from USPS General Counsel, App'x to Compl., ECF No. 1-1 at 53-55, *Commonwealth of Pennsylvania v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

[7] *Service Performance Measurement PMG Briefing*, U.S. Postal Serv. (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

WHEREAS on August 21, 2020, the State of North Carolina, along with six other states filed a lawsuit challenging the Postal Service's procedural changes that the State alleges will likely delay election mail even further, creating a "significant risk" that North Carolina voters will be disenfranchised by the State's relevant deadlines governing absentee ballots;

WHEREAS increases in absentee voting, coupled with mail delays, threaten to slow down the process of mailing and returning absentee ballots, and appear likely to impact the 2020 elections;

WHEREAS pursuant to N.C. Gen. Stat. § 163-231(b)(2)(c), North Carolina already accepts military and overseas absentee ballots until the end of business on the business day before the canvass which occurs no earlier than the tenth day after the election, *see id.* § 163-182.5(b);

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also extended Election Day Receipt Deadlines in light of the current public health crisis. *See Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (extending ballot receipt deadline for November 2020 election); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (extending ballot receipt deadline for the November 2020 election); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR (N.D. Ga, Aug. 31, 2020) (granting motion for preliminary injunction in part and extending receipt deadline); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt

deadline and recognizing that enforcing the deadline was likely to disenfranchise thousands of voters); *LaRose v. Simon*, No. 62-CV-20-3149 at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's receipt deadline);

WHEREAS multiple courts have found that the enforcement of various other state election laws during the pandemic violate constitutional rights. *See, e.g.*, *Esshaki v. Whitmer*, 813 F. App'x 170, 173 (6th Cir. 2020) (finding ballot-access provisions unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *Garbett v. Herbert*, No. 2:20-CV-245-RJS, 2020 WL 2064101, at *18 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witness requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3490216 (D. Idaho June 26, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560 (2020);

WHEREAS the State Board of Elections has broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c).

WHEREAS the Executive Director of the State Board, as the chief State elections official, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19;

WHEREAS the Consent Parties agree that an expeditious resolution of this matter for the 2020 elections, in the manner contemplated by the terms of this Stipulation and Consent Judgment, will limit confusion and increase certainty surrounding the 2020 elections and is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest;

WHEREAS the Executive Defendants believe that continued litigation over the Challenged Provisions will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina;

WHEREAS the Consent Parties wish to avoid uncertainty about the requirements and obligations of voting in the 2020 elections for State Board officials and non-parties including county board officials, staff, and election workers, and the voting public;

WHEREAS the Consent Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and the Consent Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, other courts across the country have approved similar consent judgments between parties, *see Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4460914 (D.R.I. July 30, 2020) (approving consent judgment to not enforce Witness Requirement in primary and November general elections); Stipulation and Partial Consent

Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election); *League of Women Voters of Va.*, 2020 WL 2158249 (approving consent judgment to not enforce Witness Requirement in primary election); *see also Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (denying motion to stay the consent judgment and judgment pending appeal) *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

WHEREAS the Executive Defendants do not waive any protections offered to them through federal or state law and do not make any representations regarding the merits of Plaintiffs' claims or potential defenses which could be raised in litigation;

WHEREAS the Consent Parties agree that the Consent Judgment promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs' claims regarding the 2020 elections against the Executive Branch Defendants;

WHEREAS Plaintiffs agree to a waiver to any entitlement to damages and fees, including attorneys' fees, expenses, and costs against the Executive Defendants with respect to any and all claims raised by Plaintiffs in this action relating to the 2020 elections;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Consent Parties, that: (i) the terms of this Consent Judgment constitute a fair and equitable settlement of the issues raised with respect to the 2020 elections, and (ii) the Consent Judgment is intended to and does resolve Plaintiffs' claims;

NOW, THEREFORE, upon consent of the Consent Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Consent Judgment, including relinquishment of certain legal rights, the Consent Parties agree as follows:

II.
JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Article 26 of Chapter 1 of the General Statutes, N.C. Gen. Stat. § 7A-245(a)(2), and N.C. Gen. Stat. § 1-493, and has jurisdiction over the Consent Parties herein. Venue for this action is proper in Wake County Superior Court because the Executive Defendants reside in Wake County. *Id.* § 1-82. The Court shall retain jurisdiction of this Stipulation and Consent Judgment for the duration of the term of this Stipulation and Consent Judgment for purposes of entering all orders and judgments that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Consent Judgment applies to and is binding upon the following parties:

A. Damon Circosta, in his capacity as Chair of the North Carolina State Board of Elections;

B. The North Carolina State Board of Elections; and

C. All Plaintiffs.

IV.
SCOPE OF CONSENT JUDGMENT

A. This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Consent Judgment, they are releasing any claims under the North Carolina Constitution that they might have against Executive Defendants with respect to the Challenged Provisions in the 2020 elections. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Consent Judgment.

B. The Consent Parties to this Stipulation and Consent Judgment acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Challenged Provisions for elections held after the 2020 elections.

C. The Consent Parties to this Stipulation and Consent Judgment further acknowledge that by signing this Stipulation and Consent Judgment, the Consent Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Consent Judgment, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Consent Judgment or defenses thereto.

D. By entering this Stipulation and Consent Judgment, Plaintiffs are fully settling a disputed matter between themselves and Executive Defendants. The Consent Parties are entering this Stipulation and Consent Judgment for the purpose of resolving disputed claims, avoiding the burdens and costs associated with the costs of litigating this matter through final judgment, and ensuring both safety and certainty in advance of the 2020 elections. Nothing in this Stipulation and Consent Judgment constitutes an admission by any party of liability or wrongdoing. The Consent Parties acknowledge that a court may seek to consider this Stipulation and Consent

Judgment, including the violations alleged in Plaintiffs' Amended Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT JUDGMENT OBJECTIVES

In addition to settling the claims of the Consent Parties, the objective of this Stipulation and Consent Judgment is to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

VI.
INJUNCTIVE RELIEF

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND JUDGED FOR THE REASONS STATED ABOVE THAT:

A. For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots, as set forth in N.C. Gen. Stat. § 163-231(b)(2), to the deadline set forth in paragraph VI.B below and in Numbered Memo 2020-22 (attached as Exhibit A).

B. Pursuant to Numbered Memo 2020-22, an absentee ballot shall be counted as timely in the 2020 elections if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m. For purposes of this Stipulation and Consent Judgment and as the Numbered Memo requires, a ballot shall be considered postmarked on or before Election Day if it has a postmark affixed to it or if there is information in the Postal Service tracking system (BallotTrax), or another tracking service

offered by the Postal Service or the commercial carrier, indicating that the ballot was in the custody of the Postal Service or a commercial carrier on or before Election Day.

C. For the 2020 elections, Executive Defendants shall institute a process to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19 (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature. If a county board office receives a container-return envelope with such a curable deficiency, it shall contact the voter in writing by mail and, if available, email, within one business day of identifying the deficiency, informing the voter that there is an issue with their absentee ballot and enclosing a cure certification. The written notice shall be sent to the address to which the voter requested their ballot be sent. The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier.

D. Pursuant to Numbered Memo 2020-23, (attached as Exhibit C) Executive Defendants shall institute a process for establishing a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices. Such drop-off stations may be located outdoors subject to the conditions set forth in Numbered Memo 2020-23. In addition, when a person returns a ballot in person, the county board intake staffer shall ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person returning the ballot in person indicates that they are not

the voter or the voter's near relative or legal guardian, the county board intake staffer will also require the person to provide their address and phone number.

E. Executive Defendants shall take additional reasonable steps to inform the public of the contents of Numbered Memos 2020-19, -22, -23 and shall encourage all county boards of elections to do the same.

F. Plaintiffs will withdraw their Motion for Preliminary Injunction, filed on August 18, 2020, and will not file any further motions for relief for the 2020 elections based on the claims raised in their Amended Complaint of August 18, 2020.

G. In accordance with the terms of this Stipulation and Consent Judgment, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to this lawsuit.

H. All remaining claims filed by Plaintiffs against the Executive Defendants related to the conduct of the 2020 elections in this action are hereby dismissed with prejudice. The Court will retain jurisdiction of these claims only as to enforcement of the Stipulation and Consent Judgment.

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The parties to this Stipulation and Consent Judgment may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Consent Judgment that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Consent Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Consent Judgment, or for granting any other relief not inconsistent with the terms of this Consent Judgment, until this Consent Judgment is terminated. The Consent Parties may apply to this Court for any orders or

other relief necessary to construe or effectuate this Stipulation and Consent Judgment or seek informal conferences for direction as may be appropriate. The Consent Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If any Party believes that another has not complied with the requirements of this Stipulation and Consent Judgment, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Consent Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Consent Judgment that requires any Party to file a motion with this Court for enforcement of this Stipulation and Consent Judgment.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Consent Parties acknowledge that no person has exerted undue pressure on them to enter into this Stipulation and Consent Judgment. Every Party is voluntarily choosing to enter into this Stipulation and Consent Judgment because of the benefits that are provided under the agreement. The Consent Parties acknowledge that they have read and understand the terms of this Stipulation and Consent Judgment; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Consent Judgment to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Consent Judgment shall be severable, and, should any provisions be declared by a court of competent jurisdiction to be

unenforceable, the remaining provisions of this Stipulation and Consent Judgment shall remain in full force and effect.

C. Agreement. This Stipulation and Consent Judgment is binding. The Consent Parties acknowledge that they have been advised that (i) no other Party has a duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Consent Judgment may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Consent Judgment if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Judgment constitutes the entire agreement between the Consent Parties relating to the constitutionality and enforcement of the Challenged Provisions as they pertain to the 2020 elections. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Consent Judgment are valid unless they are in writing, identified as an amendment to this Stipulation and Consent Judgment, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Consent Judgment except as herein explicitly contained.

E. Warranty. The persons signing this Stipulation and Consent Judgment warrant that they have full authority to enter this Stipulation and Consent Judgment on behalf of the Party each represents, and that this Stipulation and Consent Judgment is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Consent Judgment may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Consent Judgment is effective upon the date it is entered by the Court.

IX.
TERMINATION

This Stipulation and Consent Judgment shall remain in effect through the certification of ballots for the 2020 elections. The Court shall retain jurisdiction to enforce the terms of the Consent Judgment for the duration of this Consent Judgment. This Court's jurisdiction over this Stipulation and Consent Judgment shall automatically terminate after the certification of all ballots for the 2020 elections.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND CONSENT JUDGMENT AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT JUDGMENT TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA CHAIR, NORTH CAROLINA STATE BOARD OF ELECTIONS

Dated: September 22, 2020

By: /s/ Alexander McC. Peters
Alexander McC. Peters, N.C. Bar No. 13654
Terrance Steed
North Carolina Dept. of Justice
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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ

Dated: September 22, 2020

By: _____
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IT IS SO ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT JUDGMENT.

Dated: _____ _____

Superior Court Judge

EXHIBIT A

Numbered Memo 2020-22

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Return Deadline for Mailed Civilian Absentee Ballots in 2020

DATE: September 22, 2020

The purpose of this numbered memo is to extend the return deadline for postmarked civilian absentee ballots that are returned by mail and to define the term "postmark." This numbered memo only applies to remaining elections in 2020.

Extension of Deadline

Due to current delays with mail sent with the U.S. Postal Service (USPS)—delays which may be exacerbated by the large number of absentee ballots being requested this election—the deadline for receipt of postmarked civilian absentee ballots is hereby extended to nine days after the election only for remaining elections in 2020.

An absentee ballot shall be counted as timely if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m.[1]

Postmark Requirement

The postmark requirement for ballots received after Election Day is in place to prohibit a voter from learning the outcome of an election and then casting their ballot. However, the USPS does not always affix a postmark to a ballot return envelope. Because the agency now offers BallotTrax, a service that allows voters and county boards to track the status of a voter's absentee ballot, it is possible for county boards to determine when a ballot was mailed even if it does not have a postmark. Further, commercial carriers including DHL, FedEx, and UPS offer tracking services that allow voters and the county boards of elections to determine when a ballot was deposited with the commercial carrier for delivery.

[1] *Compare* G.S. § 163-231(b)(2)(b) (that a postmarked absentee ballot be received by three days after the election).

For remaining elections in 2020, a ballot shall be considered postmarked by Election Day if it has a postmark affixed to it or if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day. If a container-return envelope arrives after Election Day and does not have a postmark, county board staff shall conduct research to determine whether there is information in BallotTrax that indicates the date it was in the custody of the USPS. If the container-return envelope arrives in an outer mailing envelope with a tracking number after Election Day, county board staff shall conduct research with the USPS or commercial carrier to determine the date it was in the custody of USPS or the commercial carrier.

EXHIBIT B

Numbered Memo 2020-19

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: Absentee Container-Return Envelope Deficiencies

DATE: August 21, 2020 (revised on September 22, 2020)

County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.[1]

1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

[1] This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also Numbered Memo 2020-15, which explains that signature comparison is not permissible for absentee request forms.

2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name[2]
- Witness or assistant did not print address[3]
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line

[2] If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

[3] Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure certification in accordance with Section 3.

This cure certification process applies to both civilian and UOCAVA voters.

2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

3. Voter Notification

3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

If, prior to September 22, 2020, a county board reissued a ballot to a voter, and the updated memo now allows the deficiency to be cured by certification, the county board shall contact the voter in writing and by phone or email, if available, to explain that the procedure has changed and that the voter now has the option to submit a cure certification instead of a new ballot. A county board is not required to send a cure certification to a voter who already returned their second ballot if the second ballot is not deficient.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a multipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline, defined in Numbered Memo 2020-22 as (1) 5 p.m. on Election Day or (2) if postmarked on or before Election Day, 5 p.m. on Thursday, November 12, 2020. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.

COUNTY LETTERHEAD

DATE

NAME
STREET ADDRESS
CITY, STATE, ZIP CODE

RE: Notice of a Problem with Your Absentee Ballot

The [County] Board of Elections received your returned absentee ballot. We were unable to approve the counting of your absentee ballot for the following reason or reasons:

- ☐ The absentee return envelope arrived at the county board of elections office unsealed.
- ☐ The absentee return envelope did not contain a ballot or contained the ballots of more than one voter.
- ☐ Other:
  _____

We have reissued a new absentee ballot. Please pay careful attention to ALL of the instructions on the back of the container-return envelope and complete and return your ballot so that your vote may be counted.

If time permits and you decide not to vote this reissued absentee ballot, you may vote in person at an early voting site in the county during the one-stop early voting period (October 15-31), or at the polling place of your proper precinct on Election Day, **November 3**. The hours for voting on Election Day are from **6:30 a.m.** to **7:30 p.m.** To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov.

Sincerely,

[NAME]
_____ County Board of Elections

VOTER'S NAME
STREET ADDRESS
CITY, STATE, ZIP CODE
CIV Number

Absentee Cure Certification

There is a problem with your absentee ballot – please sign and return this form.

Instructions

You are receiving this affidavit because your absentee ballot envelope is missing information. For your absentee ballot to be counted, complete and return this affidavit as soon as possible. **The affidavit must be received by your county board of elections by no later than 5 p.m. on Thursday, November 12, 2020.** You, your near relative or legal guardian, or a multipartisan assistance team (MAT), can return the affidavit by:

- Email (add county email address if not in letterhead) (you can email a picture of the form)
- Fax (add county fax number if not in letterhead)
- Delivering it in person to the county board of elections office
- Mail or commercial carrier (add county mailing address)

If this affidavit is not returned to the county board of elections by the deadline, your absentee ballot will not count. If you decide not to return this affidavit, you may still vote in person during the early voting period (October 15-October 31) or on Election Day, November 3, 2020. To find the hours and locations for in-person voting in your county, visit http://www.ncsbe.gov.

READ AND COMPLETE THE FOLLOWING:

I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

(Print name and sign below)

_____

Voter's Printed Name **(Required)**

_____

Voter's Signature* **(Required)**

EXHIBIT C

Numbered Memo 2020-23

TO: County Boards of Elections

FROM: Karen Brinson Bell, Executive Director

RE: In-Person Return of Absentee Ballots

DATE: September 22, 2020

Absentee by mail voters may choose to return their ballot by mail or in person. Voters who return their ballot in person may return it to the county board of elections office by 5 p.m. on Election Day or to any one-stop early voting site in the county during the one-stop early voting period. This numbered memo provides guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots.

General Information

Who May Return a Ballot

A significant portion of voters are choosing to return their absentee ballots in person for this election. Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot.[1] A multipartisan assistance team (MAT) or a third party may not take possession of an absentee ballot. **Because of this provision in the law, an absentee ballot may not be left in an unmanned drop box.**

The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it.

Intake of Container-Return Envelope

As outlined in Numbered Memo 2020-19, trained county board staff review each container-return envelope to determine if there are any deficiencies. Review of the container-return envelope

[1] It is a class I felony for any person other than the voter's near relative or legal guardian to take possession of an absentee ballot of another voter for delivery or for return to a county board of elections. G.S. § 163-223.6(a)(5).

does not occur at intake. Therefore, the staff member conducting intake should not conduct a review of the container envelope and should accept the ballot. If intake staff receive questions about whether the ballot is acceptable, they shall inform the voter that it will be reviewed at a later time and the voter will be contacted if there are any issues. Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot.

It is not recommended that county board staff serve as a witness for a voter while on duty. If a county board determines that it will allow staff to serve as a witness, the staff member who is a witness shall be one who is not involved in the review of absentee ballot envelopes.

Log Requirement

An administrative rule requires county boards to keep a written log when any person returns an absentee ballot in person.[2] **However, to limit the spread of COVID-19, the written log requirement has been adjusted for remaining elections in 2020.**

When a person returns the ballot in person, the intake staff will ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person indicates they are not the voter or the voter's near relative or legal guardian, the staffer will also require the person to provide their address and phone number.

Board Consideration of Delivery and Log Requirements

Failure to comply with the logging requirement, or delivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot.[3] A county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized

[2] 08 NCAC 18 .0102 requires that, upon delivery, the person delivering the ballot shall provide the following information in writing: (1) Name of voter; (2) Name of person delivering ballot; (3) Relationship to voter; (4) Phone number (if available) and current address of person delivering ballot; (5) Date and time of delivery of ballot; and (6) Signature or mark of person delivering ballot certifying that the information provided is true and correct and that the person is the voter or the voter's near relative.

[3] *Id.* Compare G.S. § 163-230.2(3), as amended by Section 1.3.(a) of Session Law 2019-239, which states that an absentee request form returned to the county board by someone other than an unauthorized person is invalid.

to possess the ballot. The county board may, however, consider the delivery of a ballot in accordance with the rule, 08 NCAC 18 .0102, in conjunction with other evidence in determining whether the ballot is valid and should be counted.

Return at a County Board Office

A voter may return their absentee ballot to the county board of elections office any time the office is open. A county board must ensure its office is staffed during regular business hours to allow for return of absentee ballots. Even if your office is closed to the public, you must provide staff who are in the office during regular business hours to accept absentee ballots until the end of Election Day. You are not required to accept absentee ballots outside of regular business hours. Similar to procedures at the close of polls on Election Day, if an individual is in line at the time your office closes or at the absentee ballot return deadline (5 p.m. on Election Day), a county board shall accept receipt of the ballot.

If your site has a mail drop or drop box used for other purposes, you must affix a sign stating that voters may not place their ballots in the drop box. However, a county board may not disapprove a ballot solely because it is placed in a drop box.[4]

In determining the setup of your office for in-person return of absentee ballots, you should consider and plan for the following:

- Ensure adequate parking, especially if your county board office will be used as a one-stop site
- Arrange sufficient space for long lines and markings for social distancing
- Provide signage directing voters to the location to return their absentee ballot
- Ensure the security of absentee ballots. Use a locked or securable container for returned absentee ballots that cannot be readily removed by an unauthorized person.
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, it is not recommended you keep an outside return location open after dark or during inclement weather.

[4] *Id.*

Return at an Early Voting Site

Location to Return Absentee Ballots

Each early voting site shall have at least one designated, staffed station for the return of absentee ballots. Return of absentee ballots shall occur at that station. The station may be set up exclusively for absentee ballot returns or may provide other services, such as a help desk, provided the absentee ballots can be accounted for and secured separately from other ballots or processes. Similar to accepting absentee ballots at the county board of elections office, you should consider and plan for the following with the setup of an early voting location for in-person return of absentee ballots:

- Have a plan for how crowd control will occur and how voters will be directed to the appropriate location for in-person return of absentee ballots
- Provide signage directing voters and markings for social distancing
- Ensure adequate parking and sufficient space for long lines
- If your set-up allows the return of ballots outside, plan for the possibility of severe weather. You may need a tent or other covering. Have a plan for how crowd control will occur without the physical barriers of an office and the security of your staff and the balloting materials. For safety reasons, ensure that there is adequate lighting as voting hours will continue past dark.

Because absentee ballots must be returned to a designated station, absentee ballots should not be returned in the curbside area.

Procedures

Absentee ballots that are hand-delivered must be placed in a secured container upon receipt, similar to how provisional ballots are securely stored at voting sites. Absentee by mail ballots delivered to an early voting site must be stored separately from all other ballots in a container designated only for absentee by mail ballots. County boards must also conduct regular reconciliation practices between the log and the absentee ballots. County boards are not required by the State to log returned ballots into SOSA; however, a county board may require their one-stop staff to complete SOSA logging.

If a voter brings in an absentee ballot and does not want to vote it, the ballot should be placed in the spoiled-ballot bag. It is recommended that voters who call the county board office and do not want to vote their absentee ballot be encouraged to discard the ballot at home.

Return at an Election Site

An absentee ballot may not be returned at an Election Day polling place. If a voter appears in person with their ballot at a polling place on Election Day, they shall be instructed that they may

(1) take their ballot to the county board office or mail it so it is postmarked that day and received by the deadline; or (2) have the absentee ballot spoiled and vote in-person at their polling place.

If someone other than the voter appears with the ballot, they shall be instructed to take it to the county board office or mail the ballot so it is postmarked the same day. If the person returning the ballot chooses to mail the ballot, they should be encouraged to take it to a post office to ensure the envelope is postmarked. Depositing the ballot in a USPS drop box on Election Day may result in ballot not being postmarked by Election Day and therefore not being counted.

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 8881
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, *et al.* Plaintiffs, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*, Defendants, and PHILIP E. BERGER in his official capacity as President Pro Tempore of the North Carolina Senate, *et al.*, Intervenor-Defendants, and REPUBLICAN NATIONAL COMMITTEE, *et al.*, Republican Committee-Intervenor Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING OCTOBER 2, 2020 ORDER GRANTING JOINT MOTION FOR ENTRY OF CONSENT JUDGMENT**

THIS MATTER CAME ON TO BE HEARD before the Court during the October 2, 2020 Session of the Superior Court of Wake County. All adverse parties received notice and participated. The Court considered the pleadings, arguments, briefs of the parties, supplemental affidavits, and the record established thus far, as well as argument submitted by counsel in attendance.

1. Following the hearing, the Court granted the Joint Motion for Entry of Consent Judgment, whereupon the Consent Judgment was signed by the Court, and filed and served on all parties. The Court sees fit to further explain the basis of its rulings in the Consent Judgment here. The Court heard argument at the October 2, 2020 hearing, considered the arguments made by the

parties, and made a series of oral rulings upon which it based the granting of the Joint Motion and entry of the Consent Judgment. These rulings, which were effective at the time they were announced from the bench, are hereby memorialized and further explained below.

FINDINGS OF FACT

2. This matter involves claims brought by Plaintiffs involving as-applied challenges to the absentee ballot receipt deadline set forth in N.C.G.S. § 163-231(b)(1), (2), enforcement of the witness requirement for absentee ballots set forth in N.C.G.S. § 163-231(a) (as modified by SL 2020-17), the lack of prepaid postage available to absentee-by-mail voters, application of any signature verification requirement, enforcement of elections laws prohibiting individuals and organizations from assisting voters when submitting or filling out absentee ballot request forms or absentee ballots as set forth in N.C.G.S. §§ 163-226.3(a)(5), -230.2(c), (e), and -231(b)(1), and the failure to provide an additional 21 days of early voting.

3. Plaintiff North Carolina Alliance For Retired Americans is incorporated in North Carolina as a 501(c)(4) nonprofit, social welfare organization. The Alliance has over 50,000 members across all 100 of North Carolina's counties. Its members comprise retirees from public and private sector unions, community organizations, and individual activists. Some of its members are disabled, and all of its members are of an age that places them at a heightened risk of complications from coronavirus.

4. Individual Plaintiffs each have their own hardships as well as shared hardships, which encumber their abilities to vote in the election. These include, but are not limited to, significant concerns regarding the United States Postal Service's ability to timely deliver and return absentee ballots; and health concerns related to voting in person, interacting with a witness,

traveling to and from voting sites, or delivering an absentee ballot, particularly for those deemed high risk for COVID-19.

5. On July 30, 2020, Thomas J. Marshall, General Counsel and Executive Vice President of the United States Postal Service sent a letter to North Carolina's Secretary of State, warning her that North Carolina elections law relating to absentee ballot deadlines was "incongruous with the Postal Service's delivery standards." *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D.P.A.), Dkt. 1-1 at 53-55. USPS also stated that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned on time or be counted." *Id.* In particular, USPS recommended that elections officials transmitting communication to voters "allow 1 week for delivery to voters" and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.* Accordingly, in North Carolina, voters can postmark their ballot by Election Day, but because of USPS delays and through no fault of their own, not have their ballots counted because the ballots arrived at the county board of elections office after the statutory deadline.

6. On May 12, 2020, Legislative Defendants noticed their intervention in this case purportedly "as agents of the State" and "on behalf of the General Assembly." LDs' Mot. to Intervene, ¶¶ 9-10.

7. On July 1, 2020, the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, Donald J. Trump for

President, Inc., and the North Carolina Republican Party (the Political Committees) moved to intervene in this case to protect their "specific desire to elect particular candidates," and "the interests of voters throughout North Carolina," as well as their "members' ability to participate in those elections . . . governed by the challenged rules." Political Committees' Mot. to Intervene, ¶¶ 1, 25. The Court granted the Political Committees permissive intervention on September 24, 2020.

8. On August 18, 2020, Plaintiffs filed a motion for preliminary injunction.

9. On September 22, 2020, Plaintiffs and State Defendants jointly moved for the entry of a consent judgment as full and final resolution of Plaintiffs' claims against the State Defendants related to the conduct of the 2020 elections. On October 1, 2020, Plaintiffs withdrew their motion for preliminary injunction.

10. Under the consent order as proposed in the Joint Motion, plaintiffs agreed to forgo many of their demands, including expanded early voting, elimination of the witness requirement for mail-in absentee ballots, elimination of the postmark requirement, and pre-paid postage for mail-in absentee ballot return envelopes. The Executive Defendants agreed: (1) to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine (9) days after Election Day to match the UOCAVA deadline, in keeping with the guidance received on July 30, 2020 from the Postal Service; (2) implement the revised cure process set forth in Numbered Memo 2020-19; and (3) establish separate mail-in absentee ballot "drop off stations" staffed by elections officials at each early voting site and at each county board of elections to reduce the congestion and crowding at early voting sites and county board offices. Plaintiffs agreed to accept

these measures, which fell far short of their demands, "as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections."

11. The consent judgment as proposed does not enjoin any statutes. The proposed consent judgment retains fidelity to the purpose behind these statutes: (1) ensuring that all ballots that are marked in accordance with all state laws are counted so long as the delay in delivery to the county board of elections is no fault of the voter's, (2) ensuring that there is a log of the person who returns absentee ballots so that, in the event of concerns about fraud, these concerns can be investigated, and (3) ensuring that the voter to whom the absentee ballot was issued is the one who voted the ballot that the county board of elections received. In addition, the consent order is narrowly targeted to modifications that address the exigent circumstances of the COVID-19 pandemic. It therefore does not modify any election procedures beyond the 2020 election cycle.

12. As of September 29, 2020, more than 1,116,696 absentee ballots have been requested. As of October 2, 2020, 325,345 have been submitted, and 319,209 have been accepted. Early voting starts on October 15.

13. The Court hereby incorporates by reference those factual statements made in the Stipulation and Consent Judgment, Part I – Recitals, and entered on October 2, 2020 by this Court, as if set forth fully herein.

CONCLUSIONS OF LAW

14. North Carolina courts have a "strong preference for settlement over litigation." *Ehrenhaus v. Baker*, 216 N.C. App. 59, 72, 717 S.E.2d 9, 19 (2011).

15. Although North Carolina courts have not articulated a standard for approval of a consent judgment, courts in this State have looked to the federal standard to provide guidance in

similar contexts. *See, e.g.*, *Ehrenhaus*, 216 N.C. App. at 71-72, 717 S.E.2d at 18-19 (adopting federal standard for approval of class-action settlements). Before approving entry of a consent judgment, a federal court has the duty to "satisfy itself that the agreement is 'fair, adequate and reasonable,' and is 'not illegal, a product of collusion, or against the public interest.'" *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)).

16. On June 10, 2020, the North Carolina General Assembly enacted House Bill 1169, which the Governor signed into law as North Carolina Session Law 2020-17 the following day. This law made a number of changes in response to the COVID-19 pandemic. The legislature did not revise, in any way relevant to the Joint Motion or the Consent Judgment, the emergency powers granted to the State Board or its Executive Director under section 163-27.1 or revise powers granted to the State Board to enter into agreements to avoid protracted litigation under section 163-22.2.

17. Joint movants have demonstrated that the plaintiffs are likely to succeed on the merits of their constitutional claims.

18. The Court finds this agreement is fair, adequate, and reasonable. It is not illegal. It is not a product of collusion. On its face, comparing the complaint to the consent order, the plaintiffs did not obtain all the relief that they had sought. On its face, this is a compromise. There exists no evidence to the contrary.

19. The relief imposed by this consent judgment is very limited. It makes only minor and temporary changes to election procedures to accommodate the exigencies of the COVID-19 pandemic, which also makes it reasonable.

20. The Court finds that there is a strong public interest in having certainty in our elections procedures and rules, and the entry of this consent judgment is, therefore, in the public interest.

21. The North Carolina State Board of Elections has a strong incentive to settle this case to ensure certainty on the procedures that will apply during the current election cycle. Settlement will also provide public confidence in the safety and security in this election, in light of all the serious public-health challenges faced at this time.

22. The North Carolina State Board of Elections has authority to enter into this consent judgment under two separate provisions of the North Carolina General Statutes: sections 163-22.2 and 163-27.1.

23. First, section 163-22.2 authorizes the State Board, "upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes." This section applies here. The proposed consent judgment is an "agreement with the courts." The State Board, moreover, has made the reasonable decision to enter into this agreement to avoid "protracted litigation" regarding plaintiffs' claims with an election fast approaching.

24. Second, section 163-27.1 authorizes the Executive Director of the State Board to "exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by" a "natural disaster." A "natural disaster" includes a "[c]atastrophe arising from natural causes [that] result[s] in a disaster declaration by the President of the United States or the Governor." 08 NCAC 01.0106. The COVID-19 pandemic constitutes a natural disaster within the meaning of the statute, as shown by the declaration of emergency by the Governor, the

declaration of disaster by the President, and the emergency order that the Executive Director issued under this authority on July 17, 2020. The Executive Director therefore had the statutory authority to issue the Numbered Memoranda that form the basis of this consent judgment pursuant to her emergency powers under section 163-27.1.

25. Accordingly, votes cast and counted pursuant to the Numbered Memoranda and the consent judgment are lawfully cast votes under North Carolina law, because the North Carolina State Board of Elections and its Executive Director validly issued the Numbered Memoranda and entered into the consent judgment under their statutory authority conferred on them by the General Assembly.

26. Sections 1-72.2 and 120-32.6 of the North Carolina General Statutes do not alter the State Board's authority under sections 163-22.2 or 163.27.1. Nor do they provide that the Speaker and the President Pro Tem are necessary parties to the consent judgment in this case.

As an initial matter, the authority delegated to the State Board in sections 163-22.2 and 163-27.1 is more specific than the more general grants of authority listed in sections 1-72.2 and 120-32.6. More specific grants of statutory authority control over more general grants. Here, therefore, the more general grants of certain litigation authority in sections 1-72.2 and 120-32.6 do not displace the settlement and emergency powers of the State Board.

27. In addition, sections 1-72.2 and 120-32.6 allow the Speaker and the President Pro Tem to appear and be heard, or in some cases to request to do so, in certain lawsuits on behalf of the legislative branch alone. However, this limited authority does not allow these legislators to represent the interests of the executive branch or of the State, including any interest of the State in the execution and enforcement of its laws. These statutes do not authorize the Speaker and the

President Pro Tem, individually or jointly, to control executive officials' decisions about execution and enforcement of state law, or to prevent executive officials from entering into settlements that affect how statutes are executed or enforced after their enactment. Nor do these statutes make the General Assembly or these legislative officers necessary parties to any such settlement. To read sections 1-72.2 and 120-32.6 otherwise would violate the North Carolina Constitution's separation of powers clause. *See* N.C. Const. art. I, § 6; *Cooper v. Berger*, 370 N.C. 392, 414-15, 809 S.E.2d 98, 111-12 (2018).

28. For all these reasons, therefore, the consent of the Speaker and the President Pro Tem is not needed for this Court to approve and enter this consent judgment.

29. Because the North Carolina General Statutes delegate to the State Board the authority to issue the directives that form the basis for the proposed consent judgment, neither the Numbered Memoranda, nor the consent judgment itself, violates the Elections Clause of the U.S. Constitution, art. I, § 4, cl.1.

30. Neither the Numbered Memoranda, nor the consent judgment itself, violates the Equal Protection Clause of the U.S. Constitution, amend. XIV, § 1. They provide adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them. They do not dilute or discount anyone's vote. Instead, they ensure that all eligible voters have an opportunity to cast their ballots and correct any deficiencies in those ballots under the same, uniform standards.

31. The Numbered Memoranda and the consent judgment are therefore consistent with both the North Carolina Constitution and the U.S. Constitution.

32. Based upon the foregoing, on October 2, 2020, Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment was granted and final judgment was entered.

ISSUED, this 5th day of October 2020, *nunc pro tunc* October 2, 2020.

G. Bryan Collins
Special Superior Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing document was served on the following parties via email:

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This the 5th day of October, 2020.

Kellie Z. Myers
Trial Court Administrator – 10th Judicial District
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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as CHAIR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants, and,

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

No. 20-CVS-8881

STIPULATION AND CONSENT JUDGMENT

Plaintiffs North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz, and Executive Defendants Damon Circosta and the North Carolina State Board of Elections (collectively, "the Consent Parties") stipulate to the following and request that this Court approve this Consent Judgment. This Stipulation and Consent Judgment encompasses Plaintiffs' claims, which pertain to elections in 2020 ("2020 elections") and are premised upon the current public health crisis facing North Carolina caused by the ongoing spread of the novel coronavirus.

I.
RECITALS

WHEREAS on August 10, 2020, Plaintiffs filed a complaint, and, on August 18, 2020, Plaintiffs filed an amended complaint against Executive Defendants challenging the constitutionality and enforcement, during the 2020 elections, of: (1) North Carolina's limitations on the number of days and hours of early voting that counties may offer, N.C. Gen. Stat. § 163-227.2(b); (2) its requirement that all absentee ballot envelopes must be signed by a witness during the pandemic, as applied to voters in single-person or single-adult households, Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a) ("HB 1169") (the "Witness Requirement"); (3) its failure to provide pre-paid postage for absentee ballots and ballot request forms, N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"); (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, as applied to voters who submit ballots through the United States Postal Service, *id.* § 163-231(b)(2) (the "Receipt Deadline"); (5) the practice in some counties of rejecting absentee ballots for signature defects (the "Signature Matching Procedures"); (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239, § 1.3(a) ("SB 683"), (the "Application Assistance Ban"); and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C. Gen. Stat. § 163-226.3(a)(5) (the "Ballot Delivery Ban") (collectively, the "Challenged Provisions");

WHEREAS the Complaint seeks to enjoin enforcement of the Challenged Provisions during the 2020 elections due to the ongoing public health crisis caused by the spread of the novel coronavirus (COVID-19);

WHEREAS the COVID-19 public health crisis is ongoing, and North Carolina remains under Executive Order 163, which contemplates a phased reopening of North Carolina but strongly recommends social distancing, Exec. Order 163, § 2.2, mandates mask wearing in most business and government settings, *id.* § 3.2, imposes capacity limits in most public-facing business and government settings, *id.*, § 3.2(e), prohibits mass gatherings, *id.* § 7, and states that "[p]eople who are at high risk of severe illness from COVID-19 are very strongly encouraged to stay home and travel only for absolutely essential purposes," *id.* § 2.1;

WHEREAS North Carolina remains under a state of emergency, declared by the Governor, "based on the public health emergency posed by COVID-19," Exec. Order 116, and under a federal disaster declaration statewide, 85 Fed. Reg. 20701;

WHEREAS as of September 19, 2020, North Carolina has had more than 192,248 confirmed COVID-19 cases, with more than 3,235 fatalities;

WHEREAS COVID-19 case counts continue to grow across the country, and the director of the Center for Disease Control and Prevention recently warned that the country should brace for "the worst fall from a public health perspective, we've ever had"[1];

WHEREAS the Executive Director of the North Carolina State Board of Elections observed that COVID-19 infections in North Carolina are likely to continue into the fall, through at least Election Day;[2]

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[1] *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, WebMD (Aug. 13, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

WHEREAS, on June 22, 2020, the Centers for Disease Control and Prevention (CDC) issued interim guidance to prevent the spread of COVID-19 in election-polling locations.[3] The CDC guidance encourages elections officials to:

- "Encourage voters to stay at least 6 feet apart" from each other by posting signs and providing other visual cues and have plans to manage lines to ensure social distancing can be maintained;
- Increase the number of polling locations available for early voting and extend hours of operation at early voting sites;
- Maintain or increase the total number of polling places available to the public on Election Day to improve the ability to social distance;
- Minimize lines as much as possible, especially in small, indoor spaces;
- "Limit the number of voters in the facility by moving lines outdoors if weather permits or using a ticket system for access to the facility";
- Offer alternatives to in-person voting;
- Offer alternative voting options that minimize exposure between poll workers and voters;

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[2] N.C. State Bd. of Elections, *Emergency Order, Administering the November 3, 2020 General Election During the Global COVID-19 Pandemic and Public Health Emergency* (July 17, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Emergency%20Order_2020-07-17.pdf.

[3] *Considerations for Election Polling Locations and Voters: Interim guidance to prevent spread of coronavirus disease 2019 (COVID-19)*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html.

WHEREAS large crowds at early voting and long lines on Election Day may create public health risks and impose severe burdens on the right to vote, making absentee voting by mail essential to ameliorate these possibilities;

WHEREAS, as of September 18, 2020, more than 889,273 absentee ballots had already been requested by North Carolina voters, more than 14 times the number of absentee ballots that had been requested by this time in 2016;

WHEREAS the absentee voting period for the 2020 elections began on September 4, 2020, N.C. Gen. Stat. § 163-227.10(a), and, as of September 21, 2020, nearly 1,400 absentee ballots had been flagged for incomplete witness information, according to data from the State Board of Elections[4];

WHEREAS, on August 4, 2020, the United States District Court for the Middle District of North Carolina enjoined the State Board from "the disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-00457-WO-JLW (M.D.N.C. Aug. 4, 2020) (Osteen, J.), ECF 124 at 187. The injunction is to remain in force until the State Board implements a cure process that provides a voter with "notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." *Id.*

WHEREAS courts in other states have enjoined those states from enforcing witness and notarization requirements, some of which are similar to North Carolina's Challenged Provisions,

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[4] *North Carolina Early Voting Statistics*, U.S. Elections Project, https://electproject.github.io/Early-Vote-2020G/NC.html.

for elections occurring this year during the COVID-19 pandemic. *See, e.g.*, *Common Cause R.I. v. Gorbea*, No. 20-1753, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020) (denying motion to stay consent judgment suspending "notary or two-witness requirement" for mail ballots and finding that "[t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020) (finding "strong likelihood that the burdens placed upon [plaintiffs] by" single-witness signature requirement "outweigh the imprecise, and (as admitted by [defendants]) ineffective, state interests of combating voter fraud and protecting voting integrity"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden [of the witness requirement] is substantial for a substantial and discrete class of Virginia's electorate. During this pandemic, the witness requirement has become 'both too restrictive and not restrictive enough to effectively prevent voter fraud.'"); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election);

WHEREAS the delivery standards for the Postal Service, even in ordinary times, contemplate at a minimum at least a week for ballots to be processed through the postal system and delivered to election officials[5];

WHEREAS the General Counsel of the Postal Service sent a letter on July 30, 2020 to North Carolina's Secretary of State warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[6] In particular, the Postal Service recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.*;

WHEREAS mail delivery conditions are already leading to greater delays: since mid-July there have been sharp decreases in the percentage of U.S. Postal Service mail, sent by any method, delivered on time;[7]

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[5] *State and Local Election Mail—User's Guide*, U.S. Postal Serv. (Jan. 2020), https://about.usps.com/publications/pub632.pdf.

[6] Letter to North Carolina Secretary of State from USPS General Counsel, App'x to Compl., ECF No. 1-1 at 53-55, *Commonwealth of Pennsylvania v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020).

[7] *Service Performance Measurement PMG Briefing*, U.S. Postal Serv. (Aug. 12, 2020), https://oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/PMG%20Briefing_Service%20Performance%20Management_08_12_2020.pdf.

WHEREAS on August 21, 2020, the State of North Carolina, along with six other states filed a lawsuit challenging the Postal Service's procedural changes that the State alleges will likely delay election mail even further, creating a "significant risk" that North Carolina voters will be disenfranchised by the State's relevant deadlines governing absentee ballots;

WHEREAS increases in absentee voting, coupled with mail delays, threaten to slow down the process of mailing and returning absentee ballots, and appear likely to impact the 2020 elections;

WHEREAS pursuant to N.C. Gen. Stat. § 163-231(b)(2)(c), North Carolina already accepts military and overseas absentee ballots until the end of business on the business day before the canvass which occurs no earlier than the tenth day after the election, *see id.* § 163-182.5(b);

WHEREAS for the April 7, 2020 primary election in Wisconsin, the U.S. Supreme Court affirmed the implementation of a postmark rule, whereby ballots postmarked by Election Day could be counted as long as they were received within six days of Election Day, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020), and other courts have also extended Election Day Receipt Deadlines in light of the current public health crisis. *See Mich. All. for Retired Americans v. Benson*, No. 20-000108-MM (Mich. Ct. Cl. Sept. 18, 2020) (extending ballot receipt deadline for November 2020 election); *Pa. Democratic Party v. Boockvar, K.*, 133 MM 2020, 2020 WL 5554644 (Pa. Sept. 17, 2020) (extending ballot receipt deadline for the November 2020 election); *New Ga. Project v. Raffensperger*, No. 1:20-cv-01986-ELR (N.D. Ga, Aug. 31, 2020) (granting motion for preliminary injunction in part and extending receipt deadline); *Driscoll v. Stapleton*, No. DV 20-408 (Mont. Dist. Ct. May 22, 2020), *stayed pending appeal* No. DA 20-0295 (preliminarily enjoining Montana's receipt

deadline and recognizing that enforcing the deadline was likely to disenfranchise thousands of voters); *LaRose v. Simon*, No. 62-CV-20-3149 at *25 (Minn. Dist. Ct. Aug. 3, 2020) (entering consent judgment extending Minnesota's receipt deadline);

WHEREAS multiple courts have found that the enforcement of various other state election laws during the pandemic violate constitutional rights. *See, e.g., Esshaki v. Whitmer*, 813 F. App'x 170, 173 (6th Cir. 2020) (finding ballot-access provisions unconstitutional as applied during COVID-19 pandemic and upholding part of injunction enjoining state from enforcing the provisions under the present circumstances against plaintiffs and all other candidates); *Garbett v. Herbert*, No. 2:20-CV-245-RJS, 2020 WL 2064101, at *18 (D. Utah Apr. 29, 2020); *Libertarian Party of Ill. v. Pritzker*, No. 20-cv-2112, 2020 WL 1951687 (N.D. Ill. Apr. 23, 2020) (applying *Anderson-Burdick* in light of pandemic, and alleviating signature and witness requirements for minor party candidates), *aff'd sub nom. Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 (7th Cir. Aug. 20, 2020); *People Not Politicians Oregon v. Clarno*, 20-cv-1053, 2020 WL 3960440 (D. Or. July 13, 2020); *Cooper v. Raffensperger*, -- F. Supp. 3d --, 20-cv-1312, 2020 WL 3892454 (N.D. Ga. July 9, 2020); *Reclaim Idaho v. Little*, 20-cv-268, 2020 WL 3490216 (D. Idaho June 26, 2020); *Paher v. Cegavske*, -- F. Supp. 3d --, 20-cv-243, 2020 WL 2089813 (D. Nev. Apr. 30, 2020); *Goldstein v. Sec'y of Commonwealth*, 484 Mass. 516, 142 N.E.3d 560 (2020);

WHEREAS the State Board of Elections has broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c).

WHEREAS the Executive Director of the State Board, as the chief State elections official, has the authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19;

WHEREAS the Consent Parties agree that an expeditious resolution of this matter for the 2020 elections, in the manner contemplated by the terms of this Stipulation and Consent Judgment, will limit confusion and increase certainty surrounding the 2020 elections and is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest;

WHEREAS the Executive Defendants believe that continued litigation over the Challenged Provisions will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina;

WHEREAS the Consent Parties wish to avoid uncertainty about the requirements and obligations of voting in the 2020 elections for State Board officials and non-parties including county board officials, staff, and election workers, and the voting public;

WHEREAS the Consent Parties, in agreeing to these terms, acting by and through their counsel, have engaged in arms' length negotiations, and the Consent Parties are represented by counsel knowledgeable in this area of the law;

WHEREAS, other courts across the country have approved similar consent judgments between parties, *see Common Cause R.I. v. Gorbea*, No. 120CV00318MSMLDA, 2020 WL 4460914 (D.R.I. July 30, 2020) (approving consent judgment to not enforce Witness Requirement in primary and November general elections); Stipulation and Partial Consent

Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. June 17, 2020) (approving consent judgment to not enforce Witness Requirement and Receipt deadline for primary election); Stipulation and Partial Consent Judgment, *LaRose v. Simon*, No. 62-CV-20-3149 (2d Jud. Dist. Minn. July 17, 2020) (approving similar consent judgment for November general election); *League of Women Voters of Va.*, 2020 WL 2158249 (approving consent judgment to not enforce Witness Requirement in primary election); *see also Common Cause R.I. v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020) (denying motion to stay the consent judgment and judgment pending appeal) *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020);

WHEREAS the Executive Defendants do not waive any protections offered to them through federal or state law and do not make any representations regarding the merits of Plaintiffs' claims or potential defenses which could be raised in litigation;

WHEREAS the Consent Parties agree that the Consent Judgment promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs' claims regarding the 2020 elections against the Executive Branch Defendants;

WHEREAS Plaintiffs agree to a waiver to any entitlement to damages and fees, including attorneys' fees, expenses, and costs against the Executive Defendants with respect to any and all claims raised by Plaintiffs in this action relating to the 2020 elections;

WHEREAS it is the finding of this Court, made on the pleadings and upon agreement of the Consent Parties, that: (i) the terms of this Consent Judgment constitute a fair and equitable settlement of the issues raised with respect to the 2020 elections, and (ii) the Consent Judgment is intended to and does resolve Plaintiffs' claims;

NOW, THEREFORE, upon consent of the Consent Parties, in consideration of the mutual promises and recitals contained in this Stipulation and Consent Judgment, including relinquishment of certain legal rights, the Consent Parties agree as follows:

II.
JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action pursuant to Article 26 of Chapter 1 of the General Statutes, N.C. Gen. Stat. § 7A-245(a)(2), and N.C. Gen. Stat. § 1-493, and has jurisdiction over the Consent Parties herein. Venue for this action is proper in Wake County Superior Court because the Executive Defendants reside in Wake County. *Id.* § 1-82. The Court shall retain jurisdiction of this Stipulation and Consent Judgment for the duration of the term of this Stipulation and Consent Judgment for purposes of entering all orders and judgments that may be necessary to implement and enforce compliance with the terms provided herein.

III.
PARTIES

This Stipulation and Consent Judgment applies to and is binding upon the following parties:

A. Damon Circosta, in his capacity as Chair of the North Carolina State Board of Elections;

B. The North Carolina State Board of Elections; and

C. All Plaintiffs.

IV.
SCOPE OF CONSENT JUDGMENT

A. This Stipulation and Consent Judgment constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit. Plaintiffs recognize that by signing this Stipulation and Consent Judgment, they are releasing any claims under the North Carolina Constitution that they might have against Executive Defendants with respect to the Challenged Provisions in the 2020 elections. Plaintiffs' release of claims will become final upon the effective date of this Stipulation and Consent Judgment.

B. The Consent Parties to this Stipulation and Consent Judgment acknowledge that this does not resolve or purport to resolve any claims pertaining to the constitutionality or enforcement of the Challenged Provisions for elections held after the 2020 elections.

C. The Consent Parties to this Stipulation and Consent Judgment further acknowledge that by signing this Stipulation and Consent Judgment, the Consent Parties do not release or waive the following: (i) any rights, claims, or defenses that are based on any events that occur after they sign this Stipulation and Consent Judgment, (ii) any claims or defenses that are unrelated to the allegations filed by Plaintiffs in this Lawsuit, and (iii) any right to institute legal action for the purpose of enforcing this Stipulation and Consent Judgment or defenses thereto.

D. By entering this Stipulation and Consent Judgment, Plaintiffs are fully settling a disputed matter between themselves and Executive Defendants. The Consent Parties are entering this Stipulation and Consent Judgment for the purpose of resolving disputed claims, avoiding the burdens and costs associated with the costs of litigating this matter through final judgment, and ensuring both safety and certainty in advance of the 2020 elections. Nothing in this Stipulation and Consent Judgment constitutes an admission by any party of liability or wrongdoing. The Consent Parties acknowledge that a court may seek to consider this Stipulation and Consent

Judgment, including the violations alleged in Plaintiffs' Amended Complaint, in a future proceeding distinct from this Lawsuit.

V.
CONSENT JUDGMENT OBJECTIVES

In addition to settling the claims of the Consent Parties, the objective of this Stipulation and Consent Judgment is to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

VI.
INJUNCTIVE RELIEF

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND JUDGED FOR THE REASONS STATED ABOVE THAT:

A. For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots, as set forth in N.C. Gen. Stat. § 163-231(b)(2), to the deadline set forth in paragraph VI.B below and in Numbered Memo 2020-22 (attached as Exhibit A).

B. Pursuant to Numbered Memo 2020-22, an absentee ballot shall be counted as timely in the 2020 elections if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m. For purposes of this Stipulation and Consent Judgment and as the Numbered Memo requires, a ballot shall be considered postmarked on or before Election Day if it has a postmark affixed to it or if there is information in the Postal Service tracking system (BallotTrax), or another tracking service

offered by the Postal Service or the commercial carrier, indicating that the ballot was in the custody of the Postal Service or a commercial carrier on or before Election Day.

C. For the 2020 elections, Executive Defendants shall institute a process to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19 (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature. If a county board office receives a container-return envelope with such a curable deficiency, it shall contact the voter in writing by mail and, if available, email, within one business day of identifying the deficiency, informing the voter that there is an issue with their absentee ballot and enclosing a cure certification. The written notice shall be sent to the address to which the voter requested their ballot be sent. The cure certification must be received by the county board of elections by no later than 5 p.m. on Thursday, November 12, 2020, the day before county canvass. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier.

D. Pursuant to Numbered Memo 2020-23, (attached as Exhibit C) Executive Defendants shall institute a process for establishing a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices. Such drop-off stations may be located outdoors subject to the conditions set forth in Numbered Memo 2020-23. In addition, when a person returns a ballot in person, the county board intake staffer shall ask the person for their name and whether they are the voter or the voter's near relative or legal guardian. The staffer will indicate this information on a log along with the CIV number of the ballot and the date that it was received. If the person returning the ballot in person indicates that they are not

the voter or the voter's near relative or legal guardian, the county board intake staffer will also require the person to provide their address and phone number.

E. Executive Defendants shall take additional reasonable steps to inform the public of the contents of Numbered Memos 2020-19, -22, -23 and shall encourage all county boards of elections to do the same.

F. Plaintiffs will withdraw their Motion for Preliminary Injunction, filed on August 18, 2020, and will not file any further motions for relief for the 2020 elections based on the claims raised in their Amended Complaint of August 18, 2020.

G. In accordance with the terms of this Stipulation and Consent Judgment, the Consent Parties shall each bear their own fees, expenses, and costs incurred as of the date of this Order with respect to this lawsuit.

H. All remaining claims filed by Plaintiffs against the Executive Defendants related to the conduct of the 2020 elections in this action are hereby dismissed with prejudice. The Court will retain jurisdiction of these claims only as to enforcement of the Stipulation and Consent Judgment.

VII.
ENFORCEMENT AND RESERVATION OF REMEDIES

The parties to this Stipulation and Consent Judgment may request relief from this Court if issues arise concerning the interpretation of this Stipulation and Consent Judgment that cannot be resolved through the process described below. This Court specifically retains continuing jurisdiction over the subject matter hereof and the Consent Parties hereto for the purposes of interpreting, enforcing, or modifying the terms of this Stipulation and Consent Judgment, or for granting any other relief not inconsistent with the terms of this Consent Judgment, until this Consent Judgment is terminated. The Consent Parties may apply to this Court for any orders or

other relief necessary to construe or effectuate this Stipulation and Consent Judgment or seek informal conferences for direction as may be appropriate. The Consent Parties shall attempt to meet and confer regarding any dispute prior to seeking relief from the Court.

If any Party believes that another has not complied with the requirements of this Stipulation and Consent Judgment, it shall notify the other Party of its noncompliance by emailing the Party's counsel. Notice shall be given at least one business day prior to initiating any action or filing any motion with the Court.

The Consent Parties specifically reserve their right to seek recovery of their litigation costs and expenses arising from any violation of this Stipulation and Consent Judgment that requires any Party to file a motion with this Court for enforcement of this Stipulation and Consent Judgment.

VIII.
GENERAL TERMS

A. Voluntary Agreement. The Consent Parties acknowledge that no person has exerted undue pressure on them to enter into this Stipulation and Consent Judgment. Every Party is voluntarily choosing to enter into this Stipulation and Consent Judgment because of the benefits that are provided under the agreement. The Consent Parties acknowledge that they have read and understand the terms of this Stipulation and Consent Judgment; they have been represented by legal counsel or had the opportunity to obtain legal counsel; and they are voluntarily entering into this Stipulation and Consent Judgment to resolve the dispute among them.

B. Severability. The provisions of this Stipulation and Consent Judgment shall be severable, and, should any provisions be declared by a court of competent jurisdiction to be

unenforceable, the remaining provisions of this Stipulation and Consent Judgment shall remain in full force and effect.

C. Agreement. This Stipulation and Consent Judgment is binding. The Consent Parties acknowledge that they have been advised that (i) no other Party has a duty to protect their interest or provide them with information about their legal rights, (ii) signing this Stipulation and Consent Judgment may adversely affect their legal rights, and (iii) they should consult an attorney before signing this Stipulation and Consent Judgment if they are uncertain of their rights.

D. Entire Agreement. This Stipulation and Consent Judgment constitutes the entire agreement between the Consent Parties relating to the constitutionality and enforcement of the Challenged Provisions as they pertain to the 2020 elections. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Stipulation and Consent Judgment are valid unless they are in writing, identified as an amendment to this Stipulation and Consent Judgment, and signed by all Parties. There are no inducements or representations leading to the execution of this Stipulation and Consent Judgment except as herein explicitly contained.

E. Warranty. The persons signing this Stipulation and Consent Judgment warrant that they have full authority to enter this Stipulation and Consent Judgment on behalf of the Party each represents, and that this Stipulation and Consent Judgment is valid and enforceable as to that Party.

F. Counterparts. This Stipulation and Consent Judgment may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original.

G. Effective Date. This Stipulation and Consent Judgment is effective upon the date it is entered by the Court.

IX.
TERMINATION

This Stipulation and Consent Judgment shall remain in effect through the certification of ballots for the 2020 elections. The Court shall retain jurisdiction to enforce the terms of the Consent Judgment for the duration of this Consent Judgment. This Court's jurisdiction over this Stipulation and Consent Judgment shall automatically terminate after the certification of all ballots for the 2020 elections.

THE PARTIES ENTER INTO AND APPROVE THIS STIPULATION AND CONSENT JUDGMENT AND SUBMIT IT TO THE COURT SO THAT IT MAY BE APPROVED AND ENTERED. THE PARTIES HAVE CAUSED THIS STIPULATION AND CONSENT JUDGMENT TO BE SIGNED ON THE DATES OPPOSITE THEIR SIGNATURES.

NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA CHAIR, NORTH CAROLINA STATE BOARD OF ELECTIONS

Dated: September 22, 2020

By: /s/ Alexander McC. Peters
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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ

Dated: September 22, 2020

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Molly Mitchell

20 CVS 8881

IT IS SO ORDERED. JUDGMENT SHALL BE ENTERED IN ACCORDANCE WITH THE FOREGOING CONSENT JUDGMENT.

Dated: 10/2/20

Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below by electronic mail, with their consent to receive electronic service, as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 2nd day of October 2020.

Kellie Z. Myers
Trial Court Administrator – 10th Judicial District
kellie.z.myers@nccourts.org

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:20-CV-507-D

TIMOTHY K. MOORE, et al.,	)	
	)	
Plaintiffs,	)	
v.	)	**ORDER**
	)	
DAMON CIRCOSTA, et al.,	)	
	)	
Defendants.	)	

The court will hold a hearing in this case on Friday, October 2, 2020, at 5:00 p.m. in courtroom one of the Terry Sanford Federal Building, 310 New Bern Avenue, Raleigh, North Carolina. The courtroom will be open to the public. Lawyers may attend via videoconferencing or in person.

SO ORDERED. This 2 day of October 2020.

JAMES C. DEVER, III
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:20-CV-507-D

TIMOTHY K. MOORE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
DAMON CIRCOSTA, et al.,	)	
	)	
Defendants.	)	

On September 26, 2020, the Speaker of the North Carolina House of Representatives, Timothy K. Moore ("Moore"), the President Pro Tempore of the North Carolina Senate, Philip E. Berger ("Berger"), Bobby Heath ("Heath"), Maxine Whitley ("Whitley"), and Alan Swain ("Swain"; collectively, "plaintiffs") filed this action against Damon Circosta ("Circosta") in his official capacity as chair of the North Carolina State Board of Elections ("NCSBOE"), Stella Anderson ("Anderson") in her official capacity as a NCSBOE member, Jeff Carmon III ("Carmon") in his official capacity as a NCSBOE member, and Karen Brinson Bell ("Bell"; collectively, "defendants") in her official capacity as Executive Director of the NCSBOE alleging claims under 42 U.S.C. §1983 and the Elections Clause and Equal Protection Clause of the United States Constitution [D.E. 1]. On the same date, plaintiffs moved for a temporary restraining order [D.E. 8] and filed a memorandum in support [D.E. 9]. Specifically, plaintiffs contend that three memoranda NCSBOE issued on September 22, 2020, in conjunction with settlement negotiations (and ultimately a settlement on October 2, 2020) in a state court lawsuit concerning absentee ballots, violate the Elections Clause because the memoranda are inconsistent with the North Carolina General statutes and improperly

usurp legislative power to regulate federal elections. Additionally, plaintiffs contend that the three memoranda violate the Equal Protection Clause because the memoranda arbitrarily change the standards to determine the legality of an individual's vote harming plaintiffs that have voted already, and that the policies dilute the votes of those plaintiffs. See [D.E. 8] 5–22.

In Wise v. North Carolina State Board of Elections, No. 5:20-cv-505-D (E.D.N.C.) [hereinafter Wise], various plaintiffs from throughout North Carolina and other entities seek relief, inter alia, under 42 U.S.C. § 1983 and the Elections Clause, Article II, § 1, and the Equal Protection Clause. On October 2, 2020, the state court approved the settlement in the state court lawsuit, and Numbered Memo 2020-22 and Numbered Memo 2020-23 became effective. On the same date, this court held a hearing on plaintiffs' motion for a temporary restraining order in this case and in Wise. As explained below, the court grants plaintiffs' motion for a temporary restraining order in this case and in Wise, and transfers this case and Wise to the Honorable William L. Osteen, Jr., United States District Judge for the Middle District of North Carolina, for Judge Osteen's consideration of additional or alternative injunctive relief along with any such relief in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20-CV-457 (M.D.N.C.).

I.

For purposes of this temporary restraining order only, the court draws the facts largely from plaintiffs' complaint in this case and in Wise.[1] On March 10, 2020, Governor Roy Cooper declared a state of emergency due to the COVID-19 pandemic. On March 26, 2020, Bell submitted a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" to North

[1] The court cites to the documents docketed in this case in the recitation of the facts. Any citations to the docket in Wise are underlined (e.g., [D.E. 3]) to distinguish a citation to the docket in this case.

Carolina's voting requirements. Bell asked that the General Assembly "[r]educe or eliminate the witness requirement" to "prevent the spread of COVID-19." See [D.E. 1-5]. Under N.C. Gen. Stat. § 163-231, to return a completed absentee ballot, a voter must have it witnessed and then mail or deliver the ballot in person, or have it delivered by commercial carrier. In addition, the voter, the voter's near relative, or the voter's verifiable legal guardian also can return the ballots in person. See N.C. Gen. Stat. § 163-231(b)(1).[2] The General Assembly has criminally prohibited any person other than the voter, the voter's near relative, or the voter's verifiable legal guardian from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. Gen. Stat. § 163-226.3(a)(5).[3]

On June 11, 2020, the General Assembly overwhelmingly passed bipartisan legislation, the "Bipartisan Elections Act," adjusting the voting rules for the November 2020 election. See Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Before passing the Bipartisan Elections Act, the General Assembly considered numerous proposals to adjust North Carolina election laws in light of the COVID-19 pandemic. For example, the General Assembly considered

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[2] Section 163-231(b)(1) states, in full: "Transmitting Executed Absentee Ballots to County Board of Elections. - The sealed container-return envelope in which executed absentee ballots have been placed shall be transmitted to the county board of elections who issued those ballots as follows: (1) All ballots issued under the provisions of this Article and Article 21A of this Chapter shall be transmitted by mail or by commercial courier service, at the voter's expense, or delivered in person, or by the voter's near relative or verifiable legal guardian and received by the county board not later than 5:00 p.m. on the day of the statewide primary or general election or county bond election. Ballots issued under the provisions of Article 21A of this Chapter may also be electronically transmitted." N.C. Gen. Stat. § 163-231(b)(1) (emphasis added).

[3] Section 163-226.3(a)(5) states, in full: "Any person who shall, in connection with absentee voting in any election held in this State, do any of the acts or things declared in this section to be unlawful, shall be guilty of a Class I felony. It shall be unlawful: . . . (5) For any person to take into that person's possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter, provided, however, that this prohibition shall not apply to a voter's near relative or the voter's verifiable legal guardian." N.C. Gen. Stat. § 163-226.3(a)(5) (emphasis added).

the NCSBOE's proposal to eliminate the witness requirement for absentee ballots and to instead adopt a signature-matching software. The General Assembly was also aware of potential delivery issues concerning mail-in absentee ballots. Additionally, two recent voting experiences informed the General Assembly's choices. First, the General Assembly had information concerning voting processes in primary elections conducted during a pandemic. Second, the General Assembly was painfully aware of the massive abstentee-ballot fraud that occurred in the 2018 election for North Carolina's Ninth Congressional District. The scope and extent of the absentee-ballot fraud in that election required North Carolina to invalidate the election results and conduct a new election.

On June 12, 2020, Governor Cooper signed the Bipartisan Elections Act into law. As relevant here, the Bipartisan Elections Act changed the witness requirements for absentee ballots. Specifically, the act provides:

> For an election held in 2020, notwithstanding G.S. 163-229(b) and G.S. 163-231(a), and provided all other requirements for absentee ballots are met, a voter's returned absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of at least one person who is at least 18 years of age and is not disqualified by G.S. 163-226.3(a)(4) or G.S. 163-237(c), provided that the person signed the application and certificate as a witness and printed that person's name and address on the container-return envelope.

N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added). The Bipartisan Elections Act did not change the requirements concerning who may return an absentee ballot in section 163-231 or the criminal prohibition concerning the same in section 163-226.3(a)(5). It also did not change several provisions relevant to this lawsuit. Specifically, the Bipartisan Elections Act did not change the provision that sets the a deadline for receipt of absentee ballots: "The ballots issued under this Article are postmarked and that postmark is dated on or before the day of the statewide primary or general election or county bond election and are received by the county board of elections not later than three days after the election by 5:00 p.m." N.C. Gen. Stat. § 163-231(b)(2)(b) (emphasis added).

After the General Assembly enacted and the Governor signed the Bipartisan Elections Act, litigation ensued in the United States District Court for the Middle District of North Carolina in which plaintiffs in that case challenged numerous provisions of the Bipartisan Elections Act and North Carolina election laws. On August 4, 2020, after holding extensive hearings, the Honorable William L. Osteen, Jr., issued a comprehensive 188-page order largely upholding various North Carolina election laws applicable in this election (including the witness requirement), but requiring a procedural due process remedy to provide a "voter with notice and opportunity to be heard before a delivered absentee ballot is disallowed or rejected." See Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20-CV-457, — F. Supp. 3d —, 2020 WL 4484063, at *62 (M.D.N.C. Aug. 4, 2020) [hereinafter Democracy N.C.]. On September 3, 2020, a three-judge panel on the Wake County Superior Court denied injunctive relief to plaintiffs in that case seeking, inter alia, to enjoin enforcement of the witness requirement for casting absentee ballots under N.C. Gen. Stat. § 163-231 and N.C. Sess. Laws 2020-17. See Chambers v. North Carolina, 20CVS500124 (N.C. Sup. Ct. Sept. 3, 2020) (three-judge court).

On August 10, 2020, the North Carolina Alliance for Retired Americans and seven individual North Carolina voters (the "Alliance plaintiffs") filed suit in Wake County Superior Court against the NCSBOE and Circosta seeking declaratory and injunctive relief concerning several North Carolina election statutes. On the same date, the Alliance plaintiffs moved for a preliminary injunction. See [D.E. 1-2] 3. Berger and Moore intervened in the Alliance plaintiffs' suit in their respective official capacities. On August 18, 2020, the Alliance plaintiffs amended their complaint. See [D.E. 1-10]. The Alliance plaintiffs asked the court to "[s]uspend the Witness Requirement for single-person or single-adult households" and "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up

to nine days after Election Day." See id. at 5. Under the North Carolina General Statutes, an absentee ballot is timely if "postmarked and that postmark is dated on or before the day of the statewide primary or general election or county bond election and are received by the county board of elections not later than three days after the election by 5:00 p.m." N.C. Gen. Stat. § 163-231(b)(2)(b). The Alliance plaintiffs also asked the court to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot under section 163-226.3(a)(5). See [D.E. 1-9] 42.

On August 21, 2020, the NCSBOE issued Numbered Memo 2020-19 (the "August 2020-19 memo"). See [D.E. 1-4]. In that memo, the NCSBOE confirmed the statutory deadlines for absentee ballots. See id. at 5, ¶ 4. The NCSBOE also stated that a voter may cure two absentee ballot defects with a voter affidavit: (1) "Voter did not sign the Voter Certification"; and (2) "Voter signed in the wrong place." Id. at 3, ¶ 2.1. Additionally, the NCSBOE stated that five absentee ballot defects (four concerning the witness requirement) cannot be cured by a voter affidavit "because the information comes from someone other than the voter." Id. These defects include: (1) "Witness or assistant did not print name"; (2) "Witness or assistant did not print address"; (3) "Witness or assistant did not sign"; (4) "Witness or assistant signed on the wrong line"; (5) "Upon arrival at the county board office, the envelope is unsealed or appears to have been opened and resealed." Id. at 3, ¶ 2.2. If a voter's absentee ballot contains one or more of these five defects, the county board spoils the voter's absentee ballot and reissues a ballot, sending the reissued ballot and notice to the voter. Id. The August 2020-19 memo also has a procedural due process cure provision. See id. at 3–4, ¶¶ 3–5. Additionally, the August 2020-19 memo confirmed that "because of the requirements about who can deliver a ballot, and because of the logging requirements, an absentee ballot may not be left in an unmanned drop box." Id. at 6, ¶ 6.2.

On August 21, 2020, when the NCSBOE issued the August 2020-19 memo, the state court had not issued an order resolving the Alliance plaintiffs' request for injunctive relief. On September 4, 2020, the election began when the NCSBOE began issuing absentee ballots to voters.

On September 22, 2020, the NCSBOE and the Alliance plaintiffs submitted to the state court a proposed consent judgment with three exhibits. See [D.E. 1-2]. The exhibits contain three memoranda from Bell that detail material changes to the on-going election and deviate from the statutory scheme. The last two exhibits became operative upon the state court's approval of the consent judgment on October 2, 2020. The three memoranda are Numbered Memo 2020-19 (the "September 2020-19 memo"; i.e., the revised version of the August 2020-19 memo issued on August 21, 2020 and revised on September 22, 2020), Numbered Memo 2020-22, and Numbered Memo 2020-23 (collectively, the "memoranda").

The September 2020-19 memo "directs the procedure county boards must use to address deficiencies in absentee ballots." Specifically, if a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the NCSBOE considers that error a "deficiency" and would allow the absentee voter to "cure". [D.E. 1-2] 33. A voter cures such a deficiency through a "certification," which is a form the county board of elections sends to a voter that requires the voter to sign and affirm the following:

> I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I requested, voted, and returned an absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

[D.E. 1-2] 37. Notwithstanding Judge Osteen's order of August 4, 2020, this change eliminates the

statutory witness requirement for such a voter.[4]

Numbered Memo 2020-22 states that a ballot is timely "if it is either (1) received by the county board by 5:00 p.m. on Election Day; or (2) the ballot is postmarked on or before Election Day and received by nine days after the election, which is Thursday, November 12, 2020 at 5:00 p.m." Id. at 29 (emphasis added). Additionally, Numbered Memo 2020-22 states: "For remaining elections in 2020, a ballot shall be considered postmarked by Election Day if it has a postmark affixed to it or if there is information in BallotTrax, or another tracking service offered by the USPS or a commercial carrier, indicating that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." Id. at 30. This numbered memo changes the statutory deadline for absentee ballots.

Numbered Memo 2020-23 concerns "In-Person Return of Absentee Ballots." Id. at 39. In relevant part, it states: "Only the voter, or the voter's near relative or legal guardian, is permitted to possess an absentee ballot. . . . **Because of this provision in the law, an absentee ballot may not be left in an unmanned drop box.** . . . The county board shall ensure that, if they have a drop box, slot, or similar container at their office, the container has a sign indicating that absentee ballots may not be deposited in it." Id. at 39 (emphasis in original). Two pages later, Numbered Memo 2020-23 states: "Intake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot. . . . If your site has a mail drop or drop box used for other purposes, you must affix a sign stating that voters may not place their ballots in the drop box. However, a county board may not disapprove

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[4] At the October 2, 2020 hearing in this court, NCSBOE's counsel confirmed this understanding of the September 2020-19 memo cure provisions. When the court asked NCSBOE's counsel whether the September 2020-19 memo's voter certification cure applied to an absentee ballot on which all witness information was missing, NCSBOE's counsel responded that it did.

a ballot solely because it is placed in a drop box." Id. at 40–41 (emphasis added). This numbered memo eliminates the requirement that only the voter, the voter's near relative, or the voter's verifiable guardian may deliver the absentee ballot.

As mentioned, on September 4, 2020, the election began in North Carolina when the NCSBOE began mailing absentee ballots to voters. The first date on which NCSBOE reports absentee ballots cast is September 4, 2020. As of September 22, 2020, at 4:40 a.m., North Carolina voters had cast 153,664 absentee ballots. As of October 2, 2020, at 4:40 a.m., North Carolina voters had cast 319,209 ballots. See North Carolina State Board of Elections, N.C. Absentee Statistics for the 2020 General Election, https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/Absentee_Stats_2020General_10022020.pdf (last visited Oct. 2, 2020). The plaintiff voters in this case (Heath and Whitley) and one plaintiff voter in Wise (Patsy J. Wise) cast their absentee ballots and had them accepted before the Alliance plaintiffs filed notice of the consent judgment in the state court lawsuit on September 22, 2020.

On September 28, 2020, this court held a status conference in this case. At the status conference, NCSBOE's counsel stated that the NCSBOE issued the September 2020-19 memo (dated September 22, 2020) "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." This court asked NCSBOE's counsel whether NCSBOE had submitted the September 2020-19 memo to Judge Osteen and explained to Judge Osteen why the NCSBOE issued it. NCSBOE's counsel replied that the NCSBOE had not submitted the September 2020-19 memo to Judge Osteen, but that it was on counsel's list "to get done today." On September 28, 2020, the NCSBOE filed the September 2020-19 memo with the Middle District of North Carolina.

On September 30, 2020, Judge Osteen issued an order stating that the September 2020-19 memo is not "consistent with [his] order entered on August 4, 2020." See Order, Democracy N.C., No. 1:20-CV-457 [D.E. 145] 3 (M.D.N.C. Sept. 30, 2020). Judge Osteen scheduled a hearing for October 7, 2020, at 12:00 p.m. Id. [D.E. 149]. On September 30, 2020, plaintiffs in Democracy N.C. filed a motion and memorandum in the Middle District seeking to enforce order granting in part preliminary injunction, or in the alternative, motion for clarification, and to expedite. See Democracy N.C., No. 1:20-CV-457 [D.E. 147, 148] (M.D.N.C. Sept. 30, 2020). On October 1, 2020, the NCSBOE issued Numbered Memo 2020-27 discussing Judge Osteen's order of September 30, 2020. See [D.E. 40-2]. Numbered Memo 2020-27 states that, "to avoid confusion while related matters are pending in a number of courts, . . . [c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope." Id. at 2. Numbered Memo 2020-27 also states that "[i]n all other respects, Numbered Memo 2020-19, as revised on September 22, 2020 [i.e., the September 2020-19 memo], remains in effect." Id.

On October 1, 2020, Judge Osteen asked for expedited briefing on whether, inter alia, "the court should consider restraining Defendant North Carolina State Board of Elections' actions taken pursuant to Memo 2020-19 (Doc. 143-1), in light of the earlier version of that memorandum issued on August 21, 2020," and established a deadline of 12:00 p.m. on October 2, 2020, for such briefing. See Democracy N.C., No. 1:20-CV-457 [D.E.149] (M.D.N.C. Oct. 1, 2020). On October 2, 2020, Legislative defendants in Democracy N.C. asked Judge Osteen to enjoin the September 2020-19 memo and to permit the August 2020-19 memo (dated August 21, 2020) to be operative. See id. [D.E. 150].

On October 2, 2020, at 5:00 p.m., this court held a hearing on the pending TRO motions in this case and Wise. At that hearing, NCSBOE's counsel stated that the state court judge in Alliance

had approved the consent judgment in that case. See [D.E. 45-1] (attaching a copy of the consent judgment, which was approved at 4:08 p.m.). NCSBOE's counsel referenced the notice filed with this court shortly before the hearing notifying the court that the state court entered a consent judgment in Alliance. See [D.E. 45]. NCSBOE's counsel stated that the consent judgment attached to the notice at docket entry 45 was a true and accurate copy of the consent judgment the state court judge entered, and that the attached consent judgment was identical to the proposed consent judgment plaintiffs submitted with their complaint in this case. Cf. [D.E. 1-2].

During the hearing on October 2, 2020, the court learned that Judge Osteen filed an extensive order requesting additional briefing on certain constitutional questions, the need for additional injunctive relief, how Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), might apply, and the definition of "material error subject to remediation." See Democracy N.C., [D.E. 152] 1–8. Motions for injunctive relief in Democracy N.C. are due October 5, 2020, by 5:00 p.m. Responses in Democracy N.C. are due by 4:00 p.m. on October 6, 2020. Judge Osteen will hold oral argument on October 7, 2020, at 2:00 p.m. After the hearing, the court took plaintiffs' motions for a temporary restraining order in this case and in Wise under advisement. Numerous intervention motions are pending in this case and Wise, including from the plaintiffs in the Democracy N.C. action and the state-court action.

II.

The court has considered plaintiffs' request for a temporary restraining order under the governing standard. See, e.g., Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); Centro Tepeyac v. Montgomery Cty., 722 F.3d 184, 188 (4th Cir. 2013) (en banc); Real Truth About Obama, Inc. v. FEC, 575 F.3d 342, 346 (4th Cir. 2009), vacated on other grounds, 559 U.S. 1089 (2010), reissued in relevant part, 607 F.3d 355 (4th Cir. 2010) (per curiam); U.S. Dep't of Labor v.

Wolf Run Mining Co., 452 F.3d 275, 281 n.1 (4th Cir. 2006) (substantive standard for temporary restraining order is same as that for entering a preliminary injunction).

For purposes of this order only, the court need not address plaintiffs' claim in this case under the Elections Clause, or the Wise plaintiffs claims under the Elections Clause or Article II, § 1. Moreover, the court has considered the parties' arguments in this case and in Wise made both in the papers and at the hearings. The court finds plaintiffs' arguments concerning the Equal Protection Clause persuasive. In short, the court grants plaintiffs' motion in this case and in Wise for a temporary restraining order based on the Equal Protection Clause for the reasons stated in plaintiffs' papers and at the October 2, 2020 hearing. Plaintiff voters in this case and in Wise have established that (1) they are likely to succeed on the merits of their claims that the provisions in the memoranda violate the plaintiff voters' rights under the Equal Protection Clause; (2) they are likely to suffer irreparable harm absent a temporary restraining order; (3) the balance of the equities tips in their favor; and (4) a temporary restraining order is in the public interest.

Under the Fourteenth Amendment of the Constitution, a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fourteenth Amendment is one of many provisions of the Constitution that "protects the right of all qualified citizens to vote, in state as well as federal elections." Reynolds v. Sims, 377 U.S. 533, 554 (1964); see Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam). "The right to vote is more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." Bush, 531 U.S. at 104; see Wright v. North Carolina, 787 F.3d 256, 259, 263–64 (4th Cir. 2015); Hunter v. Hamilton Cty. Bd. of Elections, 635 F.3d 219, 234 (6th Cir. 2011).

The Supreme Court has identified two, separate frameworks for analyzing challenges to state voting laws and policies under the Fourteenth Amendment: (1) the framework identified in

Reynolds and Bush (hereinafter the "Reynolds-Bush" framework); and (2) the framework identified in Anderson v. Celebrezze, 460 U.S. 780 (1983), and Burdick v. Takushi, 504 U.S. 428 (1992) (hereinafter the "Anderson-Burdick" framework). See Marcellus v. Va. State Bd. of Elections, 849 F.3d 169, 180 n.2 (4th Cir. 2017); Libertarian Party of Va. v. Alcorn, 826 F.3d 708, 716–17 (4th Cir. 2016); Wright, 787 F.3d at 263–64.

The Reynolds-Bush framework addresses two principle harms under the Fourteenth Amendment. The first of those two harms is "a debasement or dilution of the weight of a citizen's vote." Reynolds, 377 U.S. at 555; see id. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen."); see also Bush, 531 U.S. at 105 ("It must be remembered that the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." (quotation omitted)); Baker v. Carr, 369 U.S. 186, 207–08 (1962); Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections, 827 F.3d 333, 337–38 (4th Cir. 2016); Wright, 787 F.3d at 259, 263–64; cf. Anderson v. United States, 417 U.S. 211, 226–27 (1974); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Not only can [the right to vote] not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots or diluted by stuffing of the ballot box."); id. at 8 ("We hold that, construed in its historical context, the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (footnotes omitted)).

The second harm that the Fourteenth Amendment prohibits and that is addressed under the Reynolds-Bush framework is the "arbitrary or disparate treatment of members of [the state's] electorate." Bush, 531 U.S. at 105; see id. at 104–05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote

over that of another."); Dunn v. Blumenstein, 405 U.S. 330, 336 (1972); Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 56 (1970) ("We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . ."); Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."); Gray v. Sanders, 372 U.S. 368, 380 (1963). To that end, a state must have "specific rules designed to ensure uniform treatment" of a voter's ballot. Bush, 531 U.S. at 106; see Dunn, 405 U.S. at 336 ("[A] citizen has a constitutionally protected right to participate in the elections on an equal basis with other citizens in the jurisdiction."); Gray, 372 U.S. at 380 ("[T]he Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.").

Plaintiff voters' claims under the Equal Protection Clause raise profound questions concerning arbitrariness and vote dilution. The election in North Carolina began on September 4, 2020. On that date, the August 2020-19 memo was legally operative and consistent with Judge Osteen's comprehensive order of August 4, 2020. The August 2020-19 memo included the statutory witness requirement, the statutory absentee ballot deadline, the statutory requirement concerning who could deliver absentee ballots, and a procedural due process cure for absentee voters.

By September 22, 2020, over 150,000 North Carolina voters—including plaintiffs Heath and Whitley in this case, and plaintiff Wise in Wise—had cast absentee ballots under the statutory scheme and the August 2020-19 memo. On October 2, 2020, however, after the election started and 319,209 North Carolina voters had cast absentee ballots, the NCSBOE materially changed the rules under which the election was taking place. Specifically, the September 2020-19 memo, Numbered

Memo 2020-22, and Numbered Memo 2020-23 eliminate the statutory witness requirement, change the statutory dates and method by which absentee ballots are accepted, and change the statutory scheme as to who can deliver absentee ballots. At bottom, the NCSBOE has ignored the statutory scheme and arbitrarily created multiple, disparate regimes under which North Carolina voters cast absentee ballots, and plaintiff voters in this case and in Wise are likely to succeed on their claims under the Equal Protection Clause.

The NCSBOE inequitably and materially upset the electoral status quo in the middle of an election by issuing the memoranda and giving the memoranda legal effect via the October 2, 2020 consent judgment. The court issues this temporary restraining order to maintain the status quo. Cf. Purcell, 549 U.S. at 4–6. Additionally, the constitutional harm of which plaintiff voters complain would be irreparable absent a temporary restraining order in this case and Wise. The public has a distinct interest in ensuring that plaintiffs' voting rights under the Constitution are secure. See Giovanni Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002); see also Legend Night Club v. Miller, 637 F.3d 291, 302–03 (4th Cir. 2011) ("Maryland is in no way harmed by issuance of an injunction that prevents the state from" violating the Constitution). "[P]ublic confidence in the integrity of the electoral process" is of paramount importance. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008). The memoranda, by materially changing the electoral process in the middle of an election after over 300,000 people have voted, undermines that confidence and creates confusion for those North Carolinians who have yet to cast their absentee ballots. In contrast, the relief plaintiff voters seek temporarily restores the status quo for absentee voting in North Carolina until the court can assess this case and the Wise case on a fuller record.

In opposition, defendants in this case raise various procedural arguments to plaintiffs' motion for a temporary restraining order. See [D.E. 31]. The court rejects those arguments at this early

stage in the litigation for the reasons stated in plaintiffs' comprehensive reply brief and at oral argument. See [D.E. 40-1].

Plaintiff voters in this case and in Wise have established that the Winter factors warrant a temporary restraining order in their favor. Thus, the court grants a temporary restraining order in this case and in Wise.

III.

As for defendants' previous motion to transfer venue in this case [D.E. 14], the court entered an order denying the motion on September 30, 2020 [D.E. 26]. Upon reconsideration of the record in this case, Wise, and Democracy N.C., the court finds that transferring this action and the Wise action to the Honorable William L. Osteen, Jr., pursuant to the first-filed rule better comports with Fourth Circuit precedent and the interests of justice.[5]

The Fourth Circuit recognizes the "first-filed" rule. See, e.g., Hartford Fire Ins. Co. v. Harleysville Mut. Ins. Co., 736 F.3d 255, 258 & n.1 (4th Cir. 2013); Ellicott Mach. Corp. v. Modern Welding Co., 502 F.2d 178, 180–82 (4th Cir. 1974); Golden Corral Franchising Sys., Inc. v. GC of Vineland, LLC, No. 5:19-CV-255-BO, 2020 WL 1312863, at *2 (E.D.N.C. Mar. 17, 2020) (unpublished); Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357, 360 (W.D.N.C. 2003). According to the first-filed rule, a district court has an independent, equitable basis for transferring an action where "sound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money" in separate litigation. Blue Stuff, 264 F. Supp. 2d at 360 (quoting Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 626 (D.C. Cir.

[5] Although this court cited In re Bozic, 888 F.3d 1048, 1054 (9th Cir. 2018), in its order denying defendants' motion to transfer, [D.E. 26], that case is not controlling precedent in the Fourth Circuit. Moreover, numerous developments in this case, Wise, and Democracy N.C. during the last six days demonstrate the wisdom of the Fourth Circuit's first-filed rule.

1975)); see Hartford Fire, 736 F.3d at 258 n.1 ("[W]e note that [a] court [is] free to raise the issue of the first-to-file rule sua sponte."). The "first-filed" rule provides that where parties "have filed similar litigation in separate federal fora, doctrines of federal comity dictate that the matter should proceed in the court where the action was first filed, and that the later-filed action should be stayed, transferred, or enjoined." Blue Stuff, 264 F. Supp. 2d at 360.

Courts have recognized three factors to consider "in determining whether to apply the first-filed rule: 1) the chronology of the filings, 2) the similarity of the parties involved, and 3) the similarity of the issues at stake." Id. "[T]he parties need not be perfectly identical in order for the first-filed rule to apply." Golden Corral, 2020 WL 1312862, at * 2; see Troce v. Bimbo Foods Bakeries Distrib., Inc., No. 3:11CV234-RJC-DSC, 2011 WL 3565054, at *3 (W.D.N.C. Aug. 12, 2011) (unpublished). Issues in separate cases are similar when they "bear on a common question." Berger v. United States DOJ, Nos. 5:16-CV-240-FL, 5:16-CV-245-FL, 2016 U.S. Dist. LEXIS 84536, at *32 (E.D.N.C. June 29, 2016) (unpublished).

Notwithstanding plaintiffs' initial choice of forum, the "first-filed" rule counsels in favor of transferring this case and the Wise case to Judge Osteen in the Middle District of North Carolina. Judge Osteen is currently presiding over Democracy N.C. That case was filed over four months before proceedings commenced in these actions. Additionally, the parties in all three cases are similar. Plaintiffs Moore and Berger are parties to this action and the Democracy N.C. action and are seeking injunctive relief in each action.[6] And defendants Circosta, Anderson, Carmon, and Bell

[6] Although plaintiffs in the Wise case are not parties to this action or Democracy N.C., this incongruity is outweighed by the fact that at least one plaintiff in Wise, Samuel Grayson Baum, resides in the Middle District of North Carolina and, with the consent of defendants, could have brought his action in that court in the first instance. See 28 U.S.C. § 1404(a); Wise, No. 5:20-CV-505 [D.E. 1].

are defendants in all three cases.[7] Furthermore, this case, Wise, and Democracy N.C. present substantially similar issues that "bear on a common question," i.e., defendants' initial conduct in setting the rules for North Carolina's 2020 election in accordance with Judge Osteen's order and the statutory scheme, and their conduct in changing those rules while subject to Judge Osteen's order. Notably, in Democracy N.C., Judge Osteen upheld the witness requirement and various other election requirements. Defendants issued the August 2020-19 memo in response to Judge Osteen's order, and the election began under the statutory scheme and the August 2020-19 memo. The September 2020-19 memo, however, eliminated the witness requirement. Moreover, Judge Osteen was not aware of the September 2020-19 memo until NCSBOE's counsel filed it in Democracy N.C. on Monday, September 28, 2020, after prompting from this court. The orders Judge Osteen issued following NCSBOE counsel's filing of the September 2020-19 memo illuminated the commonality of issues in Democracy N.C., Wise, and this action. Furthermore, there are no "special circumstances," such as forum shopping or bad faith filings, that cut against transferring this action under the first-filed rule. Blue Stuff, 264 F. Supp. 2d at 360.

Equitable factors also counsel transferring this action to Judge Osteen. Judge Osteen has been presiding over the Democracy N.C. action, involving similar parties and an overarching similar issue, for over four months. He conducted a two-day evidentiary hearing and issued a 188-page order granting in part the plaintiffs' motion for a preliminary injunction, largely upholding the statutory scheme for this election (including the witness requirement). See Democracy N.C., 2020 WL 4484063, at *1. As of October 2, 2020, Judge Osteen issued an expedited briefing order in that

[7] Although plaintiffs Heath, Whitley, and Swain in this action and voter plaintiffs in Wise are not parties to Democracy N.C., transferring a case under the first-filed rule does not require that the parties be "perfectly identical." Golden Corral, 2020 WL 1312862, at * 2; see Troce, 2011 WL 3565054, at *3.

case and ordered any party "requesting affirmative relief," including "injunctive relief," to "file a motion setting out the basis for that relief[]" no later than 5:00 p.m. on October 5, 2020. See Democracy N.C., [D.E. 152] 8–9. Allowing Judge Osteen to consider these actions together (even if not consolidated) constitutes "sound judicial administration" and avoids "wasteful expenditure of energy" and confusion as contemplated by the first-filed rule. See Blue Stuff, 264 F. Supp. 2d at 360. It also allows expeditious resolution of requests for injunctive relief and avoids multiple federal courts imposing potentially conflicting preliminary or permanent injunctions concerning this election. Accordingly, this court transfers this action and the Wise action to Judge Osteen in the Middle District of North Carolina.

IV.

In sum, the court GRANTS plaintiffs' emergency motion for a temporary restraining order in this case [D.E. 8] and in Wise [D.E. 3]. Defendants are TEMPORARILY ENJOINED from enforcing the September 2020-19 memo, Numbered Memo 2020-22, Numbered Memo 2020-23, or any similar memoranda or policy statement that does not comply with the requirements of the Equal Protection Clause. This order does not enjoin or affect the August 2020-19 memo. This temporary restraining order shall be in effect until no later than October 16, 2020, and is intended to maintain the status quo. See Fed. R. Civ. P. 65(b)(2). No bond is required. Cf. Fed. R. Civ. P. 65(c).

The court also TRANSFERS this action and Wise v. North Carolina State Board of Elections, No. 5:20-CV-505 (E.D.N.C.), to the Honorable William L. Osteen, Jr., United States District Judge in the Middle District of North Carolina for consideration along with Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20-CV-457 (M.D.N.C.). Judge Osteen has authority to terminate or modify this temporary restraining order, and this court is confident that Judge Osteen will schedule promptly, as needed, any preliminary injunction hearing or any hearing concerning

injunctive relief in this case, the Wise case, and the Democracy N.C. case. Having one federal judge preside over these three actions expedites final resolution of the dispute in this case, Wise, and Democracy N.C., helps to minimize voter confusion in this election, and helps to ensure that defendants are not subject to conflicting federal court orders in this election.

SO ORDERED. This 3 day of October 2020.

JAMES C. DEVER III
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:20-CV-507-D

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

INTRODUCTION

Defendants' conduct over the six days since this case was filed powerfully illustrates the Framers' wisdom in requiring that the regulation of federal elections be governed by written rules enacted ahead of time by the People's representatives in the state legislatures and Congress. All three of the numbered memos that Plaintiffs challenge are dated September 22, 2020, but at Monday's status conference Defendants told this Court that only one of them was then in effect.

On Wednesday, Judge Osteen made clear that Defendants' attempt to use the narrow preliminary injunction in *Democracy North Carolina* as a basis for eviscerating the one-witness requirement through Numbered Memo 2020-19 was "unacceptable." Order at 10, No. 20-457, Doc. 144 (Sept. 30, 2020). Heedless of that admonition, on Thursday morning, Defendants filed an opposition to Plaintiffs' motion that did not even mention Judge Osteen's order and that continued to maintain that Numbered Memo 2020-19 was still in place. Later on Thursday, Defendants issued Numbered Memo 2020-27, which directs county election officials to take no action on absentee ballots returned without a valid witness signature, pending further direction from the State Board of Elections. Defendants claim to have acted as they did "[i]n order to avoid confusion while related matters are pending in a number of courts," Numbered Memo 2020-27, but they could scarcely have done more to promote public confusion about the status of the witness requirement had they set out with that as their objective at the beginning of the week. Indeed, had Defendants truly desired to promote certainty and avoid confusion, it is a mystery why they would conduct secret negotiations to cut a deal with state-court plaintiffs undermining several statutes without consulting Plaintiffs Moore and Berger, who possess final decision-making authority in state court litigation challenging North Carolina laws. *See* N.C. GEN. STAT. 120-32.6(b).

And the week is not over. At 9:30am today, a hearing will commence at which Defendants will urge a state court judge who lacks jurisdiction to approve a collusive consent decree—a step that would change the enforcement status of the witness requirement yet again and trigger still more litigation in both state and federal court, all while voting in the general election is ongoing. Rather than allowing this intolerable situation to continue, the Court should put an end to Defendants' constantly shifting policies, which have already caused ballots with identical defects to be treated differently depending on when they were cast in violation of the Equal Protection

Clause. All of the requirements for entry of a temporary restraining order are satisfied, and the Court should enter one immediately—before the state court acts.

I. The Plaintiffs Have Standing.

a. Plaintiffs Moore and Berger are Agents of the General Assembly.

Plaintiffs Moore and Berger are agents of the General Assembly to protect its institutional right as the "Legislature" of North Carolina to regulate federal elections. The Supreme Court has made clear that "a State must be able to designate agents to represent it in federal court." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And North Carolina has made abundantly clear that "[*w*]*henever* the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the *subject* of an action in *any* State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties" N.C. GEN. STAT. § 120-32.6(b) (emphases added). In this case, the General Assembly, acting through its agents Plaintiffs Moore and Berger, asserts that the validity of its election laws has been usurped by the publication and enforcement of the North Carolina State Board of Elections' ("NCSBE") Numbered Memoranda. And as the Fourth Circuit noted recently, Plaintiffs Moore and Berger represent "the entirety of the bicameral legislative branch in North Carolina which makes this matter comparable to *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)." *N.C. State Conf. of NAACP v. Berger*, 970 F.3d 489, 500 (4th Cir. 2020). Since "state law authorizes legislators to represent the State's interests," Plaintiffs Moore and Berger "have

standing." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); *accord Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 802.[1]

Defendants' argument that § 120-32.6(b) does not confer standing because the Plaintiffs challenge the NCSBE's unilateral "executive action," entirely misses the mark. Defs' Resp. to Pls.' Mot. For TRO at 10, Doc. 31 (Oct. 1, 2020) ("Defs' Resp."). As § 120-32.6(b) clearly indicates, the General Assembly through its agents the Speaker of the House and President Pro Tempore of the Senate are "*necessary parties*" whenever the "validity" of a state law is the "subject of an action." The Defendants' Memoranda contradict and dramatically undermine the validity of several duly enacted North Carolina statutes in violation of the Elections Clause. Thus, those statutes are at the heart of this dispute and squarely within § 120-32.6(b)'s broad grant of authority to the General Assembly.

b. Plaintiffs Heath and Whitley Have Standing

Defendants next attack Heath's and Whitley's standing to raise their Elections Clause and Equal Protection claims, but each argument fails. First, Defendants contend that Heath and Whitley are "not proper parties to raise the Elections Clause claim" because they are not the General Assembly, the "institutional plaintiff that may have standing." Defs' Resp. at 10. But the Elections Clause is a structural constitutional provision meant to protect voters by allowing state legislatures—comprised of accountable elected officials—to regulate the times, places, and

[1] Defendants' argument that Swain lacks standing to bring the Elections Clause claim fares no better. The Memoranda injure Swain because they contravene that Clause—designed to regulate the very election in which he is a candidate. Swain is running for Congress, and only Congress or the General Assembly can set the times, places, and manner of that election. *Cf. Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (noting that "private" individuals have standing to assert a claim that their right to a public office has been impeded by unlawful means (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *Powell v. McCormack*, 395 U.S. 486 (1969))).

manner of elections. By issuing the Memoranda that have injured Heath and Whitley's ability to participate in the ongoing election on equal footing with all North Carolina voters and diluted their votes, Defendants have "violat[ed] . . . a constitutional principle that allocates power within government," and Heath and Whitley have "a direct interest" in objecting to them. *See Bond v. United States*, 564 U.S. 211, 222 (2011).

Second, Defendants insist that the Memoranda "do not enforce different requirements on different voters," and therefore that Heath and Whitley have suffered no injury conferring them standing to bring their Equal Protection claim. Defs' Resp. at 13. However, Defendants fundamentally misconstrue Heath's and Whitley's injuries. They have been injured by the Memoranda because, through them, Defendants unilaterally changed the election rules during an ongoing election and Heath and Whitley had already complied with the now-eviscerated requirements. Both Heath and Whitley had a qualified adult witness their absentee ballots and submitted them well before the statutory ballot receipt deadline of 5:00 p.m. on the third day after election day. With the Memoranda in effect, North Carolina voters who submit their absentee ballots can avoid these requirements. Therefore, the implementation of the Memoranda subject Heath and Whitley to one set of rules, and another set of voters to a different set of rules *during the same, ongoing election*. This is a quintessential Equal Protection injury. Moreover, with regard to vote dilution, Heath and Whitley are not asserting a right that is merely generalized and "possessed by every voter in North Carolina" *Id.* Indeed, Plaintiffs are asserting that Defendants are violating the one-person, one-vote principle affixed in the Supreme court's jurisprudence. Dilution of Heath's and Whitley's lawful votes, to any degree, by the casting of unlawful votes, violates their individual right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

Third, Defendants' claim that Plaintiffs' requested relief would merely "exacerbate[e]" Heath's and Whitley's injuries is meritless. Enjoining the challenged Memoranda—including the *revised* Numbered Memo 2020-19—would maintain the status quo, allow the ongoing election to proceed according to the same rules pursuant to which Heath and Whitley submitted their absentee ballots, and not countenance provisions that will lead to the acceptance of unlawful votes and result in vote dilution, like accepting absentee ballots after the statutory three-day-post-election grace period. N.C. GEN. STAT. § 163.231(b)(2)(b).

c. Plaintiffs' Injuries Are Redressable.

The Defendants argue that Plaintiffs' claims are not redressable. Defs' Resp. at 14. But Plaintiffs' injuries are clearly redressable. First, Defendants misconceive of the relief Plaintiffs seek when they assume that if Plaintiffs prevail the Court would enjoin Defendants from enforcing Numbered Memo 2020-19 without reverting to the previous policy, which—unlike Numbered Memo 2020-19—was consistent with Judge Osteen's order in *Democracy North Carolina*. This "relief" would "actually improve[]" Plaintiffs' position by undoing Defendants' violation of the Elections Clause and ending the unequal and arbitrary treatment of ballots. *Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013).

Second, Plaintiffs' claim that Numbered Memo 2020-23 undermines the criminal Ballot Harvesting Ban by instructing that "[i]ntake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot." This directly undermines the General Assembly's criminal prohibition on the unlawful delivery of ballots. *See* N.C. GEN. STAT. § 163-226.3. And since this is a "specifically identifiable" violation of law, the enjoining of Numbered Memo 2020-23 will provide

redress to the Plaintiffs. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 568 (1992) (internal quotation marks omitted).

d. Plaintiffs' Claims are Ripe for Judicial Review

Election Day is a mere 33 days away, but the election itself is ongoing as hundreds of thousands of North Carolinians request and cast their absentee ballots now. And these Memoranda are rewriting North Carolina election laws, creating uncertainty and causing confusion now. This case is ripe.

Ripeness turns on "the fitness of the issues for judicial decision and . . . the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). First, these issues are fit for review—no additional factfinding is necessary. *Cf. id.* at 812 (noting that "purely legal" questions are not ripe when factfinding is needed). There is no dispute that Numbered Memo 2020-19, as revised on September 22, 2020, is in effect now. Declaration of Linda Devore, Doc. 24-1 at 2 ("It was made clear that to the extent we were not already doing so, we were to immediately begin following revised Numbered Memo 2020-19's guidance under threat of removal from office.").[2] And this revised Memorandum accomplishes two things: (1) the revisions eviscerate the witness requirement by creating a ballot cure process that "substitute[s] a voter affidavit for a witness, and a witness signature, in a manner contrary to the absentee ballot procedure established by the North Carolina legislature." Status Conference

[2] On October 1, 2020, the NCSBE issued Numbered Memo 2020-27 (attached as Ex. 1) that instructs that "[c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope." This new Numbered Memo does not address those non-witnessed ballots that have already been "cured" nor does it undo the NCSBE's extension of the receipt deadline to nine days. *Id.* ("In all other respects, Numbered Memo 2020-19, as revised on September 22, 2020, remains in effect."). In any event, this temporary modification does not deprive the Court of jurisdiction to adjudicate this case. *Cf. Already, LLC v. Nike, Inc.*, 568 U.S. 85, 96 (2013) (stating that "voluntary cessation" only deprives a court of Article III jurisdiction if "the defendant . . . show[s] that the challenged behavior cannot reasonably be expected to recur").

Order at 8, *Democracy N.C.*; (2) revised Numbered Memo 2020-19 changes the receipt deadline from the statutory three days to the NCSBE-endorsed *nine* days. As a consequence, Numbered Memo 2020-19 rewrites two duly enacted statutes and its "effects" are already being "felt in a concrete way." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967).

The other two Memoranda—Numbered Memo 2020-22 and Numbered Memo 2020-23—have all the hallmarks of regulations that, even if not technically in effect now, are certainly impending. Numbered Memo 2020-22 and 2020-23 are each dated September 22, 2020. Neither one indicates that it is in "draft" or otherwise non-enforceable form, unlike other clearly pending actions taken by the Board. *See, e.g.*, Notice of Public Comment (March 19, 2020), https://bit.ly/33kFkL7. And Numbered Memo 2020-19, which was in effect for most of this week, explicitly references and incorporates in part Numbered Memo 2020-22, further obfuscating any pending nature of these Memoranda. Since these Memoranda are in final form, the "purely legal" question presented by this case is ripe now: Can the Defendants constitutionally issue these Memoranda under the Elections Clause or consistent with the Equal Protection Clause? *See Nat'l Park Hosp. Ass'n*, 538 U.S. at 808.

Second, there is clear hardship caused by delay. *Id.* at 808. The Defendants are rewriting duly enacted election statutes in the middle of an election while hundreds of thousands of North Carolinians have already cast their ballots and thousands more are casting their absentee ballots each day. There is no reason to wait to adjudicate these issues because each day these unconstitutional Memoranda are not restrained is a hardship to the General Assembly's institutional interest in regulating this election under the laws it enacted, to Plaintiff Swain's ability to run his campaign for Congress under constitutional laws, and Plaintiffs Heath's and Whitley's rights to have their votes neither diluted nor subject to arbitrary and inconsistent standards.

There is no doubt that this case is ripe and ready for adjudication.

II. The Defendants' Remaining Threshold Arguments Are Meritless.

The Defendants provide several jurisdictional doctrines for why the Court should abstain here. But none of them are applicable to this case.

a. The Anti-Injunction Act Is Inapplicable.

Defendants' Anti-Injunction Act ("AIA"), 28 U.S.C. § 2283, arguments fail. The AIA prohibits federal courts from issuing injunctions "to stay proceedings in a State court" subject to certain exceptions. *Id.* Defendants accuse Plaintiffs of attempting to "circumvent" this prohibition "by seeking to enjoin portions of [the] consent judgment" that is currently being considered in North Carolina Superior Court. Defs' Resp. at 15, Doc. 1, 2020). The Memoranda's inclusion in the proposed consent judgment, however, is irrelevant to Plaintiffs' claims before this Court that the Memoranda violate the federal constitution and therefore must be enjoined. *See* Compl. at 22, Doc. 1 (Sept. 26, 2020) (seeking a preliminary and permanent injunction "enjoining Defendants from enforcing and distributing" the Memoranda, "or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause"). Indeed, revised Numbered Memo 2020-19 has been issued, is publicly available on the NCSBE's website, and is largely in effect. Defendants cannot insulate the Memo from this Court's review by its mere inclusion in a proposed consent judgment.

Defendants nevertheless maintain that "[a]n injunction issued *against parties* to a state court proceeding is, for purposes of the [AIA], considered an injunction to stay the state court proceeding itself." *In re MI Windows & Doors, Inc., Prods. Liab. Litig.*, 860 F.3d 218, 224 (4th Cir. 2017); *see also Atl. Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). But the claims at issue in the state-court proceeding do not revolve around the

Memoranda; they are challenges to duly enacted North Carolina election laws. This Court's determination that the Memoranda are unconstitutional would not act as a stay to that proceeding, but merely determine that the NCSBE has issued three memoranda that substantially and unconstitutionally alter the election laws during an election. Such an order would not amount to a stay of the state-court proceedings, and therefore, the AIA does not bar Plaintiffs' requested relief.

Moreover, the AIA does not bar federal injunctions to prevent a collusive settlement agreement like the one Defendants hope to see approved in state court. *See, e.g.*, *In re Managed Care Litig.*, 236 F. Supp. 2d 1336, 1340 (S.D. Fla. 2002); *In re Lease Oil Antitrust*, 48 F.Supp.2d 699 (S.D.Tex.1998). And application of the AIA is particularly limited in cases brought under Section 1983. *See Employers Res. Mgmt. Co. v. Shannon*, 65 F.3d 1126, 1131 (4th Cir. 1995).

b. None of the Abstention Doctrines Apply.

The Supreme Court has repeatedly counseled that the various "abstention" doctrines are "the exception, not the rule." *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention is only warranted in "exceptional" circumstances because federal courts have an "obligation to hear and decide a case" that "is virtually unflagging." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73, 77 (2013) (internal quotation marks and citation omitted); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

Abstention is not warranted "simply because a pending state-court proceeding involves the same subject matter" as a federal proceeding. *Sprint*, 571 U.S. at 72 (citing *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 373 (1989) ("[T]here is no doctrine that . . . pendency of state judicial proceedings excludes the federal courts.")). And abstention is

to be avoided especially in areas where Congress has given concurrent jurisdiction—such as with Plaintiffs' Section 1983 claims—to both federal and state courts. *See Pittman v. Cole*, 267 F.3d 1269, 1286 (11th Cir. 2001) ("Congress has deliberately afforded the section 1983 plaintiff an alternative federal forum. It is not for the courts to withdraw that jurisdiction which Congress has expressly granted."). With these clear background principles from the Supreme Court, this Court should decline to abstain here.

i. *Pullman*

First, the Defendants argue that this Court should abstain under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), but *Pullman* has no application in this case. For a federal court to abstain under *Pullman*, there must be (1) an "unclear issue of state law" and (2) the resolution of that state-law question must "moot or present in a different posture the federal constitutional issue." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983). Yet when "there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). And here there is no ambiguity in any of the North Carolina statutes. HB 1169 Section 1.(a) clearly requires at least one witness. North Carolina General Statutes Section 163-231(b)(2)(b) clearly provides for only a three-day receipt deadline. And Section 163-226.3 clearly criminalizes unauthorized delivery of absentee ballots. There is simply no ambiguity.

The Defendants and Proposed Intervenor Defendants try to introduce ambiguity by arguing state law regarding whether the NCSBE has authority to rewrite duly enacted statutes. But whether the NCSBE has such authority is fundamentally a predicate question of *federal* constitutional law. The Elections Clause provides:

> [t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but

> the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Using the term "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole* but only to the state's legislative branch. *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814. In North Carolina, the "Legislature" is not the NCSBE—it is unequivocally the General Assembly. N.C. CONST. art. II, § 1. Thus, unlike states where the state constitution divides the "legislative authority" among multiple entities, *see Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814 (noting Arizona Constitution split legislative authority between the Arizona state legislature and the people through ballot initiatives (citing ARIZ. CONST., art. IV, pt. 1, § 1)), North Carolina has exclusively granted legislative authority to the General Assembly. *See* N.C. CONST. art. II, § 1. The General Assembly is thus the only North Carolina entity that can constitutionally regulate federal elections—it is the only "Legislature thereof." There is no delegation of legislative authority under the Constitution.

Even if such a delegation were constitutionally permissible (it is not), there is no state law ambiguity as to the NCSBE's authority that would merit *Pullman* abstention. *See Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967) ("We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction."). The statutes creating and regulating the NCSBE show the General Assembly has *expressly withheld* any authority to issue these Memoranda to rewrite statutes. Section 163-22(a) grants the NCSBE the power to "supervis[e] . . . the primaries and elections in the State," and the ". . . authority to make such reasonable rules and regulations . . . as it may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See id.* § 163-22(a) (emphasis added). Thus, the General Assembly has not granted the NCSBE any power to overrule

the duly enacted statutes governing elections or given it any form of legislative power; the NCSBE may not issue any rule or regulation that "conflict[s]" with provisions enacted by the General Assembly.

Executive Director Bell has limited statutory authority to make necessary changes to election procedures in response to "a natural disaster." N.C. GEN. STAT. § 163-27.1(a)(1). But the current pandemic is not a "natural disaster" under the statute and its implementing regulations "describing the emergency powers and the situations in which the emergency powers will be exercised," *id. at (a)*; *see* 8 N.C. ADMIN. CODE 1.0106, and the North Carolina Rules Review Commission unanimously rejected an earlier attempt by Executive Director Bell to extend her emergency powers to the pandemic, *see* Rules Review Commission Meeting Minutes at 4, Ex. 8 to Compl., Doc. 1-9 (May 21, 2020). In declining to approve the changes to the rule, the Rules Review Commission explained that the NCSBE "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. *Id.*

The cases that Defendants cite in their Response do not weigh in favor of *Pullman* abstention either. *Trump for President, Inc. v. Boockvar*, No. 2:20-CV-966, 2020 WL 4920952 (W.D. Pa. Aug. 23, 2020), deployed *Pullman* abstention because it found a number of state law requirements for absentee ballots to be ambiguous. *Id.* at 10. Here, by contrast, there is no ambiguity with North Carolina's election statutes. As discussed, "one witness" means one witness. "[T]hree days" means three days. And no person except a voter, "voter's near relative or the voter's verifiable legal guardian" may deliver absentee ballots evinces only one possible interpretation. Thus, any ambiguity found by the Western District of Pennsylvania in *Trump for President, Inc. v. Boockvar* is not found here. And the Defendants' other cases are inapplicable for the same reason. *See Burdick v. Takushi*, 846 F.2d 587, 588 (9th Cir. 1988) (holding it unclear whether

"Hawaii's ban on write-in voting is mandated by statute or . . . rather aris[ing] solely from the administrative policy of state election officials"); *Fuente v. Cortes*, 207 F. Supp. 3d 441, 449 (M.D. Pa. 2016) ("[T]he Pennsylvania election law in question is reasonably susceptible to two possible interpretations").

Texas Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020), is likewise inapposite. In that case, the Fifth Circuit criticized the district court for deciding a federal constitutional issue that could have been avoided because the Texas Supreme Court was about to definitively construe an ambiguous state statute—a far cry from the possible approval of a collusive consent decree by a state trial judge that at best would only set off additional litigation in state and federal court. Notably, the Supreme Court has counseled that courts must consider "the nature of the constitutional deprivation alleged and the probable consequences of abstaining." *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). In that vein, in *Harman* the Supreme Court said it was improper to abstain when plaintiffs asserted their right to vote had been impaired "in violation of Art. I, s 2, and the Fourteenth, Seventeenth and Twenty-fourth Amendments." *Id*. at 537. The Court advised that since the right to vote is fundamental and the case arose "just eight months before the 1964 general elections," "the importance and immediacy of the problem" counseled against any abstention. *Id*. With just 33 days to the election here, the Supreme Court's precedent in *Harman* clearly instructs that this Court should not abstain from deciding the important Elections Clause and Equal Protection Clause claims here.

ii. *Colorado River*

"Only the clearest of justifications" can support *Colorado River* abstention, and Proposed Intervenor Defendants' argument for that form of abstention is meritless. *See Colo. River Water Conservation Dist.*, 424 U.S. at 819. The Fourth Circuit has explained that *Colorado River*

abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005) (internal quotation marks omitted). "Exceptional circumstances allowing for abstention under *Colorado River* do not exist when state and federal cases are not *duplicative*, but merely raise similar or overlapping issues." *VonRosenberg v. Lawrence*, 849 F.3d 163, 169 (4th Cir. 2017) (emphasis added). To determine if such extraordinary circumstances are met, Fourth Circuit precedent calls for a two-step inquiry, and the argument for abstention fails at both steps.

First, the court must decide if the litigation is parallel with the state court proceedings, a requirement that is only satisfied if "substantially the same parties litigate substantially the same issues." *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991). This requirement is "strictly construed . . . requiring that the parties involved be almost identical." *Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 208 (4th Cir. 2006). Not only are the issues before the state court different (including numerous state law claims that do not overlap with the issues in this case), but so too are the parties different. Plaintiffs Swain, Heath, and Whitley are in no way involved in any parallel state court proceedings. Since neither the issues nor the parties are identical, *Colorado River* abstention does not apply.

But even if the Court proceeded to the second step, the litany of *Colorado River* factors do not counsel in favor of refusing to exercise jurisdiction. *See Chase Brexton Health Servs.*, 411 F.3d at 463–64 (listing the factors). For example, the state court case was filed only in late August, *cf. New Beckley*, 946 F.2d at 1074 ("The order in which the courts obtained jurisdiction matters little, since [the plaintiff] filed the suits in March and December of the same year."), there is no reason to think a federal forum in the Eastern District of North Carolina is inconvenient to hear the Elections Clause and Equal Protection claims of North Carolinians in the Eastern District, and this

case does not involve property or *in rem* jurisdiction, *see Chase Brexton Health Servs*., 411 F.3d at 465–66.

iii. *Younger*

Third, in a last effort to apply find some abstention hook, Proposed Intervenor Defendants point to *Younger v. Harris*, 401 U.S. 37 (1971). The Supreme Court has recently clarified that *Younger* abstention is appropriate in just three circumstances: (a) ongoing state criminal prosecutions, (b) civil enforcement proceedings, or (c) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions. *See Sprint*, 571 U.S. at 72. Obviously, any ongoing state court proceedings are neither criminal nor civil enforcement proceedings. And there is no order, such as a contempt proceeding or bond requirement, that Plaintiffs seek to circumvent. *See, e.g., Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987). Moreover, *Younger* abstention is "particularly unwarranted" in this case because Defendants—officers of the State whose interests the doctrine protects—have not invoked *Younger*. *Potrero Hills Landfill, Inc v. Cty of Solano*, 657 F.3d 876, 881 (9th Cir. 2011).

c. Plaintiffs' Claims Are Not Barred by Sovereign Immunity.

Defendants also argue that Plaintiffs' claims "turn on a question of state law" and is therefore barred by sovereign immunity under *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 124–25 (1984). Defs' Resp. 23, 27. Notably, another federal district court rejected the very same argument in an Elections Clause case decided earlier this week, observing that it would "undercut *Ex Parte Young* completely to conclude that simply because a federal constitutional claim requires the interpretation, or rests on the purported violation of, state law, it suddenly comes within *Pennhurst*'s grasp." *Donald J. Trump for President, Inc. v. Bullock*, 2020

WL 5810556, at *5 (D. Montana Sept. 30, 2020). This Court should reject Defendants' *Pennhurst* argument for that reason and several others.

First, *Pennhurst* does not apply to claims alleging violations of federal law. 465 U.S. at 104–05. Plaintiffs do not seek an order compelling Defendants to comply with North Carolina law. Instead, they seek a temporary restraining order that would prohibit Defendants from violating the Elections Clause's mandate that only "Legislature[s]" "shall . . . prescribe[ ]" the "Times, Places and Manner of holding" federal elections. U.S. Const. art. I, § 4.

The fact that the complaint alleges that the Numbered Memos contravene applicable North Carolina statutes does not change the analysis. Federal claims often require federal courts "to ascertain what" state law provides, but "ascertaining state law is a far cry from compelling state officials to comply with it." *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985); *see also David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 414 (1st Cir. 1985) (observing that *Pennhurst* only proscribes federal courts "from requiring states to conform their conduct to state law *qua* state law"). In fact, the Supreme Court has looked repeatedly to "'the method which the state has prescribed for legislative enactments'" to decide what constitutes state "[l]awmaking" for purposes of the Elections Clause. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932)); *see also Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Hawke v. Smith (No. 1)*, 253 U.S. 221 (1920). If Defendants' view of *Pennhurst* were correct, every one of those rulings would have violated the Eleventh Amendment.

Second, application of the *Pennhurst* doctrine to an Elections Clause claim is inappropriate because when states regulate federal elections, they do so pursuant to power delegated to them by the *federal* constitution. *See Cook v. Gralike*, 531 U.S. 510, 522–23 (2001); *U.S. Term Limits, Inc.*

v. Thornton, 514 U.S. 779, 804 (1995). Given the special relationship between state statutory enactments and the federal constitution in this context, state statutes regulating federal elections do not qualify as "state" laws for purposes of the *Pennhurst* doctrine. *Cf. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14–15 (2013) (declining to apply presumption against preemption in Elections Clause context in part because when states regulate federal elections they do not exercise any of their "historic police powers").

d. *Rooker-Feldman* Does Not Deprive This Court of Jurisdiction.

Defendants and Proposed Intervenor Defendants invoke the *Rooker-Feldman* doctrine, an *extraordinarily* narrow rule barring the appeal of state court judgments to lower federal courts, to argue that entry of a judgment in the state court action would divest this Court of jurisdiction. *See* 28 U.S.C. § 1257 (limiting direct appeals of state court judgments to the Supreme Court); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 414 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Yet the Supreme Court has counseled against lower courts' reliance on this doctrine because it has wrongly "been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Exxon Mobil v. Saudi Basic Industries*, 544 U.S. 280, 283 (2005). To that end, *Rooker-Feldman* only applies when (1) the "losing party in state court," (2) "filed suit in federal court," (3) "*after* state proceedings ended," (4) "complaining of an injury *caused* by the state-court judgment," and (5) "seeking review and rejection of that judgment." *Id*. at 291 (emphases added).

Before considering any other of the mandatory elements of *Rooker-Feldman*, it is plain that the doctrine does not apply here—there has been no state court judgment, and this case was filed *before* any relevant judgment that a state court might issue in the future. Accordingly, *Rooker-Feldman* does not and will not apply. "Neither *Rooker* nor *Feldman* supports the notion that

properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id*. at 292; *see also VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 406 (6th Cir. 2020) (Sutton, J., concurring) ("Absent a claim seeking review of a final state court judgment, a federal court tempted to dismiss a case under *Rooker-Feldman* should do one thing: Stop. If the temptation lingers, the court should try something else: Reconsider.").

III. The Plaintiffs Are Likely To Succeed on the Merits.

The Plaintiffs are likely to succeed on the merits for both their Elections Clause and Equal Protection Clause claims. As a result, a Temporary Restraining Order should be issued here.

a. Elections Clause

The Defendants' argument on the merits of the Elections Clause boils down to an argument that the NCSBE actually has the authority to rewrite the General Assembly's duly enacted statutes regulating this election. As discussed, the U.S. Constitution's exclusive grant of power to the state legislatures plainly forecloses this argument. North Carolina's Constitution establishes that the General Assembly is the "Legislature" of North Carolina. Moreover, the North Carolina Constitution—unlike the Arizona Constitution in dispute in *Arizona Redistricting Commission*—vests the legislative authority exclusively in the General Assembly. And this exclusive grant of authority is encapsulated in North Carolina's robust nondelegation doctrine: "[T]he legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *See Adams v. N. C. Dep't of Nat. & Econ.*

Res., 249 S.E.2d 402, 410 (1978) (noting General Assembly can only delegate adjudicative and certain rule-making power).

Notwithstanding the Elections Clause, the Defendants contend that the General Assembly has delegated this legislative power to the NCSBE. They point to three provisions. First, they point to the NCSBE's supervisory authority over the elections. But, as previously mentioned, any rules or regulations promulgated under that authority must not conflict with the provisions duly enacted by the General Assembly. *See* N.C. GEN. STAT. § 163-22(a).

Second, Defendants point to Executive Director's emergency powers under § 163-27.1(a)(1). This argument has already been rejected in by the North Carolina Rules Review Commission. Compl. Ex. 8 (Sep. 26, 2020) (Doc. 1-9 ("May 21, 2020 Meeting Minutes")). But more to the point, the Defendants do nothing to grapple with the actual text of § 163-27.1(a)(1). The provision grants the Executive Director "emergency powers" when (1) "the normal schedule for election is disrupted" by (2) a "natural disaster," "[e]xtremely inclement weather," or "armed conflict." The Defendants do not suggest that the *schedule* for the election has in anyway been disrupted, even if the pandemic has altered many facets of daily life. Yet even putting that aside, the ordinary meaning of "natural disaster" does not include a pandemic. *See* "Natural Disaster," *Merriam-Webster.com Dictionary*, ("A sudden and terrible event in nature (such as a hurricane, tornado, or flood) that usually results in serious damage and many deaths"), available at https://bit.ly/3n9KuBk; *see also Edwards v. Univ. of N. Carolina at Chapel Hill*, 421 S.E.2d 383, 385 (N.C. Ct. App. 1992) ("Unless a word in a statute has acquired a technical meaning or the language of the statute indicates that a special use is intended, it must be given its 'common and ordinary meaning.'"). There may be a policy argument that the Director should have this power, but there is no question that the General Assembly has not given it to her by granting her certain

emergency powers during a "natural disaster." Since the Director lacks this emergency power, the Proposed Intervenor Defendants reliance on cases from states that have expressly delegated such power during "outbreak[s] of disease" are easily distinguished. *See Donald J. Trump for President, Inc. v. Bullock*, 2020 WL 5810556, at *10 (D. Mont. Sept. 30, 2020).

Third, Defendants point to a statute gives the NCSBE limited remedial power to make interim rules and regulations. *See* N.C. GEN. STAT. § 163-22.2. But here again the Defendants do not grapple with the statutory text. Section 163-22.2 only grants the NCSBE this power when "any portion of Chapter 163 of the General Statutes" has been "held unconstitutional or invalid by a State or federal court or is unenforceable because of" a Voting Rights Act violation. *Id*. But as Judge Osteen discussed in his September 30 order, the witness requirement *has not* been found unconstitutional. And Defendants point to no other court decision finding the receipt deadline, postmark requirement, or ballot harvesting ban unconstitutional. Whatever authority the Board has under § 163-22.2, it does not include rewriting laws that have never been found unconstitutional "by a state or federal court."

b. Equal Protection Clause

In attempting to undermine Plaintiffs' Equal Protection claims, Defendants fundamentally misconstrue those claims. Defendants first contend that, far from creating arbitrary and nonuniform rules that will result in the unequal evaluation of ballots, the Memoranda will "ensure uniformity and consistency" and "impose clear rules that w[ill] apply to any mail-in absentee ballot cast in North Carolina as part of the November 2020 election." Defs' Resp. at 26–27. As Plaintiffs made clear, however, over 150,000 voters cast their ballots before issuance of the Memoranda on September 22, 2020, and therefore worked to comply with the witness requirement and the lawful ballot delivery requirements. But under the Memoranda, the witness requirement is nullified, and

absentee ballots can be received up to nine days after election day. Consequently, if use of the Memoranda is not enjoined, North Carolina will be administering its election in a *different manner* than before September 22, subjecting its electorate to arbitrary and disparate treatment.

Defendants also argue that Plaintiffs' vote dilution claim fails because such a claim "must prove that the State failed to afford the votes of one group of voters the same weight as those of others." *Id.* at 28. This argument fails to account for the Supreme Court's most recent case about vote-dilution claims. In *Gill v. Whitford*, the Court addressed whether plaintiffs had standing to challenge legislative districts as political gerrymanders. See 138 S. Ct. at 1929-33. It ultimately held that the plaintiffs there had not established standing because they failed to introduce evidence at trial that they lived in a politically gerrymandered district. *Id.* at 1931-32. In doing so, the Court emphasized that "a person's right to vote is 'individual and personal in nature,'" *id.* at 1929 (quoting *Reynolds*, 377 U.S. at 561), such that "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage," *id.* (quoting *Baker*, 369 U.S. at 206). To avoid confusion, it repeated that "the holdings in *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were 'individual and personal in nature,'" *id.* at 1930 (quoting *Reynolds*, 377 U.S. at 561), "because the claims were brought by voters who alleged 'facts showing disadvantage to themselves as individuals,'" *id.* (quoting *Baker*, 369 U.S. at 206). The Court's repeated, unmistakable focus on individual voting rights as the basis for vote-dilution claims makes clear that the racial-gerrymandering and one-person, one-vote cases discussed in *Gill* and cited by Defendants are examples of—not limits on—cognizable vote-dilution claims. "Thus, 'voters who allege facts showing disadvantage to themselves as individuals'"—be it from malapportioned districts or racial

gerrymanders or voter fraud or the counting of unlawful ballots—"'have standing to sue' to remedy that disadvantage." *Id.* at 1929 (quoting *Baker*, 369 U.S. at 206).

IV. The Remaining Factors Weigh in Favor of Granting a Temporary Restraining Order.

Finally, the other factors counsel in favor of granting a temporary restraining order. Defendants' arguments to the contrary essentially collapse into a single argument that the Plaintiffs have not suffered any injury. Yet undoubtedly the General Assembly has suffered an irreparable institutional injury from having its statutes nullified and being deprived of its prerogative under th Elections Clause. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). And Plaintiffs Heath's and Whitley's right to the equal protection of their right to vote cannot be remedied by damages and therefore constitutes irreparable harm. *See NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 526 (M.D.N.C. 2012) (citing *A Helping Hand, LLC v. Baltimore Cnty., MD*, 355 F. App'x 773, 776–77 (4th Cir. 2009)); *see also Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction.").[3]

The Defendants argue that denying the temporary restraining order would be in the public interest because their Numbered Memoranda are part of the "orderly administration of an election." Defs.' Resp. at 29. But this argument is completely misplaced as it is the NCSBE itself that is undoing its own regulations in the original Numbered Memo 2020-19 (as published on

[3] The Proposed Intervenor Defendants separately argue that a temporary restraining order is not in the public interest because they say this case is a case about the North Carolina Constitution. Prop. Intervenor's Prop. Memo. in Opp. to Pls.' Mot. for a TRO. at 28 (Doc. 30-1). As Plaintiffs' *federal* Elections Clause claim and *federal* Equal Protection Clause claim show, Proposed Intervenor Defendants' argument about state constitutions has nothing to do with this case.

August 21, 2020) and rewriting the duly enacted election statutes in the *middle of voting* and after *hundreds of thousands* have cast their ballots. The only way to ensure "public confidence in the integrity of the electoral process" is to stop the NCSBE's repeatedly policy changes and other unconstitutional actions. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). The public interest thus accords with the Plaintiffs' request for a temporary restraining order.

CONCLUSION

The Court should grant Plaintiffs' motion for a temporary restraining order.

Dated: October 2, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.2(f)(3), the undersigned counsel hereby certifies that the foregoing Reply Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order, including body, headings, and footnotes, contains 7,279 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2020, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing, and served on counsel registered to receive CM/ECF notifications in this case.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Civil Action No. 5:20-cv-00507-D

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN, Plaintiffs, v. DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections, Defendants.	**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER [D.E. 8]**

INTRODUCTION

Plaintiffs—Republican legislators, candidates, and voters—invite this Court to wade into their attack on the State Board of Elections, seeking to undermine the Board's unanimous bipartisan decision—reached after full and lengthy consideration and debate—to make a few modest accommodations to voters to resolve a string of good-faith legal challenges arising from the unparalleled circumstance of having to conduct an election amid a global pandemic.

As detailed below, the Court would have to go to truly extraordinary lengths to accept plaintiffs' invitation. Among other things, it would have to disregard numerous procedural and jurisdictional hurdles and the principles that underlie them, rule on multiple issues of North Carolina law that are currently pending before a North Carolina court, and displace the State Board of Elections as the body that is legislatively authorized to decide how best to harmonize necessary adjustments to state elections procedures with state law under exigent circumstances.

Accepting plaintiffs' invitation would also prolong the uncertainty that voters and election administrators face. Ending that uncertainty, and doing so in a way that honors the intent and purpose of North Carolina's elections statutes, while avoiding the much more far-reaching measures that plaintiffs in state and federal litigation have sought, are the precise reasons why the State Board decided to enter into the proposed consent judgment currently pending before a North Carolina court.

That proposed consent judgment makes three modest changes to procedures to be employed for this year's elections: (1) fulfilling the purpose of the witness requirement by allowing voters to cure deficiencies in their own absentee ballots by attesting that they, in fact, marked the ballot; (2) extending by a few days the deadline for receipt of absentee ballots that are postmarked by Election Day, to match the deadline for overseas ballots and accommodate the U.S. Postal Service's warning that more time is needed because of this year's unprecedented strain on the postal system; and (3) requiring individuals who return absentee ballots in person to attest verbally to an elections official (who then logs the attestation), rather than on a written log, that they are either the voter or a near relative and therefore are legally authorized to deliver the ballot. No statutes are being ignored. No policies are being overwritten.

As the State Board unanimously concluded, making these accommodations is not only authorized by State law, it is also a good outcome for the State. Under the agreement, the plaintiffs will withdraw multiple other requests, including further expanding early voting, eliminating the witness rule and postmark requirement altogether, and allowing for unsupervised absentee-ballot drop-boxes. The State Board rejected all of those demands, and believes they would be ill-advised for numerous reasons. Impeding entry of the consent judgment would risk reviving those claims. This Court should not accept plaintiffs' invitation to interpret state law on the flimsy bases they press here.

STATEMENT OF FACTS

A. North Carolina's Absentee-Ballot Restrictions.

North Carolina has a statutory scheme that is designed to limit absentee-ballot fraud:

- Prohibition against anyone other than the voter or the voter's near relative or guardian making an absentee ballot request, N.C. Gen. Stat. § 163-230.2(a);
- Prohibition against anyone other than the voter, the voter's near relative or guardian, or member of a multipartisan assistance team returning in person an absentee ballot request, N.C. Gen. Stat. § 163-230.2(e);
- Prohibition against anyone other than the voter or the voter's near relative or guardian returning a marked absentee ballot in person, N.C. Gen. Stat. § 163-226.3(a)(5)
- Administrative rule requiring a person returning an absentee ballot in person to provide identifying information in writing and certifying that the person returning the ballot is the voter or voter's near relative or guardian, 08 NCAC 18. 0102. The rule--which became effective in December 2018--states that county boards of elections "may consider the delivery of a ballot in accordance with this rule in conjunction with other evidence in determining whether the container-return envelope has been properly executed" and that "[f]ailure to comply with this Rule shall not constitute evidence sufficient in and of itself to establish that the voter did not lawfully vote his or her ballot." *Id.*

- Witness certification requirement that confirms that the voter marked the ballot or caused it to be marked in the voter's presence.

B. COVID-19 and the Global Pandemic

The effects of COVID-19, both on public health and on a wide variety of activities are, by now, well-known. The COVID-19 pandemic has been widely recognized as the greatest global health crisis in at least a century. In our State alone, aAt least 207,380 people in North Carolina have had laboratory-confirmed cases of COVID-19 and at least 3,441 have died from the virus. *See* https://covid19.ncdhhs.gov/, accessed Sept. 27, 2020.

On March 25, 2020, the President of the United States issued a declaration of disaster for the State as a result of the COVID-19 pandemic. This disaster declaration is still in place.

C. Remedial Actions by the State Board of Elections

On March 20, 2020, the Executive Director instituted a temporary and permanent rulemaking process to amend the rule governing the use of her emergency powers under section 163-27.1. The rule at the time allowed the Executive Director to exercise her emergency powers in response to a catastrophe resulting in a disaster declaration by the President of the United States. But because the President had not yet issued a declaration of disaster, the Executive Director had to seek a rule change to allow her to reschedule the Republican second primary in Congressional District 11 from May 12 to June 23. Ex. A. The Rules Review Commission, in a summary opinion, declined to make the rule change permanent. Contrary to the Legislators' allegations, the rule change was not a "power grab" (Br. at 3) but an attempt to allow *members of the Legislators' own party* to choose their nominees under safe conditions.

On March 26, 2020, the Executive Director sent a letter to the North Carolina General Assembly and the Governor to address the issues raised by COVID-19, including *inter alia,* permitting postage to be pre-paid for absentee ballots and reducing or eliminating the witness requirement for elections conducted in 2020.

And finally, on July 17, 2020, the Executive Director issued an emergency order requiring county boards of elections to have minimum weekend hours, minimum number of sites in proportion to

registered voter population, and minimum sanitation and hygiene standards. Ex. B. Because the President's disaster declaration was in effect, the Executive Director did not need to request a rule change to do so. This emergency order remains unchallenged.

D. The Enactment of Session Law 2020-17

On June 11, N.C. Sess. Law 2020-17 went into effect. This law made a number of changes in response to the COVID-19 pandemic, including: reducing the requirement of having two witnesses for absentee ballots to one witness and providing for absentee ballot requests to be made online. 2020 N.C. Sess. Laws 17, §§ 1.(a), 7.(a).

E. United States Postal Service Delays

On July 30, 2020, Thomas J. Marshall, General Counsel of the United States Postal Service wrote North Carolina's Secretary of State, warning that North Carolina elections law relating to absentee ballot deadlines was "incongruous with the Postal Service's delivery standards." *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D.P.A.), Dkt. 1-1 at 53-55. USPS stated that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned on time or be counted." *Id.* IUSPS recommended that elections officials "allow 1 week for delivery to voters" and that civilian voters "should generally mail their completed ballots at least one week before the state's due date. In states that allow mail-in ballots to be counted if they are *both* postmarked by Election Day *and* received by election officials by a specific date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.* Accordingly, North Carolina voters can postmark their ballot by Election Day, but because of USPS delays, may not have their ballots counted.

F. Previous Action: *Democracy NC v. North Carolina State Board of Elections*

On May 22, 2020, voting-rights groups and individual voters filed an action in the U.S. District Court for the Middle District of North Carolina. *See Democracy North Carolina v. NC State Board of Elections*, 2020 U.S. Dist. LEXIS 138492 (Aug. 4, 2020). In that action, plaintiffs challenged various provisions of North Carolina election law, alleging that in the context of the COVID-19 pandemic, those

election law provisions infringe on their rights under federal law. Among the challenged provisions of North Carolina law are the witness requirement for mail-in absentee ballots and the restrictions on how absentee ballots can be returned to county boards of elections. The plaintiffs also sought procedures for curing deficiencies in returned absentee ballots. The court granted permissive intervention to Moore and Berger, the Legislator Plaintiffs in this action. The State Board Defendants vigorously defended against these claims.

On August 4, 2020, following a two-day evidentiary hearing and a third day of oral argument, the court ruled on plaintiffs' preliminary injunction motion. *Id* . In its 188-page opinion and order, the court largely denied the preliminary injunction. However, the court enjoined defendants "from the disallowance or rejection, or permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation," and directed the adoption of procedures "which provide[] a voter with notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." *Id.* at *182. These changes were necessary, the court ruled, because North Carolina's witness requirement as statutorily authorized was likely unconstitutional. Thus, the court enjoined the State Defendants from "the disallowance or rejection . . . of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Id.* at 187. Further, the court concluded that "when the ballot is rejected for a reason that is curable, such as incomplete witness information, or a signature mismatch, and the voter is not given notice or an opportunity to be heard on this deficiency, the court finds this 'facially effect[s] a deprivation of the right to vote.'" *Id.* at 156. This "compelled" the court to find that the absentee-ballot statutes were "constitutionally inadequate" absent a statewide cure procedure. *Id.* at 157.

Though the court denied much of the requested relief, it noted that "Plaintiffs have raised genuine issues of concern with respect to the November General Election. Should Legislative and Executive Defendants believe these issues may now be discounted or disregarded for purposes of the impending election, they would be sorely mistaken." *Id*. at *4No party, including Legislative Defendants, . appealed.

To attempt to comply with this injunction and pursuant to its statutory authority under section 163-22.2, the State Board released guidance that allowed voters to cure voter signature defects but required a voter to re-vote her ballot for witness signature defects. Soon thereafter, the State Board became concerned that the cure mechanism did not provide sufficient notice or opportunity to be heard on witness signature defects and that it disparately affected the rights of certain groups of voters, thereby giving rise to the risk of additional litigation that would hamper an orderly election process.

As a result, and in a good-faith effort to ensure full compliance with the injunction while also complying with other legal obligations, the State Board directed county boards not to disapprove any ballots until a new cure procedure that would comply with the State Defendants' understanding the injunction could be implemented. On September 22, 2020, the State Board instituted the cure procedure attached to the proposed consent judgment. The State Board subsequently notified the federal court of its cure mechanism process.

G. State Court Action: *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*

On August 10, 2020, the North Carolina Alliance for Retired Americans, with several individual voters, filed an action in Wake Superior Court. Plaintiffs challenge: (1) limitations on the number of hours and days that counties can offer one-stop in-person absentee voting; (2) the witness requirement for mail-in ballots; (3) the lack of pre-paid postage for mail-in absentee ballot return envelopes; (4) rejection of mail-in absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, given concerns over delivery delays and operational difficulties with the United States Postal Service; (5) rejection of absentee mail-in ballots due when the voters signature does not match the signature on file with a board of elections; and (6) restrictions on assistance with requesting a returning mail-in absentee ballots. On August 18, 2020, plaintiffs moved for a preliminary injunction.

On August 12, 2020, the Legislative Defendants filed a notice of intervention as of right in the *NC Alliance* action. That intervention as of right was effected by the filing of the notice, and they are now

parties to that action as intervenor-defendants on behalf of the General Assembly. *See* N.C. Gen. Stat. §§ 1-72.2 and 1A-1, Rule 24(c).

H. State Board's Unanimous Bipartisan Decision to Resolve These Cases

On September 15, 2020, the State Board met to discuss with agency counsel and counsel at the North Carolina Department of Justice a strategy to resolve these cases. Because the conversation was protected by the attorney-client privilege, the Board members met with their attorneys in closed session. After lengthy discussion, the Board voted unanimously to propose an offer of settlement.

Eight days later, on September 23, after the joint motion for entry of a consent judgment became public, the two Republican members of the Board resigned. In their resignation letters, they suggested that counsel from the North Carolina Department of Justice had deceived them and they did not understand the vote they were taking. Ex. C. Records from the Board's meeting with counsel plainly belie those claims.

On September 25, the remaining Board members voted to waive attorney-client privilege as to the meeting minutes and preparation materials, including memoranda written by agency staff and outside counsel, explaining various options and opportunities for compromise. Ex. D. The materials made clear that Counsel from the Attorney General's office had properly informed the Board of their options and had in no way deceived them. Later that night, it became public that the North Carolina GOP had pressured the Republican members to resign. Ex. E.

I. The Proposed Consent Judgment

On September 22, 2020, the *NC Alliance* plaintiffs and State Board defendants filed a Joint Motion for Entry of a Consent Judgment with the superior court. Under the proposed consent order, plaintiffs agreed to drop many of their demands, including expanded early voting, elimination of the witness requirement for mail-in absentee ballots, and pre-paid postage for mail-in absentee ballot return envelopes. The State Defendants agreed: (1) to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine (9) days after Election Day to match the UOCAVA deadline, in keeping with the guidance received on July 30, 2020 from the Postal Service; (2) implement the cure

process set forth in N.M. 2020-19, as revised; and (3) establish separate mail-in absentee ballot "drop off stations" staffed by county board officials at each early voting site and at each county board of elections to reduce the congestion and crowding at early voting sites and county board offices. Plaintiffs agreed to accept these measures, which fell far short of their demands, "as a full and final resolution of Plaintiffs' claims against Executive Defendants related to the conduct of the 2020 elections." The hearing on the joint motion is set for Friday.

ARGUMENT

I. Legal Standard

The same standards that apply to preliminary injunctions apply to a motions for a temporary restraining order. *See, e.g., U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 281 n.1 (4th Cir. 2006). To obtain a TRO, the moving party must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs have the burden of proof on each factor. *Winter*, 555 U.S. at 20. Additionally, a plaintiff must show that success on the merits is likely "regardless of whether the balance of hardships weighs in his favor." *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346 (4th Cir. 2010), *vacated on other grounds*, 559 U.S. 1089 (2010). This burden requires more than simply showing that "grave or serious questions are presented." *Id.* at 347. Like a preliminary injunction, a TRO is an "extraordinary remedy," and requires a showing of immediate threatened harm. *N.C. State Bd. of Dental Examiners v. FTC*, 2011 U.S. Dist. LEXIS 12696, *4 (E.D.N.C. 2011).

II. Plaintiffs Have No Likelihood of Success on the Merits

Plaintiffs' claims have numerous jurisdictional and procedural infirmities—each of which is an independent ground for denying their motion for temporary restraining order.

A. Plaintiffs Lack Standing.

Standing requires that a party show an "invasion of a legally protected interests that is concrete and particularized and actual or imminent." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64

(1997). The injury must also be "fairly traceable to the challenged action" and "redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Prudential standing requires that a party "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (internal quotations omitted).

1. Plaintiffs Lack Prudential Standing.

The Legislators and candidate are not proper parties to raise the Elections Clause or the Equal Protection claims. The voters are not proper parties to raise the Elections Clause claim.

"[A] party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). A plaintiff ordinarily "cannot rest his claim to relief on the legal rights or interests of third parties." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). Here, the plaintiffs claim that the N.M. "usurp the General Assembly's sole authority to prescribe the regulations governing federal elections in North Carolina" pursuant to the Elections Clause. Dkt. 1, ¶ 84. But none of the plaintiffs are the General Assembly.

The Elections Clause vests authority to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives . . . in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. The term "Legislature" means the lawmaking functionaries of the state, including state legislatures and any other entities to which a state may delegate lawmaking authority, including courts. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 803 (2015). Accordingly, if the Elections Clause claim could be brought here, it would beis the General Assembly as an institutional plaintiff that may have standing. *Id.* at 803.

But none of the plaintiffs here are either the General Assembly or have been delegated lawmaking functions. The Legislators allege in their complaint that, as the "leader[s]" of the North Carolina legislative chambers, they "represent[] the institutional interests of th[ose] bod[ies] in this case." Dkt. 1, ¶¶ 7, 8. But the Legislators point to no authority—statutory or common law—that vests the right within the Speaker and President Pro Tem to represent their entire respective chambers in litigation of this

kind. *See also Raines*, 521 U.S. at 829 (noting that the plaintiffs "had not been authorized to represent their respective Houses of Congress").

The Legislators rely on N.C. Gen. Stat. § 1-72.2 and 120-32.6 for their claimed authority to "represent both the institutional interests of the General Assembly and the interest of the State as a whole in this litigation." Br. at 10. But their reliance on these statutes is misplaced. Both statutes only apply in actions "in which validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged." (N.C. Gen. Stat. §§ 1-72.2(a), (b); 120-32.6). Here, plaintiffs challenge only *executive* action. Accordingly, these statutes do not to grant them authority to represent the Legislature as a whole in this case.

Moreover, neither the Legislators nor the candidate can bring the Equal Protection Clause claim. The right to participate in elections on an equal basis is a right that belongs to the voter, not to legislators who bring their claims in their official capacity or as candidates for election. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Therefore, neither the Legislators nor the candidate has standing to bring the Equal-Protection Claim.

2. Plaintiffs' Claims Are Not Ripe.

Plaintiffs' challenges to the constitutionality of N.M. 2020-22 and 2020-23 are not ripe. The ripeness doctrine prevents courts "through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect agencies from judicial interference until an administration decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). To determine ripeness, courts consider "whether resolution of the tendered issue is based upon events or determinations which may not occur as anticipated." *A/S J. Ludwig v. Tidewater Const. Co.*, 559 F.3d 928, 932 (4th Cir. 1977).

Plaintiffs seek to enjoin the State Board from "enforcing and distributing" N.M. 2020-22 and 2020-23. Dkt. 1 at 22. But the State Board has not issued those memos. They are the subjects of the proposed consent judgment in *NC Alliance*, which has not yet been entered. If the joint motion is granted

and the proposed consent decree is entered unchanged, the State Board will issue N.M. 2020-22 and 2020-23. But it is possible the court in *NC Alliance* will decline to enter the proposed order or make changes to its substance. The N.M. will not take effect until then.

For these reasons, plaintiffs' request that this Court rule on the State Board's authority to issue these N.M. is, as the Fourth Circuit in *Tidewater Construction Company* admonished, "based upon events or determinations which may not occur as anticipated."

3. Plaintiffs Failed to State an Injury.

None of the plaintiffs can show injury from the N.M. To show injury-in-fact, a plaintiff must demonstrate that the injury is "actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 180-81 (2000).

Initially, unless the court in *NC Alliance* enters the proposed consent decree, N.M. 2020-22 and 2020-23 will not go immediately into effect. As a result, none of the plaintiffs can claim that these N.M. are currently causing them any injury.

The Legislators separately argue that they are injured under the Elections Clause because they have an interest in "the validity of the duly-enacted laws" of North Carolina and a "prerogative to regulate the federal elections in North Carolina." Dkt. 1, ¶ 73. But under long-standing Supreme Court precedent, these types of injuries are institutional injuries—not ones borne by individual legislators. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 821, 829 (1997) (holding that individual members of Congress did not suffer an injury sufficient to challenge the Line Item Veto Act because it would dilute the efficacy of "all Members of Congress and both Houses . . . equally."). By contrast, only the legislature as a whole has the authority to assert an institutional injury. *Arizona Independent Redistricting Comm'n*, 576 U.S. at 802 (recognizing an injury when the Arizona Legislature as a whole asserted its institutional injury of forgoing authority to perform redistricting duties). Here, because the Legislators represent just two of the members of the General Assembly, they alone cannot assert any alleged institutional injury relating to the regulation of elections in North Carolina and the enactment of statutes.

Moreover, the Legislators and the candidate have not alleged any injury resulting from any perceived vote-dilution or uneven enforcement of laws.

Nor do the voters succeed. They assert two injuries: that the N.M. enforce different requirements on different voters and that the N.M. unlawfully "dilute" their votes. Even if the voters' claims were cognizable, the injuries they claim are not.

The N.M. do not enforce different requirements on different voters, but rather do the exact opposite. *See* N.M. 2020-19 ("County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides."). And N.M. 2020-22 and 2020-23 are not yet in effect. Therefore, the only State Board action that could have injured anyone now is the enforcement of N.M. 2020-19. But the voters have failed to show that implementation of N.M. 2020-19 has imposed different requirements *on them*.

N.M. 2020-19 provides a cure mechanism for voters to correct deficiencies in the completion of their absentee-ballot container envelopes. That memo does not get enforced unless an absentee voter makes errors when completing her container envelope and a cure is required. Both voters allege that they have already returned their ballots by mail and their ballots have been accepted. Dkt. 1, ¶¶ 9, 10. Accordingly, both voter-plaintiffs appear to have made no errors on their envelopes, avoiding triggering the memo's provisions. Therefore, it is impossible for the implementation and enforcement of the memo to have had any effect—much less injury—on either of the voter plaintiffs.

Moreover, the right that the voters seek to assert—that only properly marked ballots are counted—is possessed by every voter in North Carolina, and therefore does not rise to an injury incurred by any one particular voter. *See, e.g.*, *Hollingsworth v. Perry*, 570 U.S. 693, 705-06 (2013) (A litigant raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy); *Lance v. Coffman*, 549 U.S. 437, 439 (2007); *Lujan*, 504 U.S. at 575. The voter plaintiffs have not shown any particularized injury here.

4. Plaintiffs Seek Relief That Does Not Redress Their Alleged Harms.

Plaintiffs seek to enjoin the effect of N.M. 2020-19 "to the extent [it] overrule[s] the enactments of the General Assembly," including the witness requirement. But if this Court were to enjoin the implementation of N.M. 2020-19, the State would have no cure procedure in place at all. The State Board is currently enjoined from rejecting any ballots without providing a cure process so that voters may redress curable deficiencies. *Democracy NC*, Dkt. 124 at 187. Without N.M. 2020-19, the State Board would have no way of rejecting *any* absentee ballots, exacerbating plaintiffs' perceived injury resulting from an alleged elimination of the witness requirement. Plaintiffs "must seek relief that actually improves their position." *Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013). The relief Plaintiffs have requested here "worsen[s] plaintiffs' injury rather than redressing it." *Id.* at 1135.

An injunction against the ballot return procedure would have similar effect. The provision plaintiffs' object to—accepting ballots that cannot be verified as having been returned by the voter or the voter's near relative or guardian—is not a provision that was implemented for the first time here. N.M. 2020-23. Rule 08 NCAC 18 .0102 (effective Dec 2018) explicitly states that failure to confirm that an absentee ballot was returned by the voter or a voter's near relative or guardian "shall not constitute evidence sufficient in and of itself to establish that the voter did not lawfully vote his or her ballot." Enjoining the N.M., which only reiterates this preexisting rule and does not change it, therefore does not grant plaintiffs the relief they seek.

B. Plaintiffs' Requested Relief Is Barred by the Anti-Injunction Act.

Plaintiffs' attempt to avoid litigating these issues in the first-filed state-court proceeding should be rejected. In that state-court case, the Legislators intervened to oppose the consent judgment, and ground their opposition in part on the same arguments they make here. *See* LDs' Opp to Joint Motion for Entry of a Consent Judgment, *NC Alliance for Retired Americans*, No. 20 CVS 8881. But rather than let those arguments be judged in the first instance by the state court in the proceedings in which they are relevant, they seek injunctive relief in federal court to prohibit the consent judgment from going into effect. "[A]n injunction to stay proceedings in a State court" would be barred by the Anti-Injunction Act.

28 U.S.C. § 2283. Plaintiffs should not be permitted to circumvent this rule by seeking to enjoin portions of a consent judgment that are currently under consideration in a separate state-court action.

The Anti-Injunction Act "is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 250 (4th Cir. 2013) (quoting *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970)). Here, plaintiffs seek "preliminary and permanent injunction[s] enjoining Defendants from enforcing and distributing" each N.M. Complaint, Prayer for Relief (e)-(g). These proposed injunctions, directed at the party to a state-court action—an action in which the Legislative-Plaintiffs are also parties—and aiming to prohibit a certain outcome of that action, plainly fall within the scope of the Act. "An injunction issued *against parties* to a state court proceeding is, for purposes of the Act, considered an injunction to stay the state court proceeding itself." *In re MI Windows & Doors, Inc., Prods. Liability Litig.*, 860 F.3d 218, 224 (4th Cir. 2017); *Atlantic Coast*, 398 U.S. at 287 ("the prohibition of [§] 2283 cannot be evaded by addressing the order to the parties").

Thus, the proposed injunction violates the Anti-Injunction Act unless it falls within one of the Act's three exceptions. *Ackerman*, 734 F.3d at 250. No exception applies here. The first exception applies "when [a federal] statute creates 'a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Id.* (quoting *Mitchum v. Foster*, 407 U.S. 225, 237 (1972)). Plaintiffs portray their claims as emerging from civil rights violations under § 1983. But courts should not lightly use § 1983 to intervene in state-court proceedings. *See, e.g.*, *Hawaii Housing Auth. v. Midkiff*, 463 U.S. 1323, 1325 (1983) (Rehnquist, J.) ("Where vital state interests are involved, a federal court should refrain from enjoining an on-going state judicial proceeding unless state law clearly bars the interposition of constitutional claims, or some extraordinary circumstance exists requiring equitable relief."). Also, because plaintiffs do not have standing to assert their claims, there is no § 1983 action properly before this Court. The "expressly authorized" exception to the Act does not apply. *See Atlantic Coast Line*, 398 U.S. at 297 ("Any doubts as to the propriety of a federal injunction against state court proceedings should

be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.").

The "necessary in aid of its jurisdiction" exception "is widely understood to apply most often when a federal court was the first in obtaining jurisdiction over a *res* in an *in rem* action and the federal court seeks to enjoin suits in state courts involving the same *res*." *In re Am. Honda Motor Co., Inc., Dealerships Relations Litig.*, 315 F.3d 417, 439 (2003). The third exception, "to protect or effectuate [a federal court's] judgments," or the "relitigation exception," "was designed to permit a federal court to prevent state court litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988). Plainly, neither exception is relevant here. .

C. This Court Should Abstain From Issues Litigated in State Court.

Plaintiffs' constitutional claims each turn on the alleged illegality under state law of the N.M. that are part of the proposed consent judgment. *See* Complaint ¶ 84-85, 93. As a result, well-settled principles of abstention counsel against this Court deciding those claims. If the Court were to decide plaintiffs' motion before the state court ruled on the proposed consent judgment, its decision would either be rendered advisory by a state court decision rejecting the consent judgment, or it would risk intruding on the state courts' construction of state law in approving the consent judgment. On the other hand, if the Court were to reach the merits of plaintiffs' motion *after* the state court issues its decision, it would risk allowing itself to impermissibly serve as a forum to appeal that decision, in violation of the *Rooker-Feldman* doctrine. The Court should decline plaintiffs' request to ignore these important principles of federalism and comity.

1. If This Motion is Decided Before the Entry of a Consent Decree, This Lawsuit Is Jurisdictionally Barred.

"*Pullman* abstention . . . is appropriate where there are unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question." *Meredith v. Talbot Cty., Md.*, 828 F.2d 228, 231 (4th Cir. 1987). Application of the *Pullman* doctrine requires: "(1) an unclear

issue of state law presented for decision, (2) the resolution of which may moot or present in a different posture the federal constitutional issue such that the state law issue is potentially dispositive." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983); *see also NC RSOL v. Boone*, 402 F. Supp. 3d 240, 257 (M.D.N.C. 2019). "*Pullman* abstention serves two primary goals: (1) avoiding constitutional questions when their resolution is unnecessary, and (2) allowing state courts to decide issues of state law." *Nivens v. Gilchrist*, 444 F.3d 237, 246 n.6 (4th Cir. 2006). Both of the requirements for abstention are presented here, and abstention would achieve the doctrine's two goals.

First, plaintiffs' claims plainly implicate unsettled issues of state law. Plaintiffs have requested that this court enter an order "prohibiting Defendants from enforcing and distributing the Numbered Memoranda at issue in this case." Mot. at 1. As they acknowledge, the N.M. are tied to and a part of a potential settlement that the Board has reached in a state court action. *See* Complaint ¶ 53; Br. at 6. The Legislators are particularly aware of this fact because they have intervened in that action to oppose the consent judgment. *See* Complaint ¶ 51; LDs' Opp. to Joint Motion for Entry of a Consent Judgment, *NC Alliance for Retired Americans v. NC State Bd. of Elections*, No. 20 CVS 8881. In their opposition to the entry of the consent judgment, the Legislators argue: (1) that the consent judgment cannot be entered because "Legislative Defendants are necessary parties to any consent judgment," (2) the state court does not have jurisdiction under state law to enter the consent judgment, (3) the consent judgment is collusive, (4) the consent judgment violates the federal constitution, (5) the consent judgment is not "fair, adequate, and reasonable," and (6) the consent judgment is against the public interest. *Id.*

Thus, by the Legislators' count, there are no less than five adequate and independent state-law reasons for the state court to reject the proposed consent judgment. The state court's acceptance of *any* one of those reasons—and consequent rejection of the consent judgment—would moot this case. That is, "the resolution of [these issues] may moot or present in a different posture the federal constitutional issue such that the state law issue is 'potentially dispositive.'" *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d at 174. But approval of the consent judgment would also significantly change the posture of the federal constitutional questions in this case. Approval of the consent judgment would necessarily

entail a finding that the Board has the delegated authority under state law to make the changes in the N.M. The state court's conclusion on that point would be dispositive as to plaintiffs' Election Clause claim in this case.

Federal courts faced with similar situations have repeatedly made the decision to abstain, or else have been instructed by the Courts of Appeals to do so. For example, Texas's vote-by-mail rules have been challenged in both state and federal court, and those lawsuits have sought injunctive relief barring enforcement of those rules. *See Texas Democratic Party v. Abbott*, 961 F.3d 389, 394-96 (5th Cir. 2020). While the state-court litigation was pending, the Western District of Texas granted a preliminary injunction that would allow every Texas voter to vote by mail. *Id.* The Fifth Circuit stayed the injunction, criticizing the district court's decision to rule "without waiting . . . for the Texas Supreme Court to interpret its own state's election law." *Id.* at 396. "The district court's decision to forge ahead despite an intimately intertwined—and, at that time, unresolved—state-law issue was not well considered." *Id.* at 397 n.13.

In *Trump for President, Inc. v. Boockvar*, 2020 WL 4920952 (W.D. Pa. Aug. 23, 2020), plaintiffs argued that Pennsylvania's Secretary of the Commonwealth's recent implementation of a mail-in voting plan violated "the Pennsylvania election code and violate[s] their rights under the federal and state constitutions." *Id.* at *2. Those claims also included Elections Clause and Equal Protection Clause violations. *Id.* at *9. As is the case here, "Plaintiffs' federal-constitutional claims hinge on violations of the [state] election code." *Id.*; *see* Complaint ¶ 84, 85 (premising Elections Clause claim on violation of state law), 93 (premising Equal Protection Clause claim on argument that the N.M. "ensure[] the counting of votes that are invalid under" state law). The court concluded that *Pullman* abstention was appropriate because "a state court could simply decide whether Defendants' conduct violates the election code and, if it does, enjoin it on that basis." *Id.* at *2. "Conversely, a state-court finding that Secretary Boockvar's guidance was lawful could defeat, or at least play a critical role in the Court's analysis of, Plaintiffs' constitutional claims . . . ." *Id.* Thus the Court concluded that "the important principles underlying the *Pullman* abstention doctrine—federalism, comity, constitutional avoidance, error prevention, and judicial

efficiency—all weigh strongly in favor of letting state court decides predicate disputes about the meaning of Pennsylvania's state election code." *Id.*[1]

Those same principles counsel abstention here. The doctrine of constitutional avoidance is "more deeply rooted than any other [doctrine] in the process of constitutional adjudication." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). If this Court were to wade into the merits of Plaintiffs' claims prior to the state court decision, it risks issuing what may ultimately be an advisory opinion on an important question of constitutional law. As federal courts across the country have recognized when faced with similar circumstances, the better course is to abstain.

2. If This Court Rules After the Entry of a Consent Decree, This Lawsuit Is Still Jurisdictionally Barred.

Waiting for the state court to issue its judgment before reaching the merits of plaintiffs' claims does not avoid the troublesome intrusions on federalism and comity presented by plaintiffs' complaint. Rather, the courts of the state of North Carolina should be allowed to definitively adjudicate the state-law predicates of plaintiffs' federal constitutional claims. If this Court were to proceed to adjudicate plaintiffs' claims after a state court upheld the consent judgment, it would be, in function, serving as a forum for the plaintiffs to appeal that state court decision.[2] This would run afoul of the bedrock principle, expressed through the *Rooker-Feldman* and *Pennzoil* doctrines.

Under *Rooker-Feldman*, suits that "essentially invite[] federal courts of first instance to review and reverse unfavorable state court judgments" must be "dismissed for lack of subject-matter

[1] *See also Moore v. Hosemann*, 591 F.3d 741, 744-45 (5th Cir. 2009) (reversing district court's conclusion that candidate's constitutional challenge to filing deadline was moot after election occurred but remanding "urg[ing] the district court to consider whether to abstain" under the *Pullman* doctrine because an adverse ruling would dispose of any federal constitutional question); *Burdick v. Takushi*, 846 F.2d 587, 88-89 (1988) (reversing district court's grant of summary judgment for plaintiff regarding Hawaii's prohibition on write-in voting and concluding *Pullman* abstention was appropriate because it was unclear whether Hawaii actually did prohibit write-in voting and that a state court decision finding that it did not would obviate the federal claim); *Fuente v. Cortes*, 207 F. Supp. 3d 441, 449-50 (M.D. Pa. 2016) (abstaining from plaintiff's challenge to his exclusion from ballot as an independent candidate because of unsettled underlying issue as to whether his exclusion was proper under state law).

[2] Plainly, if the state court were to reject the consent judgment, Plaintiffs' complaint would be moot. This section therefore assumes that the state court approves the consent judgment.

jurisdiction." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283-84 (2005); *see also* 28 U.S.C. § 1257. Courts examine "whether the state-court loser who files suit in federal district court seeks redress for an injury caused by the state-court decision itself." *Davani v. Va. Dep't of Transp.*, 434 F.3d 712, 718 (4th Cir. 2006); *see also Howell v. Wilson*, No. 3:15-cv-2561, 2015 WL 7272185, at *2 (D.S.C. Nov. 13, 2015) ("After *Exxon*, the proper inquiry examines the source of the plaintiff's injury: if the state court judgment caused the plaintiff's injury, the claim is barred, but a claim alleging another source of injury is an independent claim.").

The N.M. will be effective if, and only if, the consent judgment is approved by the state court. Therefore, to the extent that plaintiffs are injured by the changes made in the N.M., they will be injured by the state court's approval and entry of the consent judgment. Thus, plaintiffs seek relief in this court from a state court order. *See Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 88 (2d Cir. 2005) ("Where a state-court judgment causes the challenged third-party action, any challenge to that third-party action is necessarily the kind of challenge to the state court judgment that only the Supreme Court can hear."). Additionally, plaintiffs have also pressed their federal constitutional claims in the state court proceeding. *See* LDs Opp to Joint Motion for Entry of a Consent Judgment, *NC Alliance for Retired Americans v. NC State Bd. of Elections*, No. 20 CVS 8881. As a consequence, any ruling in plaintiffs' favor would necessarily "reverse or modify the state court decree." *See McGee v. N.C. State Bar*, No. 5:12-cv-227, 2012 WL 5993758, at *2 (quoting *Adkins v. Rumsfeld*, 464 F.3d 456, 464 (4th Cir. 2006)). This route is barred by *Rooker-Feldman*.

Similarly, plaintiffs' claims would also be barred by the *Pennzoil v. Texaco* doctrine. In *Pennzoil*, the Supreme Court rejected Texaco's attempt to enjoin the enforcement of a state court injunction after it had lost in that forum. 481 U.S. 1, 14 (1987). The Supreme Court held that "federal injunctions" may not be used to "interfere with the execution of state judgments," particularly where the federal lawsuit "challenge[s] the very process by which [the state court] judgments were obtained" and the federal constitutional claim could have been raised in the state court action. *Id.* at 14-16.

Pennzoil would foreclose the relief plaintiffs seek here. If this Court were to enjoin the memoranda, it would be invalidating the basis of a state-court judgment. This is particularly true given that the Legislators are defendants in the state-court action and raised the same federal claims in that case. The proper forum for the constitutional challenges raised here would be in the state court itself.

D. Plaintiffs' Elections Clause Claim Is Meritless.

1. The Merits of Plaintiffs' Elections Clause Claim Turn on State Law

The Elections Clause states, in relevant part, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. Plaintiffs assert that this Clause empowers "only two entities" to regulate elections in North Carolina: Congress and the North Carolina General Assembly. Br. at 11; *see also id.* at 12 (contending that "[b]y choosing to use the word 'Legislature,' the Elections Clause makes clear that the Constitution . . . grant[s] the power to regulate elections . . . to the state's legislative branch" alone). Under binding Supreme Court precedent, plaintiffs' interpretation of the Elections Clause is plainly wrong.

More than a century ago, the Supreme Court made clear that the word "Legislature" in the Elections Clause should not be read as a reference to "the representative body alone." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n ("AIRC")*, 576 U.S. 787, 805 (2015) (describing the holding in *Davis v. Hildebrant*, 241 U.S. 565 (1916)). In that case, *Davis v. Hildebrant*, the Court considered whether the State of Ohio could constitutionally submit state redistricting laws to residents of Ohio for approval or disapproval by popular vote. 241 U.S. at 566. The *Hildebrant* plaintiffs had argued that, because the Elections Clause commits elections to "the Legislature," the populace could not constitutionally be involved in lawmaking related to elections. *Id.* at 567. The Supreme Court disagreed. Because, under Ohio law, popular referenda "were a part of the legislative power of the state," the Court held that they fell within the scope of the Elections Clause. *Id.*

The Supreme Court has repeatedly affirmed this interpretation of the Elections Clause, including as recently as 2015. *E.g.*, *AIRC* , 576 U.S. 787; *Smiley v. Holm*, 285 U.S. 355 (1932). *Arizona*

Independent Redistricting Commission, assessed the constitutionality of a redistricting commission that had been created as part of an initiative ratified by Arizona voters. 285 U.S. at 792. After the commission adopted new redistricting maps, the Arizona Legislature sued, arguing that the commission had usurped its authority under the Elections Clause. In the Legislature's view, the Clause's use of the word "Legislature" "mean[t] specifically and only the representative body which makes the laws of the people." *Id.* (citation omitted). The Arizona Legislature thus maintained that the Commission—and the maps that it had drawn—were unconstitutional.

The Supreme Court rejected this narrow reading of the Elections Clause. *Id.* at 814-24. At the time of the Founding, the Court explained, the word "legislature" was "capaciously define[d]." *Id.* at 813 (citing several Founding-era dictionaries). The "meaning of the word 'legislature'"—a word "used several times in the Federal Constitution"—therefore "differs" based on the context in which it is used. *Id.* at 808 (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932)) (alteration omitted).

For purposes of the Elections Clause, the Court said, the word "Legislature" must be interpreted "in accordance with the [relevant] State's prescriptions for lawmaking." *Id.* For example, if state law requires that elections laws be passed by a General Assembly subject to the Governor's veto, "the Elections Clause . . . respect[s] the State's choice to include the Governor" in the legislative process. *Id.* at 807; *see also Smiley*, 285 U.S. at 368, 372-73. If, instead, state law "place[s] the lead rein in the people hands" to oversee elections-related lawmaking, then the "Legislature" should be read to include them. *AIRC*, 576 U.S. at 816.

Applying *Arizona Independent Redistricting Commission* and the many precedents like it, this Court cannot simply assume—as plaintiffs urge—that the North Carolina General Assembly is the "Legislature" that the Elections Clause references. *E.g.*, Br. at 11 ("The General Assembly is the 'Legislature' . . . ."); *id.* at 12-13, 15 ("[T]he Elections Clause . . . grant[s] the power to regulate elections . . . only to the state's legislative branch."); *see also AIRC*, 576 U.S. at 805, 808-09, 816; *Hildebrant*, 241 U.S. 565; *Smiley*, 285 U.S. at 368. Instead, this Court must look to North Carolina law to determine who

the State authorizes to regulate elections. *See Smiley*, 285 U.S. at 368 (question of who has the "authority [to] mak[e] laws for the state" is a "matter of state polity").

2. Because Plaintiffs' Claim Turns on State Law, It Is Barred by Sovereign Immunity

Because the merits of plaintiffs' Elections Clause claim turn on a question of state law, this Court lacks jurisdiction to consider the claim. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984) ("[T]he federal courts lack[ ] jurisdiction to enjoin . . . state officials on the basis of . . . state law."). "[S]overeign immunity . . . bars a court's grant of any type of relief . . . based upon a State official's violation of State law." *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 293 (4th Cir. 2001); *see also Pennhurst*, 465 U.S. at 106, 124-25. Indeed, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst*, 465 U.S. 89, 106.

Plaintiffs' Elections Clause claim flouts this clear rule. At bottom, plaintiffs are accusing the State Board of violating state law, which, they say, appoints the General Assembly as the sole regulator of federal elections. *See* Complaint ¶¶ 1-2, 18-19, 79; *see also* Br. at 1-2, 11-12, 14-16 (same). In other words, this Court can find an Elections Clause violation only if it first concludes that the State Board exceeded the authority it enjoys under state law. Any injunction this Court enters against the State Board therefore "contravenes the Eleventh Amendment." *Pennhurst*, 456 U.S. at 117; *see also id.* at 106 ("A federal court's grant of relief against state officials on the basis of state law . . . conflicts directly with the principles of federalism that underlie the Eleventh Amendment.").

3. State Law Plainly Authorizes the Board's Proposed Actions

Even if this Court had subject-matter jurisdiction, plaintiffs' Elections claim would fail on the merits. The Board's actions here violate the Elections Clause only if they are inconsistent with "the method which the State has prescribed" for enacting elections regulations. *AIRC*, 567 U.S. at 807 (quoting *Smiley*, 285 U.S. at 367); *see supra* Part II.D.1. But they are not. Instead, all three challenged memoranda are consistent with the State Board's authority under state law.

As an initial matter, under North Carolina law, the General Assembly has expressly delegated substantial authority over the conduct of elections to the State Board. Indeed, the General Statutes authorize the State Board to "supervis[e]" elections in the State and "to make such reasonable rules and regulations with respect to the conduct of . . . elections as it may deem advisable so long as they do not conflict with any provisions of this Chapter." N.C. Gen. Stat. § 163-22(a). Pursuant to this authority, the State Board makes a wide range of "interstitial policy decisions" that govern the "Time[ ], Place[ ], and Manner" of federal elections in the State—"including, but not limited to, . . . the number and location of the early voting sites to be established in each county and the number of hours during which early voting will be allowed at each site;" the requirements that voting systems must fulfill; and the guidelines for conducting a recount. *Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018); 08 N.C. Admin. Code 04.0301 (voting-system requirements); 08 N.C. Admin. Code 09.0106 (recounts).

In addition to this general authority, state law also specifically empowers the State Board to regulate elections on an emergency basis in certain contexts: First, when one or more of North Carolina's election laws are "held unconstitutional or invalid," the Board has the "authority to make reasonable interim rules and regulations with respect to the pending . . . election as it deems advisable." N.C. Gen. Stat. § 163-22.2. Second, the Board is "authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes." *Id.* This authorizes the State Board to enter into a settlement agreement when a legal challenge to one of the State's election laws or other regulations threatens to disrupt an impending election. Third, the Board's Executive Director "may exercise emergency powers . . . where the normal schedule for the election is disrupted by" a "natural disaster," "[e]xtremely inclement weather," or "[a]n armed conflict." *Id.* § 163-27.1. "[N]atural disaster," in turn, is defined to include, among other things, hurricanes, tornadoes, and "[c]atastrophe[s] arising from natural causes" that "result[ ] in a disaster declaration by the President . . . or the Governor." 08 N.C. Admin. Code 01.0106.

Together, these laws make plain that the word "Legislature" in the Elections Clause, interpreted in accordance with the Supreme Court's direction, does not consist of the General Assembly alone. In

North Carolina, the State Board is clearly an integral source of "legislative authority" delegated from the General Assembly. *See AIRC*, 576 U.S. at 805 (quoting *Hildebrant*, 241 U.S. at 567); *see also, e.g.*, N.C. Gen. Stat. §§ 163-22(a), 163-22.2, 27.1; *Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018).

All three of the challenged memoranda are consistent with this legislative framework and fall comfortably within the scope of the Board's authority.

First, all three memoranda arise out of a consent judgment proposed in response to a lawsuit filed in state court seven weeks ago. *NC Alliance*, No. 20-CVS-8881. As discussed above, the plaintiffs in that suit challenged a range of election laws as violating the North Carolina Constitution, including a range of laws that remain unaffected by the proposed consent judgment.. To avoid "protracted litigation"—at a time when voters are in desperate need of clarity—the State Board made the considered decision to enter into a consent agreement settling all of these claims. *See* N.C. Gen. Stat. § 163-22.2. A decision of that kind is expressly authorized under state law. *Id.*

Second, N.M. 2020-19, which implements a cure mechanism, sets forth "reasonable interim rules and regulations" in the wake of a constitutional challenge to the State's elections regime. *See* N.C. Gen. Stat. § 163-22.2. On August 4, 2020, a district court held that North Carolina's absentee-ballot laws failed to afford voters procedural due process because voters lacked "any notice of, or opportunities to cure, material defects in . . . th[eir] absentee ballots." *Democracy NC v. N.C. State Bd. of Elecs.*, 2020 U.S. Dist. LEXIS 138492 (Aug. 4, 2020). Accordingly, the court enjoined the State Board from allowing any absentee ballots to be rejected "without due process." *Id.* at 187. Based in part on their good-faith effort to comply with the Board's understanding of the injunction, the State Board instituted the cure procedure set forth in N.M. 2020-19. The "reasonable interim rules and regulations" set forth in N.M. 2020-19 thus fall under the Board's authority under N.C. Gen. Stat. § 163-22.2.

Third, the rules established in the N.M. would be independently authorized pursuant to the Executive Director's emergency authority under § 163-27.1(a)(1). North Carolina law permits the Director to modify the State's elections framework following a "natural disaster," including a "[c]atastrophe arising from natural causes [that has] resulted in a disaster declaration by the President . . .

or the Governor." *Id.*; 08 N.C. Admin. Code 01.0106(b). Here, North Carolina is operating under emergency declarations issued by the President and the Governor as the result of a pandemic. As a result, state law authorizes the Executive Director to implement the "remedial measures" set forth in the N.M., if she concludes that they are necessary in light of the factors listed in 08 N.C. Admin. Code 01.0106(c). Plaintiffs would have this Court believe that it violates the Elections Clause for the State Board to agree in a consent judgment to modifications to the State's elections procedures that state law, as enacted by the General Assembly, authorizes the Executive Director to implement. Plaintiffs' contention lacks merit.

Plaintiffs dispute this understanding of the Board's authority because, they say, the rules set forth in the N.M. "conflict with provisions enacted by the General Assembly." Br. at 15. Plaintiffs are wrong as a matter of North Carolina law. Section 163-27.1, the statute empowering the Executive Director to exercise emergency powers asks the Director to "avoid unnecessary conflict with" the State's other election laws. Inherent in this command is an implicit acknowledgement that tension between an emergency rule and a General Statute is lawful and expected. Similarly, the portion of § 163-22.2 that empowers the Board to "enter into agreement with the courts in lieu of protracted litigation" does not forbid the Board from entering any agreement that deviates from the election rules set out in other statutes. Section 163-22.2, after all, authorizes the Board to respond when the State's election laws are the target of litigation. In enacting that authorization, the General Assembly surely did not contemplate that consent judgments would require total surrender by plaintiffs, leaving in place the default rules that had been the impetus for the lawsuit in the first place.

In sum, because all of the rules set forth in the N.M. were imposed consistent with the authority afforded the State Board under state law, they do not violate the Elections Clause.

E. Plaintiffs' Equal Protection Claim Is Meritless.

Plaintiffs are similarly unlikely to succeed on their equal-protection claim. That claim is premised on two primary arguments, both of which lack merit.

First, plaintiffs argue that the N.M. will give rise to "arbitrary" and "nonuniform rules that will result in the unequal evaluation of ballots." Br. at 17. But even plaintiffs' own allegations cannot support

this argument. The entire purpose of the consent judgment is to ensure uniformity and consistency with the election just weeks away. Consistent with that purpose, the consent judgment would impose clear rules that would apply to any mail-in absentee ballot cast in North Carolina as part of the November 2020 election. Not surprisingly, then, plaintiffs have not identified any rules in the N.M. that will apply to some voters, but not to others. Nor have they identified any that are likely to be enforced against some voters, but not others.

To the contrary, *all* of North Carolina's election rules—including those set forth in the N.M.—will apply uniformly to all voters: *All* voters whose mail-in ballots are postmarked by Election Day and received within nine days can have their votes counted. *See* N.M. 2020-22. *All* voters who wish to vote via mail-in absentee ballot must comply with the State's witness requirement. 2020 N.C. Sess. Laws 2020-17, § 1.(a). *All* voters who wish to submit a mail-in absentee ballot in person may do so, so long as the individual dropping off the ballot provides the information required for the written log. *See* N.M. 2020-23. And *all* voters who return a mail-in absentee ballot with a curable deficiency can remedy that deficiency by way of a certification. *See* N.M. 2020-19. Plaintiffs' complaint does not allege otherwise with respect to any of these rules, a fact that dooms their equal-protection claim to the extent it relies on arbitrary treatment.

Plaintiffs' second equal-protection theory is grounded in the idea that the N.M. dilute their votes. *See* Br. at 20. According to plaintiffs, the N.M. will allow invalid votes to be counted, thereby "promot[ing] fraud and dilut[ing] the . . . weight of lawful voters." *Id.* The problems with this argument are manifold.

First, like plaintiffs' Elections Clause claim, their vote-dilution argument is barred by sovereign immunity. A key premise underlying plaintiffs' voter-dilution theory is that the N.M. violate state law and thus enables unlawful votes. But, as discussed above, *Pennhurst* bars this Court from enjoining state officials based on an alleged violation of state law. *Pennhurst*, 465 U.S. at 106, 124-25; *see supra* Part II.D.2.

Second, although vote dilution can serve as the basis for an equal-protection claim, Plaintiffs' theory is fundamentally incompatible with the nature of such a claim. "[A] vote dilution claim alleges that the State has enacted a particular voting scheme as a purposeful device 'to minimize or cancel out the voting potential'" of a particular group. *Miller v. Johnson*, 515 U.S. 900, 911 (1995); *see also Reynolds v. Sims*, 377 U.S. 533, 568 (1964). In other words, a successful voter-dilution claim must prove that the State failed to afford the votes of one group of voters "the same weight as th[ose] of other voters." *Hadley v. Junior College Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 53 (1970). Plaintiffs' complaint alleges no such thing—and understandably so. The N.M. represent the State's best effort to protect North Carolinians' right to vote, notwithstanding a global pandemic. Plaintiffs offer no evidence whatsoever that the intent of the Memoranda was to devalue the votes of one group of lawful voters vis-à-vis another.

Instead, plaintiffs' voter-dilution argument amounts to nothing more than rank speculation about the prospect of voter fraud. *See* Br. at 20. Much as plaintiffs may wish otherwise, "[t]he Constitution is not an election fraud statute." *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986). Plaintiffs thus cannot conjure up an equal-protection claim by advancing entirely unfounded theories about how voter fraud might water down the weight of lawful votes. For these reasons, plaintiffs' equal-protection claim, too, lacks merit.

III. Plaintiffs Cannot Establish Irreparable Harm.

The second *Winter* factor requires that plaintiffs demonstrate they will suffer irreparable harm if an injunction is not issued. *Winter*, 555 U.S. at 20. In *Winter*, the Supreme Court noted that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22 (internal citations and quotations omitted). Plaintiffs have failed to make this showing.

As already noted, plaintiffs have failed to adequately allege a cognizable injury at all, much less irreparable harm from such an injury. *See supra* pp. 12-14. Two of the three challenged N.M. have not gone into effect and will not go into effect unless the state court enters the consent judgment. Moreover,

the Legislators-Plaintiffs have failed to demonstrate harm because, as again already shown, only the General Assembly can assert that interest, and the Legislators are but two members of the 170-member General Assembly. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811 at 829. In addition, the voter-plaintiffs cannot show that the challenged N.M. enforce different requirements on different voters or dilute the voters' votes, let alone do so in any way that causes them harm. *See supra* pp. 27-29.

Finally, as explained above, to the extent Plaintiffs' claimed injuries are real and not illusory, they are the result of the statutory electoral scheme enacted by the General Assembly—a statutory scheme that Plaintiffs have not challenged on any grounds. Plaintiffs have therefore failed to show any harm at all, much less irreparable harm. *See supra* pp. 12-14.

IV. The Balance of the Equities and Public Interest Weigh Against a TRO.

The final two *Winter* factors require plaintiffs to demonstrate that the equities tip in their favor and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. In cases involving significant public interest, which unquestionably includes cases involving the conduct of elections, courts may "consider the balance of the equities and the public interest factors together." Courts must "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Plaintiffs have not met and cannot meet these final two factors.

Again, plaintiffs have failed to show any injury or harm at all; and so the balance of harms tips decidedly away from them and in favor of the officials who are charged with administering North Carolina's election laws and who are doing so in clear conformity with those laws. Those laws include laws that authorize the State Board to avoid protracted litigation and enter into consent judgments "until such time as the General Assembly convenes" and that authorize the Executive Director to institute emergency orders during a state or national disaster. Defendants therefore represent the public interest in this case. Defendants have exercised these authorities in an attempt to ensure the orderly administration of an election, despite a flurry of lawsuits filed amid a global pandemic. These efforts reflect the public interest. "Because state officials are the parties against whom the injunction is sought, and they represent

the public interest, consideration of the harm to them should the injunction issue merges with consideration of the public interest." *Jackson v. Leake*, 476 F. Supp. 2d 515, 530 (E.D.N.C. 2006).

Defendants and the public unquestionably share a common interest here: the safe, secure and orderly administration of the election in accordance with North Carolina law. Plaintiffs here essentially claim harm, and harm that tips in their favor, unless only portions of North Carolina's election laws are recognized and enforced. Their claims of harm rest on ignoring the authority to administer elections that the General Assembly has conferred on the State Board and its Executive Director, as recognized by the North Carolina Supreme Court. *See Cooper v. Berger*, 809 S.E.2d 98. Simply put, Plaintiffs have failed to adequately allege cognizable injuries or harms that can be remedied. There are no harms to tip the balance their direction at all.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully request that the Court deny plaintiffs' motion for a temporary restraining order.

This the 1st day of October, 2020.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants,

and

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, BARKER FOWLER, BECKY JOHNSON, JADE JUREK, ROSALYN KOCIEMBA, TOM KOCIEMBA, SANDRA MALONE, and CAREN RABINOWITZ,

[Proposed] Intervenor-Defendants.

[PROPOSED] INTERVENORS' [PROPOSED] MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Civil Action No. 5:20-CV-507-D

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Plaintiffs ask this federal court to enjoin state election officials from implementing guidance that is not only consistent with those officials' legislatively-delegated authority, but also the subject of an ongoing state court proceeding. On October 2, 2020, the Wake County Superior Court will conduct a hearing on Proposed Intervenors (the "Alliance") and the State Board of Elections' ("NCSBE") Joint Motion for Entry of a Consent Judgment—and the accompanying Numbered Memos which Plaintiffs cite as the source of their alleged harms in the present action—in connection with a state court lawsuit filed by the Alliance, which challenges several state law restrictions to absentee and in-person voting under the State Constitution. Moore and Berger, the Speaker of the North Carolina House of Representatives and President Pro Tempore of the North Carolina Senate, respectively, are parties to that case and have already submitted briefing opposing the proposed Consent Judgment.

The present lawsuit attempts improperly to interfere with, and effectively divest jurisdiction from, a state court which is currently evaluating the state law questions that will determine whether the proposed Consent Judgment and Numbered Memos will be adopted to begin with—and it seeks such extraordinary relief through an expedited, temporary restraining order no less. Putting aside the irony of state legislators seeking federal court resolution of state law separation of powers issues, the relief Plaintiffs seek is unprecedented and barred by several jurisdictional hurdles.

First, Plaintiffs lack standing to pursue their Elections Clause claim because they assert only institutional injuries to the General Assembly's authority, which none of the individual legislators or non-legislative Plaintiffs have authority to vindicate. Second, Plaintiffs assert no personal disadvantage in connection with their equal protection claim; indeed, Heath and Whitley have *already successfully voted* in this year's general election. Third, two of the proposed

memoranda at issue in Plaintiffs' complaint have not yet been implemented, and thus Plaintiffs' claims are unripe. Finally, a host of federalism and comity principles counsel against this Court wading unnecessarily into ongoing state proceedings and questions of state law. And even if Plaintiffs could clear these hurdles, they fail to meet the high burden required for the extraordinary remedy of a TRO. Their claims cannot succeed on the merits, nor have they established irreparable harm that tips the balance of the equities in their favor. This Court should deny their Motion.

BACKGROUND

The COVID-19 pandemic has wreaked havoc throughout the country, causing significant casualties and disruptions to day-to-day life. Known domestic infections have surpassed 7.1 million with more than 200,000 fatalities.[1] As of this filing, North Carolina has more than 210,000 confirmed cases and 3,532 reported deaths from the virus, with cases rapidly increasing.[2] There is no end in sight. The Director of the Centers for Disease Control and Prevention is warning that the country should brace for "the worst fall from a public health perspective, we've ever had."[3]

As a result, North Carolina is under a state of emergency and a "Safer at Home" Order issued by the Governor.[4] The Order, issued last month, "very strongly encourage[s] . . . people 65

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[1] CDC, *COVID-19 Data Tracker*, (Sept. 30, 2020), https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#cases_casesinlast7days.

[2] N.C. Dep't of Health and Human Servs., *COVID-19 Cases*, (Sept. 30, 2020), https://covid19.ncdhhs.gov/dashboard/cases.

[3] WebMD, *Coronavirus in Context: CDC Director Discusses Next Steps in the War Against COVID*, Interview with John Whyte, (Aug. 12, 2020), https://www.webmd.com/coronavirus-in-context/video/robert-redfield.

[4] Gov. Roy Cooper, Exec. Order No. 163 (Sept. 4, 2020), https://files.nc.gov/governor/documents/files/EO163-Phase-2.5-Tech-Corrections_0.pdf (Safer at Home Order).

years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes." Exec. Order No. 163, § 2. It also urges all North Carolinians to practice social distancing, wear cloth masks when leaving the home and "in all public settings," carry hand sanitizer, and wash hands frequently. *Id*. These recommendations will remain in place going forward, too, under the latest Executive Order, issued just this week.[5] Unsurprisingly, the pandemic has also introduced significant challenges to the voting process.

At the same time, the ongoing struggles of the U.S. Postal Service ("USPS") increasingly threaten the return of voters' ballots in time to be counted. The State of North Carolina itself acknowledged this when it joined six other states in filing a lawsuit against USPS last month.[6] USPS's General Counsel also sent a letter to North Carolina's Secretary of State on July 30, 2020, warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted."[7] USPS recommended that election officials transmitting communication to voters "allow 1 week for delivery to voters," and voters in turn "should generally mail their completed ballots at least one week before the state's due date." *Id.*

On August 10, in recognition of the unprecedented challenges facing North Carolina voters, the Alliance filed a complaint (which they amended on August 18) in Wake County

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[5] Gov. Roy Cooper, Exec. Order No. 169 (Sept. 30, 2020), https://files.nc.gov/governor/documents/files/EO169-Phase-3.pdf (Safer at Home Order).

[6] Compl., ECF No. 1, *Pennsylvania. v. DeJoy*, No. 2:20-cv-04096-GAM (E.D. Pa. Aug. 21, 2020), Ex. 1 to Nkwonta Declaration.

[7] Letter from USPS General Counsel to N.C. Sec'y of State, July 30, 2020, Ex. 2.

Superior Court, challenging certain election laws and procedures that, in light of the pandemic, impose undue burdens on the right to vote in violation of various provisions of the North Carolina Constitution. Am. Compl. ¶¶ 122-41, Ex. 3, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 ("State Court Lawsuit"). The State Court Lawsuit names NCSBE and its chair, Damon Circosta, as defendants. Moore and Berger intervened in the State Court Lawsuit pursuant to N.C. Gen. Stat. § 1-72.2(b). Shortly thereafter, the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc., and the North Carolina Republican Party (collectively, the "Republican Committees") also moved to intervene. Both groups were admitted into the case.

The Alliance moved for a preliminary injunction on August 18, seeking injunctive relief to ensure safe and reliable access to the franchise in the November election, including: (1) enjoining the absentee ballot receipt deadline set forth in N.C. Gen. Stat. § 163-231(b)(1)-(2), as applied to ballots submitted through USPS, and ordering NCSBE to count otherwise eligible ballots postmarked by Election Day and received by county boards up to nine days later; (2) enjoining the witness requirements for absentee ballots set forth in N.C. Gen. Stat. § 163-231(a), as applied to voters residing in single person or single-adult households; (3) enjoining N.C. Gen. Stat. § 163-231(b)(1) to the extent that it requires voters to pay for postage to mail their ballots, and ordering NCSBE to provide postage for absentee ballots; (4) enjoining N.C. Gen. Stat. §§ 162-226.3(a)(5), 163-230.2(c) and (e), 163-231(b)(1), and any other laws that prohibit individuals or organizations from assisting voters to submit absentee ballots or to complete and submit absentee ballot request forms; and (5) enjoining N.C. Gen. Stat. § 163-227.2(b) and any other laws that prevent counties from providing additional one-stop ("early") voting days and ordering NCSBE to permit counties

to expand early voting by up to an additional 21 days. In support, Plaintiffs submitted extensive evidence, including expert reports, voter and other witness affidavits, and official documents.

Before the preliminary injunction hearing, the Alliance and NCSBE reached an agreement to resolve the Alliance's claims and filed a Joint Motion for Entry of a Consent Judgment, along with the proposed Consent Judgment and three exhibits (Numbered Memos 2020-19, 2020-22, and 2020-23). ECF No. 28-1. The express objective of the proposed Consent Judgment is:

> to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections, protect the limited resources of the Consent Parties, ensure that North Carolina voters can safely and constitutionally exercise the franchise in the 2020 elections, and ensure that election officials have sufficient time to implement any changes for the 2020 elections and educate voters about these changes.

Consent Judgment § V.

Under the terms of the Consent Judgment, NCSBE would agree to: (1) count eligible ballots postmarked by Election Day, if they are received up to nine days later (similar to the deadline for military and overseas voters), *see* N.C. Gen. Stat. §§ 163-182.5(b), 163-258.10, 163-258.12(a); (2) maintain a cure process for certain deficiencies with absentee ballots, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate separate, *manned* ballot drop-off stations at all early voting locations and county board offices for the in-person return of absentee ballots; and (4) take reasonable steps to inform the public of these changes. Consent Judgment § VI. The Alliance agreed to withdraw their preliminary injunction motion and dismiss their claims upon entry of the Consent Judgment. *Id.*

Four days after the Alliance and NCSBE filed their Joint Motion for Entry of a Consent Judgment, but *before* the State Court's October 2nd hearing on the motion, Plaintiffs filed their Complaint in this case. That same day, the other intervenors in the State Court Lawsuit—the Republican Committees—filed a similar action, also in this federal district, seeking similar relief:

to preemptively enjoin enforcement of the proposed Consent Judgment pending before the State Court. *See Wise v. N.C. State Bd. of Elections*, No. 5:20-cv-00505-M, ECF No. 1.

LEGAL STANDARD

Through their TRO Motion, Plaintiffs seek to invoke an "emergency procedure" that "is *appropriate only* when the applicant is in need of immediate relief." 11A CHARLES WRIGHT, ARTHUR MILLER & MARY KANE, FEDERAL PRACTICE AND PROCEDURE § 2951 (2d ed.) (emphasis added). They bear the heavy burden of establishing that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm absent a TRO; (3) the balance of equities tips in their favor; and (4) the TRO is in the public interest. *Boansi v. Johnson*, No. 2:14-CV-47-BO, 2014 WL 6883133, at *1 (E.D.N.C. Dec. 3, 2014) (citation omitted).

ARGUMENT

I. The Court need not consider the TRO because Plaintiffs' Complaint fails to establish Article III standing.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

At its "irreducible constitutional minimum," standing contains three elements: (1) an injury in fact that is, (2) fairly traceable to the challenged conduct of the defendant, and (3) is likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff must have standing for each form of relief sought. *Friends of Earth, Inc. v. Laidlaw Env. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). To establish injury, a plaintiff must show he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*,

136 S. Ct. at 1548. Further, prudential considerations require "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499).

A. Plaintiffs lack standing to assert violations of the Elections Clause.

The Supreme Court has squarely held that a private citizen does not have standing to bring an Elections Clause challenge of the type that Plaintiffs press here. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam); *see also Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly."). And although Moore and Berger are leaders of their respective chambers of the General Assembly, they have cited no authority suggesting that they are authorized to assert the institutional rights of the entire Legislature. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997). To the extent they attempt to rely on N.C. Gen. Stat. § 120-32.6 ("certain employment authority") and § 1-72.2 ("standing of legislative officers"), those provisions are inapposite here. They state only that the Speaker of the House and the President Pro Tempore of the Senate jointly represent the General Assembly in (1) actions *challenging* the validity or constitutionality of a North Carolina statute or constitutional provision, (2) actions in which the State of North Carolina is named as defendant, and (3) actions in which the General Assembly chooses to intervene. *See* N.C. Gen. Stat. §§ 120-32.6; 1-72.2.

The present case fits none of those descriptions; rather, it is a case that Moore and Berger themselves initiated, with their fellow Plaintiffs, to challenge actions that will be taken by NCSBE in response to a State Court judgment that has yet to be entered.[8] Moore and Berger purport to

[8] The Numbered Memos challenged by Plaintiffs have been submitted with the Alliance and NCSBE's Joint Motion for Entry of a Consent Judgment for the State Court's approval. If that happens, Moore and Berger will have no standing to challenge the Memos' implementation. The

represent the "institutional interests" of the legislative bodies they lead, to be sure, but they do not purport to represent the General Assembly itself, nor do they cite any statute or formal enactment by the Legislature that would authorize them to do so. Instead, they bring this lawsuit as two individual legislators in their official capacities, whose claims "rest[] . . . on the legal rights or interests of third parties." *Id*. (quotation marks omitted). Even if they have suffered an injury in fact (which they have not) it is well settled that a party may assert only a violation of its own rights. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). Plaintiffs' first cause of action is predicated entirely on their argument that the three Memoranda "usurp the General Assembly's sole authority to prescribe the regulations governing federal elections in North Carolina" in violation of the Elections Clause, Compl. ¶ 84, a claim which, even if it were plausible (which it is not), is not Plaintiffs' to make.

Moore and Berger, moreover, have identified no "'hindrance' to the [General Assembly's] ability to protect [its] own interests." *Kowalski*, 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)); *see also Hughes v. City of Cedar Rapids*, 840 F.3d 987, 992 (8th Cir. 2016) (third-party standing requires "'a close relationship with the person who possesses the right' *and* 'a hindrance to the possessor's ability to protect [her] own interests'" (emphasis added) (quoting

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Seventh Circuit explained this just days ago, evaluating the Wisconsin Legislature's attempt to appeal a preliminary injunction—which, like a consent judgment, is a binding State Court judgment that nevertheless does not reach a final determination on the merits—extending the state's receipt deadline. *See Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-2835 & 20-2844 (7th Cir. Sept. 29, 2020), Ex. 4. The court found that legislatures lack standing to challenge such judicial determinations because "[t]he interest at stake . . . is not the power to legislate but the validity of rules established by legislation." *Id.* at 3. The State Court Lawsuit "present[s] a case or controversy because the plaintiffs want[] relief that the defendants were unwilling to provide in the absence of a judicial order. But the appeals by the [Legislature]," even if styled as a collateral attack, "do not present a case or controversy within the scope of Article III . . . ." *Id.* at 5.

Kowalski, 543 U.S. at 130)). Applying these long-held rules of prudential standing, *Am. Booksellers*, 484 U.S. at 392, Plaintiffs should be foreclosed from asserting any claims under the Elections Clause. *Hughes*, 840 F.3d at 992; *see also Corman*, 287 F. Supp. 3d at 571-73.[9]

The Elections Clause claim is one "of institutional injury (the diminution of legislative power), which necessarily damages all Members of [the Legislature] equally." *Raines*, 521 U.S. at 821. As a result, "these individual members . . . do not have a sufficient 'personal stake' in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing." *Id.* at 830; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 802 (2015) (holding legislature could pursue Elections Clause challenge because, unlike individual legislators, it was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers") (quotation marks omitted). Plaintiffs make no allegation, and provide no support for the notion, that they are authorized to represent the General Assembly in this affirmative litigation, and to the extent Moore and Berger attempt to assert an injury based on their individual roles as legislators, such allegations fail to satisfy even the threshold requirements of Article III standing. *See id.*

B. Plaintiffs have not asserted a legally cognizable vote dilution injury.

Count II of Plaintiffs' Complaint attempts to assert an Equal Protection claim on behalf of two voters who have already cast their ballots and do not allege any hindrance to having their votes counted. Their claims seek redress from: (1) unsubstantiated, generalized, and wholly speculative theories that their vote will be diluted by the casting of unlawful ballots—theories that have been

[9] The opinion of the three-judge panel in *Corman* is highly instructive. There, as here, third parties brought in federal court a collateral attack on a state court judgment. *See id.* at 561. The panel ultimately concluded that these third parties lacked both Article III and prudential standing to bring their claims in federal court. *See id.* at 573-74.

rejected repeatedly by federal courts as a basis for standing, and (2) a manufactured injury that rests solely on their purportedly disparate treatment but is unaccompanied by any allegations demonstrating that they have suffered any *personal disadvantage*. Neither amounts to an injury in fact sufficient to establish Article III standing. With respect to Heath's and Whitley's purported vote dilution injuries, multiple courts have held that the threat of future dilution based on the acceptance of potentially unlawful votes does *not* confer standing because it is impermissibly speculative and generalized.[10] *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020). "Plaintiffs never describe how [they] will be harmed by vote dilution where other voters will not. As with other '[g]enerally available grievance[s] about the government,' plaintiffs seek relief . . . that 'no more directly and tangibly benefits [them] than it does the public at large.'" *Id*. (quoting *Lujan*, 504 U.S. at 573-74); *Martel v. Condos*, No. 5:20-cv-131, slip op. at 9 (D. Vt. Sept. 16, 2020), Ex. 5 ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Am. Civ. Rts. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."); *cf. United States v. Florida*, No. 4:12cv285-RH/CAS, 2012 WL 13034013, at *1 (N.D. Fla. Nov. 6, 2012) (rejecting motion to intervene based on theory of vote dilution because applicant's "asserted interests are the same . . . as for every other registered voter in the state"). As another court recently explained when confronted with a similar claim:

> Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and

[10] To the extent Moore, Berger, and Swain assert a similar injury, those Plaintiffs also lack standing for the same reasons.

> particularized injury. This is not a pioneering finding. Other courts have similarly found the absence of an injury-in-fact based on claimed vote dilution.
> *Paher v. Cegavske* ("*Paher I*"), No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (citations omitted); *accord Paher v. Cegavske* ("*Paher II*"), No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020) (no standing where Plaintiffs "fail to more than speculatively connect the specific conduct they challenge . . . and the claimed injury [of] vote dilution").

Such is the case here. Heath and Whitley allege that their ballots have been returned and "accepted," Compl. ¶¶ 9-11; they identify no personal injury but rather hypothesize that the Memoranda will allow invalid votes to be counted and "open invitations to fraud and ballot harvesting," so as to dilute the power of their votes, Compl. ¶¶ 93-94. Not only are their claims entirely speculative, but they also amount to generalized grievances—indistinguishable from just about every voter's "interest in proper application of the Constitution and laws," which "does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74.

Purported injuries caused by alleged "later and arbitrary disparate treatment" of absentee ballots similarly fail to establish injury-in-fact. First, the relief set forth in the Memoranda does not injure Heath or Whitley in any way. They elected to cast their ballots well in advance of Election Day and allege that their ballots were accepted. *See* Compl. ¶¶ 9-11. That other voters will be able to cure issues with their ballots, drop them off at designated locations at early voting sites, or have their ballots counted if mailed by Election Day (assuming they are received within nine days) imposes no injury or burden whatsoever on *Plaintiffs'* ability to vote, nor does it disadvantage them in any way. Indeed, had there been any deficiencies with their absentee ballots, they could have remedied them pursuant to Numbered Memo 2020-19's cure procedure.

Heath and Whitley have also failed to plead any facts that could establish causation as to Count II. To satisfy Article III, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976)). Plaintiffs' theory of harm requires an attenuated chain of causation based entirely on conjecture about "ballot harvesting" by non-party actors, which is *not* traceable to NCSBE, the proposed Consent Judgment, or anything else implicated in this lawsuit. Because Count II is supported by nothing more than unfounded hypotheses about actions of third parties, it fails the traceability requirement. *See Lujan*, 504 U.S. at 562 (where "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts[,] . . . it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury" (citations omitted) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

II. Plaintiffs' case is not ripe for adjudication.

The same fatal errors that require a finding that Plaintiffs lack standing create other insurmountable jurisdictional bars. For one, most of Plaintiffs' claims are not ripe for adjudication. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006) (noting both standing and ripeness "originate in Article III's 'case' or 'controversy' language"). The "basic rationale" of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 199 (4th Cir. 2019) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). Courts "must wait until the case has 'taken on fixed and final shape so that [they] can see what legal issues [they are] deciding, [and] what effect [their] decision will have on the adversaries.'" *Trustgard Ins. Co.*,

942 F.3d at 200 (quoting *Pub. Serv. Comm'n of Utah v. Wycoff Co*., 344 U.S. 237, 244 (1952)). "An important factor in considering ripeness is whether resolution of the tendered issue is based upon events or determinations which may not occur as anticipated." *A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Co.*, 559 F.2d 928, 932 (4th Cir. 1977). For this reason, the Fourth Circuit has found claims to be "unripe for adjudication" when "the injury may or may not occur depending on the outcome of [a] state lawsuit." *Trustgard Ins. Co*., 942 F.3d at 200.

Plaintiffs' Complaint is unripe because it collaterally attacks aspects of a proposed Consent Judgment that the State Court has not yet entered.[11] Whether Numbered Memos 2020-22 and 2020-23 go into effect is currently dependent upon the outcome of the Joint Motion for Entry of Consent Judgment pending before the State Court, scheduled for hearing on October 2. This Court should reject Plaintiffs' invitation to adjudicate these hypothetical claims and decline to issue an impermissible advisory opinion. *See Trustgard Ins. Co*., 942 F.3d at 200.

III. This Court should abstain in deference to ongoing state court proceedings.

Plaintiffs' federal court challenge to the proposed Consent Judgment is precisely the type of collateral attack on state court proceedings that federal abstention doctrines seek to avoid, in favor of the "vital consideration" of "comity, that is, a proper respect for state functions." *Younger v. Harris*, 401 U.S. 37, 44 (1971) (quotation marks omitted). Abstention is particularly important when plaintiffs turn to federal court in an effort to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1, 14 (1987). "Another important reason for abstention is to avoid unwarranted determination of federal constitutional questions." *Id.* at 11. Given Plaintiffs' overt attempt to bypass ongoing state court proceedings, it is not surprising that their claims

[11] Of the Numbered Memos challenged by Plaintiffs, only the cure process in Numbered Memo 2020-19 is already in effect as a result of the judgment in *Democracy North Carolina*; however, the Court should also refuse to entertain that challenge for the numerous reasons noted in this brief.

implicate numerous abstention doctrines, any one of which counsels this Court to decline jurisdiction. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *Id.* at 11 n.9. "Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Id.* Nevertheless, intervenors address each doctrine in turn.

A. The Court should abstain under *Pullman* because unsettled questions of state law are potentially dispositive.

Under the *Pullman* abstention doctrine, "[f]ederal courts 'should abstain' . . . where a case involves an open question of state law that is potentially dispositive inasmuch as its resolution may moot the federal constitutional issue." *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839-40 (4th Cir. 2012) (quoting *Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 264 (2011) (Kennedy, J., concurring)); *Md. Chapter of Am. Massage Therapy Ass'n, v. State*, No. 90-2417, 928 F.2d 399, 1991 WL 34791, at *2 (4th Cir. 1991) ("Since 1941, the Supreme Court has recognized that federal courts should abstain from deciding constitutional claims when an interpretation of an unclear state statutory provision by a state court might eliminate the constitutional issues presented."). Abstention is proper even if state court resolution of the state law issue would just "present [the federal constitutional issue] in a different posture." *Id.* (quoting *Educ. Servs. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170 (4th Cir. 1983)).

The Numbered Memos have been submitted in the State Court Lawsuit, along with a Joint Motion to Enter a Consent Judgment; if the Consent Judgment is approved, Moore and Berger will have no claim because NCSBE will simply be promulgating the Memos pursuant to a court order. But even if the Judgment is not entered, NCSBE would still have the authority to promulgate this guidance if it chose to do so. Plaintiffs' challenges rely on many misguided reinterpretations of both federal and state law, all of which require that their claims fail as a matter of law, *see infra*

Section IV.A. However, even if the Court were willing to entertain these novel legal theories, *Pullman* abstention would be warranted because their interpretations would raise potentially "unsettled questions of state law"—including, for instance, the scope of the authority delegated to NCSBE, whether the voting restrictions challenged by the Alliance violate the North Carolina Constitution, and the extent to which the proposed memoranda conflict with existing statutes—"that may dispose of the case and avoid the need for deciding the constitutional question." *Meredith v. Talbot Cnty., Md.*, 828 F.2d 228, 231 (4th Cir. 1987).

The first issue Plaintiffs raise is whether state law delegates to NCSBE the power to promulgate the challenged Memoranda. *See* N.C. Gen. Stat. §§ 163-26, 163-27.1; 08 N.C. ADMIN. CODE 01.0106. To the extent Plaintiffs suggest NCSBE's authority is unsettled (it is not, *see infra* Section IV.A.1), abstention is required when a federal court is tasked with evaluating an ambiguous delegation of power by a legislature to other governmental bodies. *Cf. K Hope, Inc. v. Onslow Cnty.*, 107 F.3d 866, Nos. 95-3126, 95-3195, 95-3127, 95-3196, 95-3153, 95-3197, 1997 WL 76936, at *1 (4th Cir. 1997) (requiring abstention when constitutional questions could be avoided by state court's resolution of whether a "County's enactment of the ordinance constituted a valid exercise of the power granted to counties by the North Carolina legislature"). It was clear before this federal proceeding was filed that this issue would arise in the State Court Lawsuit. Counsel for Republican Committee intervenors in the State Court Lawsuit expressly stated in oral argument that the scope of NCSBE's authority "is the question that the [state] Court is going to be looking at" during the Consent Judgment hearing and that the intervenors "would like to be heard on that." September 24 Transcript of Hearing on Republican Committees' Motion to Intervene, Ex. 6 at 36. The same counsel also represented that "[t]he Legislative Defendants"—that is, Moore and Berger—"are concerned" about the same question. *Id.* at 37. Sure enough, just yesterday,

Moore and Berger raised the issue of NCSBE's authority in their briefing on the proposed Consent Judgment in the State Court Lawsuit. *See* Legislative-Defendants' Opposition to Motion for Entry of a Consent Judgment ("Legislative Consent Opposition"), *N.C. All. for Retired Ams. v. NCSBE*, Ex. 7 at 17-19. This important question of state law—the scope of NCSBE's emergency power—should be resolved by the State Court.

Plaintiffs' reliance on extrinsic evidence also supports abstention under *Pullman*. In an attempt to convince the Court to adopt a limiting construction of the term "natural disasters" in one relevant statute, Plaintiffs look beyond the text of that statute, suggesting that their understanding of NCSBE's emergency powers is not settled state law. They suggest that a single chamber's nine-member committee's rejection of a proposed clarification to the text of 08 N.C. ADMIN. CODE 01.0106—which defines the emergency powers of NCSBE's Executive Director—somehow determined the scope of the statute pursuant to which that rule was promulgated. *See* Br. at 3. On the merits, this argument is unconvincing for a host of reasons. *See, e.g.*, *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment."); *id.* ("A mere statement . . . as to what the Committee believes an earlier statute meant is obviously less weighty."). However, Plaintiffs' reliance on legislative history to interpret a statute that is essential to their Elections Clause claims strongly suggests their claim turns on unsettled questions of state law. As the Supreme Court has noted, when "[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

Further to this point, Plaintiffs have implicitly relied on conflicting interpretations of this *same* state law in state court. Though Plaintiffs contend here that NCSBE "do[es] not have any

delegated authority" to use emergency powers during the pandemic, Compl. ¶¶ 39-44; *see* Br. at 3, Moore and Berger have readily relied on *other* guidance passed in response to the COVID-19 pandemic, issued under the authority of the *same statute and rule*, to support their arguments as intervenor-defendants in a similar state court lawsuit. *See, e.g.*, Numbered Memo 2020-14, Ex. 8 (issuing "Emergency Order" pursuant to N.C. Gen. Stat. § 163-27.1 and 08 N.C. ADMIN. CODE 01.0106 to "offset the nature and scope of the disruption from the COVID-19 disaster"); Legislative-Defendants' Memorandum of Law in Support of Motion to Dismiss ("*Stringer* Brief"), *Stringer v. NCSBE*, No. 20-CVS-05615, Ex. 9 at 7, 25 (citing Numbered Memo 2020-14 as supporting evidence for Moore and Berger's motion to dismiss). When dealing with such disputes over the appropriate interpretation of state law, federal courts abstain to allow the state judiciary to resolve any ambiguity. *See, e.g.*, *Pub. Citizen, Health Rsch. Grp. v. Comm'n on Med. Discipline of Md.*, 573 F.2d 863 (4th Cir. 1978); *Md. Chapter of Am. Massage Therapy Ass'n*, 1991 WL 34791. Because Plaintiffs' challenges are premised on their disputed (and unpersuasive) interpretation of NCSBE's authority, they present an unresolved question of state law that warrants abstention.

Even if Plaintiffs' interpretation of NCSBE's authority were correct, they would be forced to rely on further misconstructions of North Carolina law to prove their allegations. At the very least, the question of whether the Numbered Memos conflict with North Carolina election laws presents additional state law disputes. For example, Plaintiffs' gripe with Numbered Memo 2020-23 is that it conflicts with North Carolina's ban on assisting voters with absentee ballot return. *See* Br. at 8-9.[12] However, N.C. GEN. STAT. § 163-226.3(a)(5) is silent on the *validity* of ballots that

[12] Numbered Memo 2020-23 *helps* enforce this criminal provision, because it requires election officials to collect additional information from unauthorized individuals who return ballots. *See* Number Memo 2020-23 at 2.

are returned by unauthorized individuals. Rather, the North Carolina Administrative Code precludes the rejection of ballots solely because of unauthorized return. *See* 08 N.C. ADMIN. CODE 18.0102. A prior version of Numbered Memo 2020-19—cited authoritatively by several Plaintiffs in related state litigation—confirms the truth of this statement. *See* Numbered Memo 2020-19, § 6.2 (Aug. 21, 2020), Ex. 10 ("[D]elivery of an absentee ballot by a person other than the voter, the voter's near relative, or the voter's legal guardian, is not sufficient evidence in and of itself to establish that the voter did not lawfully vote their ballot."); *see also* Stringer Br. at 6, 28 (citing Numbered Memo 2020-19 as supporting evidence for Moore and Berger's motion to dismiss). Additionally, Plaintiffs' challenge to Numbered Memo 2020-19 is premised on an allegation that it eliminates the Witness Requirement. *See* Br. at 6-7. But whether, as a matter of North Carolina law, the Witness Requirement conflicts with the implementation of a reasonable cure process to address minor deficiencies in ballots that do not affect the integrity of the vote is at best unsettled. These open questions have been raised by Moore and Berger in the State Court Lawsuit and provide even further support for *Pullman* abstention.

B. The Court should abstain under *Colorado River* in deference to parallel state court proceedings.

The Court should also abstain under the *Colorado River* doctrine to allow for the resolution of parallel proceedings in the State Court Lawsuit. *See Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 248 (4th Cir. 2013) (explaining courts abstain under Colorado River "in favor of ongoing, parallel state proceedings in cases where 'considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation' clearly favor abstention") (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Proceedings are parallel "if substantially the same parties litigate substantially

the same issues in different forums." *Ackerman*, 734 F.3d at 249 (quoting *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 464 (4th Cir. 2005)).

These cases are parallel. They involve substantially the same parties: Moore and Berger are intervenor-defendants in the State Court Lawsuit; Circosta is a defendant in both cases; the remaining defendants are all named in their official capacity as members of NCSBE, which is also a defendant in the State Court Lawsuit. Only Heath, Whitley, and Swain are not parties to the state proceeding; however, they have no standing to bring these claims and thus cannot preclude abstention under *Colorado River*. *See Corbin v. United Law Grp.*, No. CV 09-9334-VBF(RNBx), 2010 WL 11601588, at *3 (C.D. Cal. Mar. 5, 2010) ("The addition of plaintiffs in the Federal Action also does not defeat a finding of substantial similarity."); *Lumen Constr., Inc. v. Brant Constr. Co.*, 780 F.2d 691, 695 (7th Cir. 1985) ("If the rule were otherwise, the *Colorado River* doctrine could be entirely avoided by the simple expedient of naming additional parties.").[13] Further, the cases involve substantially the same issues. The Numbered Memos challenged here are the subject of a hearing scheduled in the State Court Lawsuit on October 2 to determine whether the State Court will enter the proposed Consent Judgment which incorporate the same Memos. Moore and Berger have raised the same federal constitutional issues before the State Court. *See* Legislative Consent Opposition at 14-28. Because the proceedings are parallel, the Court must proceed to the *Colorado River* factors.

The Fourth Circuit has identified several factors to guide the *Colorado River* analysis:

> (1) whether the subject matter of the litigation involves property where the first court may assume in rem jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the

[13] Additionally, Swain is a Republican candidate for office. *See* Compl. ¶ 11. Thus, he is not only aligned with the Republican Party Intervenors in the State Court Lawsuit—he is expressly represented by them.

> progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights.

Chase Brexton Health Servs., Inc., 411 F.3d at 463-64. Here, the relevant and applicable factors—elements three through six—weigh heavily in favor of abstention.

First, there is a strong desire to avoid piecemeal litigation, especially in circumstances like these where the purpose of the federal lawsuit is to *preempt* an unfavorable ruling in the state court proceeding. This "attempt to forum shop or avoid adverse rulings by the state court . . . weighs strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). Second, the State Court Lawsuit has progressed significantly, to the point where parties are a day away from a hearing on a motion to enter the proposed Consent Judgment, resolving all claims. On the other hand, this lawsuit was filed just a few days ago, after the State Court had already calendared the Consent Judgment hearing. Third, there are critical issues of state law at stake, including questions involving state legislative processes and state separation of powers. Finally, these issues are best adjudicated by the State Court—the forum where this dispute first arose—which is better suited to protect the rights of all parties, which, as noted above, for the most part arise under state law. For these reasons, the Court should abstain under *Colorado River*.

C. *Younger* requires abstention due to ongoing state proceedings.

Younger also requires abstention. "Absent a few extraordinary exceptions, *Younger* mandates that a federal court abstain from exercising jurisdiction and interfering in a state . . . proceeding if (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges." *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006) (footnote omitted). Though *Younger* concerned an underlying state criminal case, the Supreme Court has since applied *Younger* abstention to civil cases. *See, e.g.*,

Pennzoil, 481 U.S. 1; *see also S.C. Ass'n of Sch. Adm'rs v. Disabato*, 460 F. App'x 239, 242 (4th Cir. 2012). Further, *Younger* is "particularly applicable" if "the pending state proceeding may rectify any constitutional violations." *Clowdis v. Silverman*, 666 F. App'x 267, 269 (4th Cir. 2016).

All three prongs of *Younger* are met here. First, the State Court Lawsuit is an ongoing state proceeding that was brought well before this newly-filed federal collateral attack. Second, that case implicates vital state interests, including the scope of the General Assembly's delegation to NCSBE and, more broadly, the State's interest in administering elections that comply with the State Constitution, including, the fundamental right to vote. *See S.C. Ass'n of Sch. Adm'rs*, 460 F. App'x at 243 (affirming *Younger* abstention due to "important state interests . . . in interpreting and applying" a state statutory scheme); *cf. Burdick v. Takushi*, 846 F.2d 587, 589 (9th Cir.1988) (holding state election laws qualify as "a sensitive area of social policy"). And third, Plaintiffs have already raised the same federal constitutional challenges to the proposed Consent Judgment in State Court in advance of the hearing on October 2. *See* Legislative Consent Opposition at 14-28. Plaintiffs may fear that their opposition to the Consent Judgment will fail in the State Court, but that is not grounds to forego abstention. *See Nivens v. Gilchrist*, 319 F.3d 151, 158 (4th Cir. 2003), *as amended* (Mar. 11, 2003) ("Simply put, an assertion that the North Carolina courts will likely decide a constitutional issue in a way contrary to what Appellants believe the Constitution mandates is not a sufficient basis to avoid application of *Younger* abstention.").

Even if the State Court enters the proposed Consent Judgment, *Younger* abstention is required under *Pennzoil*. In *Pennzoil*, after Texaco lost in state court, it filed a federal lawsuit seeking to enjoin enforcement of the state court judgment, alleging that the state's process for compelling compliance violated the U.S. Constitution. 481 U.S. at 13. The Supreme Court, citing "the importance to the States of enforcing the orders and judgments of their courts," held that the

federal court could not entertain the suit. *Id*. "[F]ederal injunctions" may not be used to "interfere with the execution of state judgments," particularly where the federal lawsuit "challenge[s] the very process by which [the state court] judgments were obtained" and the federal constitutional claim could have been raised in the state court action. *Id*. at 14-16. Under *Pennzoil*, it is "inappropriate for the federal court to proceed on an injunctive claim to render [a] state judgment nugatory." *Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989); *see also Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) (*Pennzoil* applies where a federal challenge "implicate[s] a State's interest in enforcing the orders and judgments of its courts").

Younger abstention, as applied in *Pennzoil*, forbids the relief Plaintiffs seek here. Plaintiffs preemptively seek to render the State Court's adjudication nugatory—that is, to enjoin enforcement of a consent judgment that the State Court has not yet entered—but that underlying State Court Lawsuit is ongoing, and Plaintiffs have raised the same arguments they present here at the State Court's October 2 hearing. *See* Legislative Consent Opposition at 14-28. That forum, not this one, is the proper venue for Plaintiffs' challenge to the proposed Consent Judgment. This Court should therefore "defer[ ] on principles of comity to the pending state proceedings." *Pennzoil*, 481 U.S. at 17.[14]

[14] Depending on the State Court Lawsuit's outcome, this Court will also lack jurisdiction to hear Moore and Berger's Election Clause claim under the *Rooker-Feldman* doctrine. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). If the Consent Judgment is entered, Plaintiffs will be "[t]he losing party in state court" who have "filed suit in a U.S. District Court" that only became a case or controversy "after the state proceedings ended," and they will be "complaining of an injury caused by the state-court judgment and seeking federal-court review and rejection of that judgment." *Skinner v. Switzer*, 562 U.S. 521, 531 (2011). This Court must not review the state court Consent Judgment decision because "lower federal courts possess no power whatever [sic] to sit in direct review of state court decisions." *Feldman,* 460 U.S. at 482 n.16; *see* 28 U.S.C. § 1257.

IV. Plaintiffs' TRO Motion should be denied.

A. Plaintiffs are unlikely to succeed on the merits.

1. Plaintiffs are unlikely to succeed on their Elections Clause claim.

The Elections Clause vests authority in "the Legislature" of each state to regulate presidential elections. U.S. Const. art. II, § 1, cl. 2. The U.S. Supreme Court has held, however, that state legislatures can delegate this authority—including to state officials like NCSBE. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting Elections Clause does not preclude "State's choice to include" state officials in lawmaking functions so long as it is "in accordance with the method which the State has prescribed for legislative enactments" (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *id.* at 816-17 ("States retain autonomy to establish their own governmental processes." (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999))); *id.* at 841 (Roberts, C.J., dissenting) (Supreme Court precedents hold "the Elections Clause did not prevent a State from applying the usual rules of its legislative process" "to *supplement* the legislature's role in the legislative process"); *Corman*, 287 F. Supp. 3d at 573 ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state." (quoting *Ariz. State Legislature*, 576 U.S. at 816)). Indeed, such delegation *must* be permitted; if Plaintiffs were correct that *any* "'Regulations' for the times, places, and manner of holding the upcoming federal election" are "unconstitutional," Br. at 11, then *any* discretion exercised by *any* non-legislative entity in *any* state—from a county board's decision about where to put polling places to a state official's guidance on wording ballot instructions—would be unconstitutional. Accordingly, the Consent Judgment and NCSBE's actions under it could only constitute plausible violations of the Elections Clause if they exceeded the authority granted to NCSBE by the General Assembly. They do not.

First, NCSBE has broad, general supervisory authority over elections as set forth in N.C. GEN. STAT. § 163-22(a). As part of its supervisory authority, NCSBE is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C. GEN. STAT. § 163-22(c). Moreover, NCSBE's Executive Director, as the chief state elections official, has the authority to issue Emergency Orders pursuant to N.C. GEN. STAT. § 163-27.1 and 08 N.C. ADMIN. CODE 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19. The State's election laws *specifically* contemplate that the Executive Director may not be able to avoid conflict with previously enacted laws during emergencies. N.C. GEN. STAT. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid *unnecessary* conflict with the provisions of this Chapter. The Executive Director shall adopt rules describing the emergency powers and the situations in which the emergency powers will be exercised.") (emphasis added).

Second, to the extent that the fast-approaching state court proceeding results in entry of the Consent Judgment invalidating the three-day ballot receipt deadline, NCSBE "shall have the authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable." *Id.* § 163-22.2. These statutes, enacted by the General Assembly, clearly plan for and require the *precise* actions taken by NCSBE here. Any suggestion otherwise is both meritless and involves complicated questions of state law that should not be decided here.[15]

[15] To the extent the State Court finds that the voting restrictions remediated by the Numbered Memos would violate the rights of voters under the State Constitution absent such relief, then the Elections Clause has no place here. *See Ariz. State Legislature*, 576 U.S. at 817-18. ("Nothing in [the Elections] Clause instructs, nor has th[e] [U.S. Supreme] Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution.").

Just yesterday, a federal court rejected Montana legislators' nearly identical challenges to election modifications made by the Executive branch in response to COVID-19. *Donald J. Trump for President, Inc. v. Bullock*, CV 20-66-H-DLC (D. Mont. Sept. 30, 2020), Ex. 11. Like NCSBE's authority, Montana law provides the Governor with certain powers to respond to an "emergency or disaster." *Id.* at 27. The court held that this provision "constitute[s] a fundamental part of the legislative enactments governing the time, place, and manner of elections" and—given that "the term 'Legislature' as used in the Elections Clause is not confined to a state's legislative body"—directives issued pursuant to those emergency powers do not violate the Elections Clause. *Id.* at 29-32. This Court should similarly reject Plaintiffs' challenge.

2. Plaintiffs are unlikely to succeed on their Equal Protection claim.

a. Plaintiffs' "unequal evaluation of ballots" claim lacks merit.

Despite Plaintiffs' assertions, the Memoranda—even once implemented—will not lead to "the unequal evaluation of ballots." Br. at 19. Although Plaintiffs are correct that the Equal Protection Clause requires states to "avoid arbitrary and disparate treatment of the members of its electorate," *Bush v. Gore*, 531 U.S. 98, 105 (2000), that line of case law is wholly irrelevant here.

First, the Memoranda apply equally to *all* North Carolina voters. Indeed, setting aside that Numbered Memos 2020-22 and 2020-23 have not yet been issued, both affect only *future* election procedures. Numbered Memo 2020-22 allows all otherwise eligible ballots that are mailed by Election Day to count if they are received within nine days of the election. That Heath and Whitley have already cast their ballots is beside the point; just like the three-day ballot receipt deadline, the nine-day deadline will apply to *all* duly-cast ballots. And to the extent Numbered Memo 2020-22 introduces a new deadline into the election process, it affects only the counting of ballots on election officials' end, after Election Day has passed—not when voters themselves must submit their ballots. All North Carolina voters who are mailing their ballots for the November election

must do so by Election Day. Numbered Memo 2020-22 does nothing to change that. The same is true of Numbered Memo 2020-23, which affects the drop-off procedure for absentee ballots at early voting locations. Early voting begins on October 15, and *all* voters who choose to return their ballot at early voting locations will have the option to utilize the absentee ballot drop-off stations that Numbered Memo 2020-23 will implement. Finally, Numbered Memo 2020-19, which has been recently revised, expands the list of curable deficiencies for all voters.

Even operating under their misconstrued theory, Plaintiffs have not attempted to articulate, let alone successfully shown, that their right to vote—or anyone else's for that matter—has been burdened or that their votes will be *valued* less than others'. *See Bush*, 531 U.S. at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, *value* one person's vote over that of another.") (emphasis added); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (explaining the Equal Protection Clause "bars a state from *burdening* a fundamental right for some citizens but not for others") (emphasis added). Nor could they. Heath and Whitley have *already successfully voted*, and their ballots will count.

At bottom, Plaintiffs take issue with the fact that voters casting ballots after Plaintiffs have already successfully cast theirs may face fewer barriers (despite the fact that Plaintiffs have alleged *no* barriers to their own voting process at all). There is no authority to suggest that a law that makes exercise of a fundamental right *easier* for future actors is barred by the equal protection doctrine. *Cf. Short*, 893 F.3d at 677-78 ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution."). That position is especially troubling here, where the Alliance *has* shown, in the ongoing state court proceedings, that the pre-Memoranda rules burdened their fundamental right to vote. Indeed, taking Plaintiffs' argument to its logical conclusion would lead to absurd results. For example, under Plaintiffs' novel

understanding of the Equal Protection Clause, someone who is already registered to vote could challenge the introduction of online voter registration in his or her State because that "easier" procedure was unavailable to them at the time of registration. Ultimately, Plaintiffs' position would allow just about any voter to block any and all new procedures on the grounds that they benefit others, inviting the Court to adopt a limitless expansion of federal court jurisdiction, *see supra* Section I, to vindicate a previously unrecognized right to dictate how others vote.

b. Plaintiffs' "vote dilution" argument lacks merit.

Plaintiffs' vote dilution claim is equally meritless. Besides the fact that Plaintiffs again neither allege nor demonstrate any harm, *see supra* Section I, "[t]he Constitution is not an election fraud statute." *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)). There is simply no authority for transmogrifying the vote dilution line of cases into a weapon that voters may use to enlist the federal judiciary to make it *more difficult* for millions of their fellow citizens to vote, based entirely on unfounded and speculative fears of voter fraud. *Cf. Short*, 893 F.3d at 677-78. To the contrary, courts have routinely—and appropriately—rejected such efforts. *See Minn. Voters All.*, 720 F.3d at 1031-32 (affirming Rule 12(b)(6) dismissal of vote dilution claim); *see also Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406-07 (E.D. Pa. 2016) (rejecting claim of vote dilution "based on speculation that fraudulent voters may be casting ballots elsewhere in the" state on motion for preliminary injunction). Plaintiffs have failed to allege facts that give rise to a plausible claim for relief, or even alleged a cognizable legal theory.

B. Plaintiffs do not establish irreparable harm.

To obtain preliminary relief, Plaintiffs must show that they are "likely to suffer irreparable harm" in its absence. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). A TRO is an extraordinary remedy that requires, at a minimum, a "clear showing" that the movant will suffer

harm that is "neither remote nor speculative, but actual and imminent." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 (4th Cir. 2019).

Plaintiffs assert two theories of irreparable harm: first, that NCSBE is nullifying state laws on an ongoing basis, and, second, that Heath's and Whitley's right to vote is threatened by the proposed Memoranda. Neither theory holds water. Two of the proposed Memoranda have yet to take effect, and all are the subject of an ongoing state court proceeding. In any event, this Court cannot rest a finding of likely irreparable harm on a presumption that state agencies will act unlawfully. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 542 (4th Cir. 2013) ("[A] court is required to presume good faith on the part of public officials"). Moreover, Heath and Whitley have *already voted*, and all of the proposed Memoranda—regardless of when they go into effect—apply equally to all North Carolina voters. Plaintiffs have not satisfied their burden of establishing a likelihood of irreparable harm.

C. Equity and public interest weigh against a TRO.

Both the "balance of the equities" and the "public interest" strongly disfavor a TRO. North Carolina citizens have an interest in their state courts interpreting their rights under the state constitution. *See Minn. v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions."); *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164, 170 (1983) ("Only [the North Carolina Supreme] Court may authoritatively construe the Constitution and laws of North Carolina with finality."). Because "Plaintiffs have not demonstrated a likelihood of success on the merits or irreparable harm, the balance of equities and the public interest are better served by allowing the underlying [state action to] proceed." *Di Biase v. SPX Corp.*, 872 F.3d 224, 235-36 (4th Cir. 2017).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

Dated: October 1, 2020

Respectfully submitted,

/s/ *Narendra K. Ghosh*

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**Pro Hac Vice Application Forthcoming*

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Civil Action No. 4:20-CV-182

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

Plaintiffs respectfully request that this Court enter a temporary restraining order to enjoin an unprecedented effort by the State Board of Elections to usurp the General Assembly's prerogative to regulate federal elections in North Carolina. Disregarding the clear mandate of the U.S. Constitution that provides that only the "Legislature[s]" of the several states or Congress may prescribe the time, place, and manner of federal elections, the Board, through its Executive

Director Karen Brinson Bell, issued three Memoranda directly contravening the General Assembly's duly-enacted statutes. Ignoring the fact that the Board is neither the North Carolina Legislature nor Congress, the Board proceeded to negotiate with private parties and issue these Memoranda to gut several important election rules. Further, these ad-hoc Memoranda have been issued while voting is *ongoing* and to that end the Board is applying different rules to ballots cast by similarly situated voters thus violating the Equal Protection Clause in two distinct ways: this new regime results in arbitrary distinctions based solely on whether a ballot was cast before or after the Memoranda were adopted; and the new rules allow illegally cast votes to be counted thereby diluting the vote of those who cast their ballots lawfully. For the reasons set forth below and in light of the ongoing election, Plaintiffs are entitled to a temporary restraining order.

STATEMENT OF FACTS

As North Carolina's "Legislature," the General Assembly is tasked with regulating federal elections in North Carolina. U.S. CONST. art. 1, § 4, cl. 1. Accordingly, the General Assembly has exercised its federal constitutional authority to establish rules governing the manner of federal elections in North Carolina and provided many options for North Carolinians to exercise their right to vote. For instance, voters have three main options for casting their ballots. Voters may vote in person on Election Day, they may vote in person during the 17-day early voting, or they may vote absentee by mail.

Voters do not need any special circumstance or reason to vote absentee in North Carolina. To return completed absentee ballots, a voter must have them witnessed and then must mail or deliver them through a delivery service such as UPS or in person. In addition, the voter's near relative or verifiable legal guardian can also return the ballots in person. N.C. GEN. STAT. § 163-231. But other than the voter's near relative or verifiable legal guardian, the General Assembly has

criminally prohibited any other person from "return[ing] to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5).

The General Assembly also enacted strict requirements for the return of absentee ballots. Generally speaking, absentee ballots must be received by the appropriate local county board of elections either: (a) no later than 5:00pm on Election Day; or (b) if postmarked by Election Day, "no later than three days after the election by 5:00 p.m." N.C. GEN STAT. § 163.231(b)(2)(b). This is referred to as the Receipt Deadline.

In response to the COVID-19 pandemic, North Carolina elections officials sought the power to adjust the State's voting laws to account for the pandemic. To that end, North Carolina State Board of Elections Executive Director Karen Brinson Bell and the Board attempted to assert emergency powers to change the election laws for the 2020 election pursuant to statutory authority to respond to a "natural disaster." N.C. GEN. STAT. § 163-27.1. But the North Carolina Rules Review Commission unanimously rejected this attempted power grab—by a vote of 9–0, *see* Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/3kLAY5y (Compl. Ex. 8). In declining to approve the changes to the rule, the Rules Review Commission explained that the Board "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. *Id.*

Director Bell also wrote a letter to Governor Cooper and to legislative leaders recommending several "statutory changes" on March 26, 2020. N.C. State Board of Elections, *Recommendations to Address Election-Related Issues Affected by COVID-19* at 3 (March 26, 2020), https://bit.ly/369EBOO (Compl. Ex. 4). In her letter, Director Bell requested that, among other things, the General Assembly "[r]educe or eliminate the witness requirement." She explained

that such action was recommended to "prevent the spread of COVID-19." And she further argued that "[e]liminating the witness requirement altogether is another option."

On June 11, 2020, the General Assembly passed bipartisan legislation adjusting the voting rules for the November Election by an overwhelming 142-26 margin. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Governor Cooper signed the duly passed bill into law the next day. The Act made a number of adjustments to North Carolina's election laws, including some—but not all—of what Director Bell requested.

Unlike Director Bell's suggestion to "[e]liminate" the Witness Requirement, the General Assembly modified the requirement. Normally under North Carolina law, absentee ballots require two qualified witnesses. *See* N.C. GEN. STAT. § 163-231. But for the 2020 Election, the Bipartisan Elections Act provides that an "absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of *at least one person* who is at least 18 years of age and is not disqualified by G.S. 163–226.3(a)(4) or G.S. 163–237(c)." *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a) (emphasis added). The one absentee ballot witness is still required to sign "the application and certificate as a witness" and print his or her "name and address" on the absentee ballot's return envelope.

And while the Bipartisan Elections Act changed numerous other provisions to account for the pandemic, it did not change the Receipt Deadline for absentee ballots, which remains set by statute as three days after the election by 5:00pm for ballots delivered by the U.S. Postal Service. The Bipartisan Elections Act also did not alter the prohibition on "any person" other than a near relative or verifiable legal guardian "tak[ing] into that person's possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5). This remains clearly illegal as a matter of North Carolina law.

On August 10, 2020, nearly two months after the General Assembly's enactment of the Bipartisan Elections Act, the North Carolina Alliance for Retired Americans, a social welfare organization comprised of retirees from public and private unions, community organizations, and individual activists, together with seven individual North Carolina voters filed suit in the Wake County Superior Court. *See North Carolina Alliance for Retired Americans, et al. v. North Carolina State Board of Elections* ("*Alliance*"), No. 20-CVS-8881 (Wake Cnty. Super. Ct.).

The *Alliance* plaintiffs named as a defendant one of the named Defendants in this action, Board Chair, Damon Circosta. The *Alliance* plaintiffs sought injunctive relief, seeking numerous alterations to North Carolina's election statutes. Among their requested remedies, the *Alliance* plaintiffs asked the court to "[s]uspend the Witness Requirement for single-person or single-adult households" and to "[r]equire election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day." The *Alliance* plaintiffs also sought to "[p]reliminarily and temporarily enjoin the enforcement of the" criminal prohibition on delivering another voter's absentee ballot.

Legislative Plaintiffs Moore and Berger intervened as of right to defend the duly-enacted election regulations. In fact, both the federal district court for the Middle District of North Carolina and a North Carolina state court heard and rejected recent motions to preliminarily enjoin the Witness Requirement because the plaintiffs in those cases failed to show a likelihood of success on the merits. *See* Order on Injunctive Relief, *Chambers v. State*, No. 20 CVS 500124, at 6–7 (N.C. Super. Ct. Sept. 3, 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 4484063, at *36 (M.D.N.C. Aug. 4, 2020).

But before the state court had an opportunity to rule on the motion for a preliminary injunction in the *Alliance* case, the Board and the *Alliance* plaintiffs agreed to a proposed consent

judgment. Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment, *Alliance*, No. 20-CVS-8881 (Sept. 22, 2020 Wake Cnty. Super. Ct.) (Compl. Ex. 1). The Board made this agreement despite the fact that "a lot of the concessions" in the consent judgment had been previously rejected by the federal and state court hearing similar claims. *See* Ken Raymond Resignation Letter (Sept. 23, 2020) (Compl. Ex. 7); *see also* David Black Resignation Letter (Sept. 23, 2020) (Compl. Ex. 6). Lawyers in the North Carolina Attorney General's office allegedly did not apprise Board members of this fact, prompting two Board members to resign. *See id.*

The Board released three Numbered Memoranda, at the same time as announcing the consent judgment.[1] Each memorandum purports to nullify validly enacted statutes passed by the General Assembly pursuant to its exclusive federal constitutional prerogative to regulate the time, place, and manner for holding federal elections. Numbered Memo 2020-19 "directs the procedure county boards must use to address deficiencies in absentee ballots." Originally released August 21, 2020, the Board revised it on September 22, 2020 to allow voters to cure deficiencies in the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. (Compl. Ex. 1 at 32–37; original attached as Compl. Ex. 3). If a "witness . . . did not print name," "did not print address," "did not sign," or "signed on the wrong line," the Board will allow the absentee voter to "cure" the deficiency. A voter cures a Witness Requirement deficiency through a "certification."

The Board's "certification" is simply a form sent to the voter by the county board. And the voter can return the form to the county board at any time until 5 p.m., November 12, 2020, and

[1] Numbered Memo 2020-19 is available on the Board's Numbered Memo page. *See* https://bit.ly/367Ffw8 (last accessed Sept. 26, 2020). But Numbered Memos 2020-22 and 2020-23 for some reason are not available. These Memoranda are dated September 22, 2020 and are publicly available through a link to the Board's joint motion in the Board's press release announcing the motion. *See* https://bit.ly/2S5qBNr; *see also* N.C. State Bd. of Elections, State Board Updates Cure Process to Ensure More Lawful Votes Count (Sept. 22, 2020) (Compl. Ex. 2). Numbered Memo 2020-19 also cross references Numbered Memo 2020-22. *See* Numbered Memo 2020-19 at 4.

may do so via fax, email, in person, or by mail or commercial carrier. For a missing witness, the "certification" does not require the voter to resubmit a ballot in accordance with the Witness Requirement mandated by Section 1.(a) of the Bipartisan Elections Act. Instead, the "certification" eliminates the Witness Requirement altogether. All a voter must do is sign and affirm the following affidavit:

> I am submitting this affidavit to correct a problem with missing information on the ballot envelope. I am an eligible voter in this election and registered to vote in [name] County, North Carolina. I solemnly swear or affirm that I voted and returned my absentee ballot for the November 3, 2020 general election and that I have not voted and will not vote more than one ballot in this election. I understand that fraudulently or falsely completing this affidavit is a Class I felony under Chapter 163 of the North Carolina General Statutes.

Thus, the Board through Memorandum 2020-19's "certification" allows absentee voters to be their own witnesses, a step that effectively vitiates the Witness Requirement. This is directly contrary to clear text of the Bipartisan Elections Act that requires at least one witness for every absentee ballot. Notably, in federal litigation challenging the Witness Requirement, Executive Director Bell testified under oath that an absentee ballot with "no witness signature" could not be cured and therefore elections officials would have to "spoil that particular ballot" and require the voter to vote a new one. Evidentiary Hearing Tr. at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. July 21, 2020) (Compl. Ex. 5). This understanding is also reflected in the original version of Numbered Memo 2020-19, which required ballots with missing witness information to be spoiled because such "deficiencies cannot be cured by affidavit, because the missing information comes from someone other than the voter." Original Numbered Memo 2020-19 at 2.

Numbered Memo 2020-19, together with Numbered Memo 2020-22, alters the Receipt Deadline in violation of a duly enacted provision of the North Carolina General Statutes. *See* N.C.

GEN. STAT. § 163-231(b)(2)(b). Numbered Memo 2020-19, cross-referencing Numbered Memo 2020-22, states that a ballot is not late (1) if it is received by 5 p.m. on Election Day or (2) "if postmarked on or before Election Day" and "received by 5 p.m. on Thursday, November 12, 2020." Election Day is November 3, 2020. Under the Receipt Deadline enacted by the General Assembly, a ballot must be received by November 6 at 5:00pm—in other words, within three days of Election Day. *See* N.C. GEN. STAT. § 163-231(b)(2)(b). The Board, through Numbered Memos 2020-19 and 2020-22, completely ignores that strict statutory limit and extends the Receipt Deadline to *nine days*—tripling the amount of time for absentee ballots to arrive after Election Day. Numbered Memo 2020-22 also expands the category of ballots that may be counted if received after Election Day. (Compl. Ex. 1 at 29–30). Under state law, only ballots sent through U.S. Postal Service and "postmarked" by Election Day may be counted if received after Election Day. Numbered Memo 2020-22, however, in certain circumstances allows ballots sent through the U.S. Postal Service without a postmark or sent by commercial carrier to be counted if received after Election Day. *See* Numbered Memo 2020-22 at 1–2.

Numbered Memo 2020-23 undermines the General Assembly's criminal prohibition on the delivery of an absentee ballot by individuals other than the voter himself or the voter's near relative or legal guardian. (Compl. Ex. 1 at 39–43). The General Assembly has provided that it shall be unlawful for any person—other than the voter, the voter's near relative, or legal guardian—"to take into that person's possession for delivery to a voter or for return to a county board of elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5). And Numbered Memo 2020-23 purports to clarify the procedures for local county officials to confirm that ballots are delivered lawfully. For instance, the Numbered Memo sets out that county officials must confirm with individuals that are dropping off ballots that the individual is the voter, the voter's near relative,

or the voter's legal guardian. But even if the individual does not fall into one of the three lawful categories of people who can drop off a voter's ballot, the Numbered Memo instructs that "[i]ntake staff shall accept receipt of all ballots provided to them, even if information is missing or someone other than the voter or their near relative or legal guardian returns the ballot." This directly undermines the General Assembly's criminal prohibition on the unlawful delivery of ballots. *See* N.C. GEN. STAT. § 163-226.3.

Moreover, Numbered Memo 2020-23 does nothing to prevent the anonymous and unlawful delivery of votes. After stating that "an absentee ballot may not be left in an unmanned drop box," *i.e.*, a place where county officials are not confirming the identity of the mail deliverer at all, the memorandum plainly discloses the Board's lack of desire to enforce the ban on anonymous deliveries of ballots. To that end, local voting sites that have "a mail drop or drop box used for other purposes . . . must affix a sign stating that voters may not place their ballots in the drop box." "However, a county board may not disapprove a ballot solely because it is placed in a drop box." Thus, Numbered Memo 2020-23 plainly discloses that votes that are illegally placed in a drop box—with only a mere sign saying they should not be so placed—will be counted. This fundamentally undermines the General Assembly's criminal prohibition on the delivery of ballots by those whom it has not authorized.

Numbered Memo 2020-19, Numbered Memo 2020-22, and Numbered Memo 2020-23 are all dated September 22, 2020. These modifications thus come well after North Carolina began mailing out absentee ballots on September 4, 2020. *See* Pam Fessler, "Voting Season Begins: North Carolina Mails Out First Ballots," npr.org (Sept. 4, 2020), https://bit.ly/2Gb2dY2. As of September 22, 2020 at 4:40am (several hours before the three Memoranda were announced), 153,664 absentee ballots had *already been cast*. Absentee Data, North Carolina State Board of

Elections (Sept. 22, 2020), *available at* https://bit.ly/2G3stnJ. Each and every one of those ballots were cast with a different set of rules than those which now apply post-September 22, 2020 with the three Memoranda.

In response to the Board's actions, the Plaintiffs seek declaratory and injunctive relief.

STANDARD OF REVIEW

"The substantive standard for granting either a temporary restraining order or a preliminary injunction is the same." *Patel v. Moron*, 897 F. Supp. 2d 389, 395 (E.D.N.C. 2012). To obtain either, a party must establish: "(1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest." *Id.*; FED. R. CIV. P. 65(b).

ARGUMENT

Legislative Plaintiffs sue in their official capacity as Speaker of the House and President Pro Tempore of the Senate. As such, under North Carolina law, they represent *both* the institutional interests of the General Assembly *and* the interests of the State as a whole in this litigation. *See* N.C. GEN. STAT. §§ 1-72.2, 120-32.6. The Defendants' actions undermine North Carolina's election statutes and effectively nullify statutes enacted by the General Assembly while depriving the State of its ability to "enforce its duly enacted" laws. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). Plaintiff Alan Swain is currently running as the Republican candidate for Congress in North Carolina's Second Congressional District. The Defendants' Memoranda unconstitutionally change the rules governing the ongoing voting in his federal election.

Plaintiffs Bobby Heath and Maxine Whitley are both eligible, registered voters who reside in North Carolina. Both Plaintiff Heath and Plaintiff Whitley, following the existing statutory requirements, requested and received absentee ballots. Both Plaintiff Heath and Plaintiff Whitley,

following the requirements in place before Defendants issued the Numbered Memos being challenged here, obtained a qualified witness and had that individual witness them voting their absentee ballot. Both Plaintiff Heath and Plaintiff Whitley, after obtaining the required witness signature on their ballots, returned their ballots by mail to their respective County Boards of Election and had those ballots received by their County Board of Election prior to September 22, 2020.

I. Plaintiffs Are Likely To Succeed on the Merits

The Defendants' actions in publishing the three Memoranda violate two provisions of the Constitution that protect our elections and the right to vote: the Elections Clause and the Equal Protection Clause.

A. The Defendants' Memoranda Violate the Elections Clause

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." (emphasis added). U.S. CONST. art. 1, § 4, cl. 1. Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Since neither Congress nor the General Assembly promulgated the Board's Memoranda, these Memoranda are unconstitutional to the extent they overrule the enactments of the General Assembly or otherwise qualify as "Regulations" for the times, places, and manner of holding the upcoming federal election.

The General Assembly is the "Legislature," established by the people of North Carolina. N.C. CONST. art. II, § 1. And the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme

judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6; *see also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). With this grant of exclusive legislative power, the General Assembly is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the state. *Id*. Concurrently, this exclusive grant of legislative power means the U.S. Constitution has assigned the role of regulating federal elections in North Carolina to the General Assembly.

The word "Legislature" in the Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id.*; *see e.g.*, Federalist No. 27, at 174–175 (C. Rossiter ed. 1961) (Alexander Hamilton) (defining "the State legislatures" as "select bodies of men"); "Legislature," American Dictionary of the English Language (1828) (Noah Webster) ("[T]he body of men in a state or kingdom, invested with power to make and repeal laws."); "Legislature," A Dictionary of the English Language (1755) (Samuel Johnson) ("The power that makes laws."). By choosing to use the word "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch, *Ariz. State Legislature v. Ariz. Indep. Redist. Comm'n*, 576 U.S. 787, 814 (2015), and in North Carolina that is the General Assembly.

The Framers had a number of reasons to delegate (subject to Congress's supervisory power) the task of regulating federal elections to state Legislatures like the General Assembly. Specifically, the Framers understood the regulation of federal elections to be an inherently legislative act. After all, regulating elections "involves lawmaking in its essential features and most important aspect." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *cf. Ariz. Indep. Redist. Comm'n*, 576

U.S. at 808 (observing that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking"). And so, as one participant in the Massachusetts debate on the ratification of the Constitution explained, "[t]he power . . . to regulate the elections of our federal representatives must be lodged somewhere," and there were "but two bodies wherein it can be lodged—the legislatures of the several states, and the general Congress." M. Farrand, *The Records of the Federal Convention of 1787, vol. 2* (1911), *available at* https://bit.ly/3kPvZRu.

Further, the Framers were aware of the possibility that regulations governing federal elections could be ill-designed. James Madison, for instance, acknowledged that those with power to regulate federal elections could "take care so to mould their regulations as to favor the candidates they wished to succeed." *Id*. But as with so many other problems the Framers confronted, their solution was structural and democratic. To ensure appropriate regulation of federal elections, the Elections Clause gives responsibility to the most democratic branch of state government—the Legislature—so that the people may check any abuses at the ballot box. And as a further check, the Elections Clause gives supervisory authority to the most democratic branch of the federal government—the U.S. Congress.

The text and history of the Elections Clause thus confirm that the General Assembly is the only constitutionally empowered state entity to regulate federal elections. And as the Supreme Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—the state legislatures' power to prescribe regulations for federal elections "cannot be taken from them or modified by their state constitutions." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And courts have long recognized this limitation on the power of states to restrain the discretion of state legislatures under the Elections Clause and the Presidential

Electors Clause. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W. 2d 279, 286–87 (Neb. 1948); *Com. ex rel. Dummit v. O'Connell*, 181 S.W. 2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

The Board has clearly violated the Elections Clause by issuing Memoranda that purport to adjust the rules of the election that have already been set by statute. First, the Board has no freestanding power under the Constitution to rewrite North Carolina's elections laws and to "prescribe[ ]" the Board's own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. The exclusive home of the legislative branch in North Carolina is the General Assembly. Thus, the Board is not the "Legislature" empowered to adjust the rules of the federal election on its own.

Second, the Board has not been delegated the General Assembly's constitutional authority, so this case is far afield from *Arizona Independent Redistricting Commission*. In that case, the Supreme Court dealt with a provision of the Arizona Constitution—adopted through popular initiative—that vested an independent state commission with authority over drawing federal congressional districts. The state legislature claimed that the federal Elections Clause rendered that allocation of authority invalid, but the Supreme Court disagreed, concluding that the independent state commission simply acted as "a coordinate source of legislation on equal footing with the representative legislative body." *Arizona Indep. Redist. Comm'n*, 576 U.S. at 795. But here the Board has no legislative power and is not on equal footing with the General Assembly. Indeed, the North Carolina Supreme Court expressly held that a prior version of the Board "clearly performs primarily executive, rather than legislative or judicial, functions." *Cooper v. Berger*, 809 S.E.2d 98, 112 (N.C. 2018). It therefore struck down provisions limiting the Governor's control over the Board. The current version of the statute does not change the nature of the Board's activities but

rather addresses the constitutional infirmities recognized by *Cooper v. Berger*. *Compare id.* at 114, with N.C. GEN. STAT. § 163-19.

Furthermore, the Board is merely a creature of statute. *See* N.C. GEN STAT. § 163-19(a) ("There is established the State Board of Elections, which may be referred to as the "State Board" in this Chapter."). And consistent with being a creature of statute, the Board is limited by the statute that created it. "The State Board of Elections shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations . . . as it may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See* N.C. GEN. STAT. § 163-22(a) (emphasis added). Thus, the General Assembly has not granted the Board any power to overrule the duly enacted statutes governing elections or given it any form of legislative power. Quite the contrary, the Board is not allowed to issue any rules or regulations that "conflict" with provisions enacted by the General Assembly.

The Board's own actions confirm this. In particular, Executive Director Bell asked the General Assembly to eliminate the Witness Requirement. If the Board had the power to abolish that requirement unilaterally, why would the Board seek a legislative fix instead? The Board further sought to expand its emergency powers through regulation, but this effort too was rejected. If the Board had the power to overrule the General Assembly's statutes through its existing authorities, then why did it seek to amend its regulations in this way? The answer to both questions is the same—the Board does not have the power to amend or nullify the General Assembly's statutes regulating the federal election.

The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. And the General Assembly has not further delegated the power to enable the Board to amend or nullify its duly-enacted statutes. Thus, because the Numbered

Memoranda purport to alter the time, place, and manner for holding the upcoming federal election in a manner that contravenes the General Assembly's duly enacted statutes, these Memoranda violate the Elections Clause.

B. The Defendants' Ad-hoc Memoranda Violate the Equal Protection Clause

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941). But the right to vote includes the right to have one's ballot counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted).

To ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000)); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court's] decisions."). "[T]reating voters differently" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001).

At a minimum then, the Equal Protection Clause requires the "nonarbitrary treatment of voters" and forbids voting practices that are "standardless," without "specific rules designed to

ensure uniform treatment." *Bush*, 531 U.S. at 103, 105–06; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). Consequently, the "formulation of uniform rules" is "necessary" because the "want of" such rules may lead to "unequal evaluation of ballots." *Bush*, 531 U.S. at 106.

Defendants have violated these constitutional requirements, thereby infringing upon Plaintiff Heath's and Plaintiff Whitley's rights under the Equal Protection Clause to (1) "participate in" the upcoming election "on an equal basis with other citizens in" North Carolina. *Dunn*, 405 U.S. at 336, and (2) have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29.

First, if the Memoranda are not enjoined, North Carolina will be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. As discussed above, North Carolina law requires all absentee ballots to be witnessed by one qualifying adult. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17, § 1.(a). North Carolina also prohibits any person other than a voter's "near relative" or "verifiable legal guardian" from delivering a completed absentee ballot to a county board of elections. N.C. GEN. STAT. § 163-226.3(a)(5). North Carolina also requires absentee ballots to be received, at the latest, by 5 p.m. three days after Election Day. These provisions governed the absentee ballot submission process for the 153,664 voters who had already cast their absentee ballots before the Memoranda were announced like Plaintiffs Heath and Whitley. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the Board's memoranda. The Board's new Numbered Memo 2020-19 is thus a sudden about-face on the Witness Requirement that upends the careful bipartisan framework that has governed voting so far.

The Defendants' Memoranda not only effectively nullified the Witness Requirement and Ballot Harvesting Ban, *see supra* I.A., but the Board has also been plainly inconsistent in its requirements. On August 21, 2020, the Board explained in Numbered Memo 2020-19 that a failure to comply with the Witness Requirement was a deficiency that *could not* be cured by a post-submission affidavit. *See* N.C. State Bd. of Elections, Numbered Memo 2020-19 at 2 (Aug. 21, 2020). Instead, the relevant county board of elections was required to spoil the ballot and reissue a new ballot along with an explanatory notice to the voter. *Id.* The lack of a witness was a problem that no affidavit could cure. *Id.*

The Defendants then arbitrarily changed course. The Defendants issued the updated Numbered Memo 2020-19 on September 22, 2020. The new memo explains that an absentee ballot entirely devoid of witness information may be cured with a certification from the voter. See N.C. State Bd. of Elections, Numbered Memo 2020-19 at 2–4 (Sept. 22, 2020), https://bit.ly/3666pTV (explaining that deficiencies curable by a certification from the voter include a witness or assistant failing to write their name, address, or signature). This absentee "certification" will transmogrify an entirely unwitnessed (and hence invalid) ballot into a lawful, compliant ballot. All the Board's Numbered Memo requires is that the voter merely affirm that the voter "voted and returned [her] absentee ballot for the November 3, 2020 general election and that [she] ha[s] not voted and will not vote more than one ballot in this election." Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment Ex. B, *N.C. Alliance for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Super. Ct. Sept. 22, 2020) (Compl. Ex. 1 at 37). The certification does not require voters to affirm that they had their ballots witnessed in the first place or even attempted to follow this important aspect of the law.

And Numbered Memo 2020-19, in conjunction with Numbered Memo 2020-22, goes further by allowing absentee ballots to be received up to *nine days* after Election Day. This is both in violation of the General Assembly's enacted statutes but also a further change in the rules while voting is ongoing. And Numbered Memo 2020-23 further provides a standardless approach by allowing even the anonymous delivery of ballots—plainly contrary to N.C. GEN. STAT. § 163-226.3's prohibition on the delivery of ballots by all but a select few—to unmanned boxes at polling sites.

Accordingly, if these Memoranda are not enjoined, North Carolina will necessarily be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. See *Bush*, 531 U.S. at 106. Over 150,000 voters cast their ballots before issuance of the Memoranda, and therefore worked to comply with the Witness Requirement and lawful delivery requirements. There is no justification for subjecting North Carolina's electorate to this arbitrary and disparate treatment, especially given that both a North Carolina federal court and a North Carolina state court have rejected motions to preliminarily enjoin the witness requirement, finding that plaintiffs in those cases had not shown a likelihood of success on the merits. See Order on Injunctive Relief, *Chambers v. State*, No. 20 CVS 500124, at 6–7 (N.C. Super. Ct. Sept. 3, 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 4484063, at *36 (M.D.N.C. Aug. 4, 2020). For the Board to suddenly reverse course despite this demonstrated success in court raises questions as to the rationale underlying a sudden change in policy in the midst of an ongoing election. [2]

[2] Even if the state court *had* preliminarily enjoined the witness requirement, finding a likelihood of success on the merits, the fact would remain that the state court lacks authority to alter the election laws. *See supra* Part I.A. The Elections Clause of the U.S. Constitution assigns the role of regulating federal elections in North Carolina exclusively to the General Assembly, not the state courts. *See* U.S. CONST. art. I, § 4, cl. 1.

Second, if the Memoranda are not enjoined, the Board will be violating Plaintiffs Heath's and Whitley's rights to have their ballots counted without dilution. *Reynolds*, 377 U.S. at 555 n. 29. The Board's Memoranda ensure that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in three ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Numbered Memo 2020-19; (2) by allowing absentee ballots to be received up to nine days after Election Day, *see id.*; *see also* Numbered Memo 2020-22; and (3) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see* Numbered Memo 2020-23. These changes are open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the vote of Plaintiffs Heath and Whitley.

The Board's Memoranda are a denial of the one-person, one-vote principle affixed in the Supreme Court's jurisprudence. Dilution of lawful votes, to any degree, by the casting of unlawful votes violates the right to vote. *Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker v. Carr*, 369 U.S. 186, 208 (1962). Moreover, those practices, such as the Board's that promote fraud and dilute the effectiveness of individual votes by allowing illegal votes, violate the Fourteenth Amendment too. *Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). Thus, when the Board purposely accepts even a single ballot without the required witness, accepts otherwise late ballots beyond the deadline set by the General Assembly, or facilitates the delivery of ballots by unlawful parties, the Board has accepted votes that dilute the weight of lawful voters like Plaintiffs Heath and Whitley.

Accordingly, the Board is not only administering the election in an arbitrary and nonuniform manner that will inhibit Plaintiffs Heath's and Whitley's right "to participate in" the

election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336, but it is also purposefully allowing otherwise unlawful votes to be counted, thereby deliberately diluting and debasing Plaintiffs Heath's and Whitley's lawful votes. These are clear violations of Plaintiffs Heath's and Whitley's Equal Protection rights under the Fourteenth Amendment.

II. The Irreparable Harm to Plaintiffs Warrants a Temporary Restraining Order

Plaintiffs have demonstrated that they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Board's *ongoing* implementation of the Memoranda has the immediate and irreparable effect of nullifying North Carolina election statutes during the very election those statutes were enacted to regulate. And the *ongoing* implementation undermines Plaintiffs Heath's and Whitley's right to vote on an equal basis right now as individuals are casting votes under the updated Memoranda now.

First, the ongoing nullification of duly-enacted North Carolina laws governing this election is *per se* irreparable. "The inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The Board's actions are a serious affront to those "statutes enacted by representatives of its people," and thus can only be remedied by immediate injunctive relief. *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers); *see also Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020).

Second, Plaintiffs Heath's and Whitley's right to the Equal Protection of their right to vote cannot be remedied by damages and therefore constitutes irreparable harm. *See NAACP-Greensboro Branch v. Guilford Cty. Bd. of Elections*, 858 F. Supp. 2d 516, 526 (M.D.N.C. 2012) (citing *A Helping Hand, LLC v. Baltimore Cnty.*, 355 Fed. App'x 773, 776–77 (4th Cir. 2009));

see also Ross v. Meese, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction."). Their harm is all the more irreparable as voting is ongoing, thus the Board's arbitrary and standardless treatment of ballots—to the detriment of lawful voters like Plaintiffs Heath and Whitley—only gets worse and harder to remedy as more ballots are accepted under the new Memoranda.

III. The Public Interest and Lack of Harm to Defendants Warrant a Temporary Restraining Order

The balance of equities and public interest weigh strongly in favor of granting a temporary restraining order. Plaintiffs stand to suffer immediate, irreparable harm, including injuries to the General Assembly's prerogative to regulate the federal election, Plaintiff Swain's ongoing election, and Plaintiffs Heath's and Whitley's right to have their vote treated equally. And "upholding constitutional rights surely serves the public interest." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). Moreover, the Board's decision to issue the Memoranda, changing the rules of balloting midstream, undermines public confidence in this election. And to the extent the Memoranda are unconstitutional, voters are being told inaccurate information right now about how to lawfully cast a ballot in North Carolina. Thus, these Memoranda introduce additional confusion and uncertainty into an election where citizens are already concerned about election security. Since "public confidence in the integrity of the electoral process has independent significance," the public interest would be further served here. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). By contrast, the Board can "in no way [be] harmed by issuance of a" temporary restraining order "which prevents the [Board] from enforcing [Memoranda] likely to be found unconstitutional. If anything, the system is improved by such" an order. *Giovani Carandola*, 303 F.3d at 521.

IV. The Court Should Waive the Bond Requirement or Set Bond at a Nominal Amount

While Federal Rule of Civil Procedure 65 provides that "[t]he court may issue a . . . temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined," it is well established "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement," *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). Here, Defendants will not suffer costs and damages from the proposed restraining order, so Plaintiffs should not be required to post security, or should be required to post only a nominal amount.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter a temporary restraining order:

(1) Enjoining Defendants from enforcing and distributing Numbered Memo 2020-19 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(2) Enjoining Defendants from enforcing and distributing Numbered Memo 2020-22 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause.

(3) Enjoining Defendants from enforcing and distributing Numbered Memo 2020-23 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause

(4) Enjoining Defendants from enforcing and distributing the three Numbered Memoranda or any similar memoranda or policy statement that does not comply with the requirements of the Equal Protection Clause.

Plaintiffs request that the temporary restraining order last until such time as the parties shall brief, and the Court shall decide, a motion for a preliminary injunction.

Dated: September 26, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.2(f)(3), the undersigned counsel hereby certifies that the foregoing Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order, including body, headings, and footnotes, contains 7265 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2020, I caused the foregoing document to be filed electronically with the Clerk of Court through the CM/ECF System for filing, and served on counsel registered to receive CM/ECF notifications in this case. I also caused the foregoing document to be e-mailed to the following counsel for Defendants:

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

TRACEY MARTEL, ROBERT FRENIER, BRIAN SMITH, RAOUL BEAULIEU, and MARY BEAUSOLEIL, Plaintiffs, v. JAMES C. CONDOS, in his official capacity as the SECRETARY OF STATE OF VERMONT, Defendant.	)	Case No. 5:20-cv-131

ORDER ON MOTION FOR PRELIMINARY INJUNCTION AND ON MOTION TO DISMISS
(Docs. 2, 10)

In the spring of 2020, faced with the crisis resulting from the spread of COVID-19 infection, the Vermont legislature passed two bills that changed Vermont election law for the 2020 primary and general elections. *See* 2020 Vt. Acts & Resolves Nos. 92 and 135 (Act 92 and Act 135, respectively). These became law in July 2020 after the governor declined to sign or veto the measures. *See* Letter from Philip B. Scott, Governor, to the Vt. Gen. Assembly (July 2, 2020), https://governor.vermont.gov/sites/scott/files/documents/Vermont%20General%20Assembly%20Letter%20re%20S.348.pdf. Vermont Secretary of State James C. Condos issued a Directive on July 20, 2020 exercising the authority conferred upon him by the two Acts. (Doc. 1-1.) The Directive includes, among other things, a provision stating that, for the November general election, "[a] ballot will be mailed to every active voter on the statewide voter checklist." (Doc. 1-1 at 4.)

The above-captioned plaintiffs have filed a complaint against Secretary Condos seeking a declaration that the Directive is unconstitutional, *ultra vires*, and contrary to law. (Doc. 1 at 25.) They also seek an injunction rescinding the Directive and preventing Secretary Condos from distributing mail-in ballots as contemplated by the Directive. (*Id.*) Currently pending is Plaintiffs' Motion for a Preliminary Injunction (Doc. 2) and Defendant's Motion to Dismiss (Doc. 10). The court held a hearing on the motions on September 15, 2020.

Background

The provisions in Acts 92 and 135 principally at issue in this case concern the legislature's decision to authorize the Secretary of State to require local election officials to send ballots by mail to all registered voters. Act 92 states, in pertinent part:

> In the year 2020, the Secretary of State is authorized, in consultation and agreement with the Governor, to order or permit, as applicable appropriate elections procedures for the purpose of protecting the health, safety and welfare of voters, elections workers, and candidates in carrying out elections including:
>
> (1) requiring mail balloting by requiring town clerks to send ballots by mail to all registered voters . . . .

Act 92, § 3(a). Act 135 amended Act No. 92. It removed the requirement of "agreement" with the Governor. Act 135, § 1. It also added a new subsection (c):

> If the Secretary of State orders or permits the mailing of 2020 General Election ballots to all registered voters pursuant to subsection (a) of this section, the Secretary shall:
>
> (1) inform the Governor as soon as reasonably practicable following the Secretary's decision to do so; and
>
> (2) require the return of those ballots to be in the manner prescribed by 17 V.S.A. § 2543 (return of ballots) as set forth in Sec. 1a of this act, the provisions of which shall apply to that return.

Id.[1] Other changes in election practices authorized by the Acts include provisions for collecting and counting mail-in ballots early, permitting drive-up, car window collection of ballots, and extending both voting hours and the time to process and count ballots. Act 92, § 3(a)(1–6); Act 135 § 1 (a)(1–6).

In response to the legislative initiative, the Secretary of State issued a Directive on July 20, 2020 exercising the authority conferred upon him by the two Acts. (Doc. 1-1.) The Directive states that it is issued "[n]otwithstanding any provisions of law contained in Title 17 of the Vermont Statutes Annotated to the contrary" and "pursuant to the authority granted to the Secretary of State by Act 92 (2020) and Act 135 (2020)." (*Id.* at 1.) The Directive describes a variety of measures for both the August primary and November general elections, including new procedures for ballot returns, processing, outdoor and drive-through polling places, outdoor ballot handling, overseas voters, changes of polling places, qualifications of election officials, home delivery of ballots, mask requirements, and voting in person after receiving a ballot by mail. (*See id.* at 1–4.) Regarding ballot returns, the Directive states that, with four enumerated exceptions, "[b]allots may not be returned to the Clerk by any candidate whose name appears on the ballot for that election, or any campaign staff member of any such candidate." (*Id.* at 1.) Regarding changes to polling places, the Directive states that "[t]he location of a polling place may be changed no less than 15 days prior to the election." (*Id.* at 3.)

[1] Paragraph (2) of subsection (c) contains a mistake. Section 2543 of Title 17 sets out procedures for returning early ballots to local election officials. Sec. 1a appeared in prior versions of Act No. 135. It contained procedures restricting so-called "ballot harvesting" by third party organizations. Section 1a was dropped from the final version of Act 135 and never enacted. The reference to it is a legislative drafting mistake which was noted in the Governor's July 2, 2020 letter as a technical error. It refers to a proposed change in the law which was not ultimately passed. Such mistakes are unhelpful in understanding statutory language, but this one does not have any effect on the other provisions of Acts 92 and 135. The court will apply the other provisions of the Acts despite the mistaken reference to the (non-existent) Section 1a.

The Directive contains the following provision for "mailed ballots" in the November general election:

> A ballot will be mailed to every active voter on the statewide voter checklist. "Active" voters are any voters that have not been sent a challenge letter by the BCA asking the voter to affirm their residence, or who have responded to any such letter and have affirmed their residence.
>
> - Ballots will be mailed to all active registered voters starting Friday, September 18.
> - Ballots will be mailed or otherwise delivered to all military and overseas voters no later than the September 19 deadline mandated by federal law.
> - All ballots will be mailed from a central location by the Secretary of State's Office.
> - For mailing purposes, the Secretary of State will use the mailing address contained in any pending request for a General Election ballot first, and if none will use the mailing address in the voter's record second, and if none the legal address in the voter's record.
> - The issue date for all ballots will be recorded in the statewide election management system by the Secretary of State on a batch basis as they are sent. Clerks will only by required to record the date that ballots are returned. Clerks will be required to enter the request, issue, and return date for any ballots requested by voters after the statewide mailing is sent, including for those voters who may register after that date.
> - Postage for the mailing of ballots and the return of ballots to the Clerks by voters will be paid by the Secretary of State's office. All envelopes will be pre-paid.

(*Id.* at 4–5.)

After issuing the Directive and in preparation for the August primary election, the Secretary caused absentee primary ballot request forms printed on postcards to be sent to every person listed on the statewide voter checklist. (Doc. 1 ¶ 42.) According to the Complaint, the issuance of the postcards "was intended to be a test of the process by which Condos intended to mail ballots to all voters on the statewide voter checklist pursuant to the Directive." (*Id.* ¶ 43.) Plaintiffs allege that the postcard mailing revealed "numerous problems," such as postcards

being sent to voters at addresses they no longer used, postcards sent to people who are no longer eligible to vote in Vermont, and some longtime registered voters who received no postcard. (*Id.* ¶¶ 45–48.)

The Secretary of State is prepared to follow the Directive and Acts 92 and 135 by mailing out ballots to all active registered voters on Friday, September 18, 2020.

Analysis

I. Plaintiffs' Challenges

Plaintiffs are five registered Vermont voters. In addition to their status as registered voters, several have played a role in local and state government. Plaintiff Tracey Martel is the town clerk of Victory, Vermont, where she is responsible for the administration of Victory's elections. Robert Frenier is a former member of the Vermont House of Representatives. Brian Smith is a current member of the Vermont House. Mary Beausoleil is a resident of Lyndon and previously a Justice of the Peace.

A. Challenge to Statewide Mail-In Ballots

Plaintiffs complain that their individual votes will be diluted if the distribution of mail-in ballots leads—as they fear—to mistaken votes or widespread voter fraud. The Complaint alleges that:

> if General Election mail-in ballots are automatically distributed to every eligible voter (any voter on a voter check-list), without any request for such a ballot from that voter, many castable ballots will inevitably fall in the hands of persons other than the voter to whom the mail-in ballot was directed, including some mail-in ballots that will be sent to persons to have moved, died or otherwise become ineligible."

(Doc. 1 ¶ 25.) Plaintiffs fear that ballots will be mailed to voters who have moved away, died, or otherwise become ineligible and that these ballots will be used to vote illegally by the ineligible voter or others who acquire the ballots and return them to polling places. (*See id.* ¶ 62.)

B. Other Challenges

In addition to their challenge based on alleged dilution of their votes, Plaintiffs assert in Count II that the Directive is unconstitutional and an *ultra vires* use of legislative power. They assert that the Directive contains provisions that are inconsistent with Vermont law. (*See id.* ¶ 71.) Finally, in Count III, Plaintiffs assert that the Directive is *ultra vires* because, in Plaintiffs' view, it does nothing beyond existing Vermont law to "protect[] the health, safety, and welfare of voters, elections workers, and candidates in carrying out elections"—the stated purpose of Acts 92 and 135. *See* Act 92, § 3(a); Act 135 § 1(a).

II. Standing

Plaintiffs' case begins and ends with the issue of standing. This is a constitutional requirement which operates as a check on the ability of litigants to file claims for injuries which are insufficiently specific and direct in their effect on the plaintiff. *See Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014).[2] Cases in which plaintiffs assert "generalized grievances" of unlawful governmental action are commonly dismissed on standing grounds. *See United States v. Richardson*, 418 U.S. 166 (1974) (impact of government action plainly undifferentiated and common to all members of the public). The constitutional minimum of standing consists of three elements: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial

[2] Standing has both a constitutional and a prudential aspect. In this case, the court is only concerned with constitutional standing. Because it is absent, there is no need to consider the further issue of whether standing is not present for prudential reasons.

decision." *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 184 (2d Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The requirement of "injury in fact" serves multiple purposes. It limits justiciable cases to those controversies which are sufficiently well-defined by injury to the plaintiff that the parties will develop the facts and seek remedies which are responsive to the harm. *See Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982) ("The requirement of 'actual injury redressable by the court' . . . tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." (internal citations omitted)). In a manner directly relevant to this case, the requirement supports principles of separation of power and caution in second-guessing decisions made by the other branches. *See Laird v. Tatum*, 408 U.S. 1, 15 (1972) ("Carried to its logical end, [litigation without direct injury] would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse,' it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."). The "injury in fact" must have been "concrete and particularized" and also "actual or imminent, not conjectural or hypothetical." *Liberian Cmty. Ass'n of Conn.*, 970 F.3d at 184 (quoting *Lujan*, 504 U.S. at 560).

Standing doctrine has an extensive history in the context of challenges to election practices. In *United States v. Classic*, 313 U.S. 299 (1941), the Supreme Court recognized the constitutional right to vote and have one's vote counted. "Obviously included within the right to choose [representatives], secured by the Constitution, is the right of qualified voters within a

state to cast their ballots and have them counted at Congressional elections." *Id.* at 315. *See Ex parte Yarbrough,* 110 U.S. 651 (1884). In reapportionment cases, the Court has long recognized the standing of the disadvantaged voter. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) ("[Plaintiffs] are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law.") (citations and internal quotations omitted). Standing in such cases, however, does not extend to parties who have not themselves suffered discrimination or other individualized injury. *See United States v. Hays,* 515 U.S. 737, 745 (1995) (without evidence that "plaintiff has personally been subjected to a racial classification…[he] would be asserting only a generalized grievance against governmental conduct of which he or she does not approve."); *Sinkfield v. Kelley*, 531 U.S. 28 (2000) (majority white voters lacked standing to complain of unlawful racial practices to which they had not been subjected). The Second Circuit recognized the same principles in *League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors,* 737 F.2d 155, 162 (2d Cir. 1984) ("[parties] who are not persons domiciled in underrepresented voting districts lack standing to prosecute this appeal." *See Roxbury Taxpayers Alliance v. Delaware Cty Bd. of Supervisors*, 80 F.3d 42 (2d Cir. 1996) (only underrepresented voters have standing to bring claims of disproportional representation).

It would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters. State legislation which unfairly restricts a voter's right to vote is subject to review by the courts. "We have long recognized that a person's right to vote is 'individual and personal in nature.'" *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964). But as the *Gill* decision illustrates,

the Supreme Court continues to decline to extend standing to plaintiffs asserting generalized objections to state election laws. In this case, the alleged injury is similar to the impact alleged by the majority voters who lacked standing in the reapportionment cases. The gerrymandered districts altered the proportional impact of every vote, but only those specifically disadvantaged by the unconstitutional scheme have standing. A vote cast by fraud or mailed in by the wrong person through mistake has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged.

These cases lead the court to be cautious in this case about extending standing to any registered voter – such as the five who have sued here – who alleges an injury common to all other registered voters. If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury. As the affidavit submitted by plaintiffs' expert makes clear, plaintiffs believe that the new processes in place for the 2020 general election in Vermont have an excessive error rate. They propose a different system with heightened security, principally through a system to compare the signature accompanying the mail-in ballot with the signature on file. It is unnecessary to decide whether their proposed change is a good idea or not since the standing doctrine does not permit everyone and anyone to bring a lawsuit to challenge the merits of legislation.

The Vermont Superior Court in *Paige v. State of Vermont* recently rejected a similar challenge to the Directive on standing grounds. In that case, a Vermont voter and candidate for elected office in the upcoming election, H. Brooke Paige, challenged the Directive's statewide mail-in ballot procedure in the context of what he described as an interlocutory appeal of an administrative election complaint that he had filed. The Superior Court declined to hear the case

because Mr. Paige had not exhausted his administrative remedies. *Paige v. State of Vermont*, No. 20-CV-00307 (Vt. Super. Ct. Sept. 8, 2020) (Zonay, J.). But the court also held that Mr. Paige lacked standing to challenge the statewide mail-in ballot procedure based on concerns of fraud because his claim consisted of "theoretical harms to the election process rather than threats of actual injury being caused to a protected legal interest." *Id.*

Plaintiffs seek to distinguish *Paige*. They note that Mr. Paige filed his suit prematurely. That is one of the bases for the Superior Court's decision, but the court also separately found that Mr. Paige lacked standing. On the issue of standing, Plaintiffs argue that Mr. Paige had standing because a Vermont statute allowed him to file an election complaint with the Secretary of State. Plaintiffs here do not rely on that Vermont statute, but instead assert that they have alleged an individualized and particular harm flowing from the Directive. For the reasons stated above, the court disagrees; Plaintiffs have failed to show the "injury in fact" necessary to have standing. The *Paige* court's conclusion on the standing issue applies with equal force in this case. *Accord, Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) (Nevada voters lacked standing to challenge all-mail election plan based on concerns of an increase in illegal votes; their "purported injury of having their votes diluted due to ostensible election fraud may be conceivable raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury").

At oral argument, counsel for the plaintiff drew attention to a problem different from dilution by fraudulent votes which formed the focus of the complaint. Instead, plaintiffs seek to argue that the universal mail-in system may deprive them of an individualized right to vote if they (1) do not receive their ballot in the mail and (2) fail to take other measures to obtain a ballot such as contacting the town clerk directly or appearing at the polling place on election day

in person. As this is not a class action, the court considers the experience of the individual plaintiffs themselves. These are sophisticated voters who have gone to considerable lengths to obtain counsel skilled in election law and to file a lawsuit in federal court. Of all people likely to be confused about how to vote, these five plaintiffs must be last on the list. The court will not enjoin a state-wide mailing because one or more of these plaintiffs may be confused by the non-receipt of a separate mailing last month in connection with the primary election.

Conclusion

Plaintiffs' Motion for Preliminary Inunction (Doc. 2) is DENIED.

Defendant's Motion to Dismiss (Doc. 10) is GRANTED.

This case is DISMISSED WITHOUT PREJUDICE.

Dated at Rutland, in the District of Vermont, this 16th day of September, 2020.

Geoffrey W. Crawford, Chief Judge
United States District Court