No. 20-2107

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, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs-Appellants,

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-Appellees.

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

RESPONSE TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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Appellees, members of the North Carolina State Board of Elections and the Board's Executive Director, respectfully submit this response to appellants' emergency motion for an injunction pending appeal.

STATEMENT OF THE CASE

The Board respectfully incorporates the factual recitation from its Emergency Motion to Stay Temporary Restraining Order Pending Appeal in the related case of *Moore v. Circosta,* No. 20-2062, Dkt. 5-1 (4th Cir. Oct. 5, 2020), as well as the recitation in its response to the Emergency Motion in the other related case of *Wise v. Circosta*, No. 20-2104, Dkt. 8 (4th Cir. Oct. 16, 2020), filed concurrently with this motion.

The Board sets out the following additional facts that are relevant only to the *Moore* Plaintiffs' request for emergency relief in this case.

A. The Preliminary Injunction Proceedings Below

After extensive briefing and a hearing, on October 14, the district court denied Plaintiffs' motion for a preliminary injunction.[1] The

[1] The district court did not explicitly disturb the previously entered temporary restraining order, which is set to expire at midnight tonight.

district court held that Plaintiffs did not have standing to raise their Elections Clause claim for two reasons: First, the Court cited Supreme Court precedent holding that private plaintiffs lack standing to bring Elections Clause claims. App. 72 (citing *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). Second, the Court held that Plaintiffs Berger and Moore do not have authority to represent the General Assembly as an institution, as they must to raise a claim under the Elections Clause. App. 72-75.

As to Plaintiffs' Equal Protection Claims, the district court held that they had failed to articulate an injury for their vote-dilution claims. App. 40. As to their arbitrary and disparate treatment claims, however, the district court held that the voter Plaintiffs had been subjected to a different standard when they voted by mail and therefore had experienced harm. App. 45. The harm the individual Plaintiffs experienced, in the district court's estimation, is that they voted their ballots with a witness and mailed their ballots for arrival many weeks before the deadline, while other voters had the option of curing their ballots if they omitted a witness signature and to mail their ballots for arrival during the safe-harbor period. App. 45-65.

The district court held, however, that the balance of the equities weighed against federal courts making changes to state procedures that state officials had taken in response to a public health emergency. Under the *Purcell* doctrine, the district court declined to impose "judicially created confusion" by changing the procedures the Board had put in place less than a month before Election Day through a preliminary injunction. App. 69.

In a separate case, *Democracy N.C. v. N.C. State Bd. of Elecs.*, No. 1:20CV457, the court separately directed the Board to make one modification to its procedures to prohibit voters from being able to cure deficiencies in absentee ballots caused by a completely missing witness or assistant signature. App. 68. Those voters would have to revote their ballots. *Id.*

Plaintiffs then sought another injunction in the district court, requesting an order enjoining the State's election procedures through the duration of the appeal. *Moore v. Circosta*, No. 20-cv-911, Dkt. 75. The district court declined to enjoin the State's procedures past the time when the temporary restraining order was already scheduled to expire, tonight at midnight. *Id.*, Dkt. 78.

B. Further State-Court Activity

Since the state trial court entered its judgment, Plaintiffs have also moved to stay that judgment at the North Carolina Court of Appeals. *See N.C. Alliance for Retired Americans v. N.C. State Board of Elections*, P20-513 (N.C. Ct. App.). On October 15, the state Court of Appeals entered an administrative stay pending a response from the Board, and indicated that it would rule on the stay pending appeal when it received that response. P20-513, Oct. 15 Order. The Board filed its response earlier today.

STANDARD OF REVIEW

Plaintiffs ask this Court to issue an emergency injunction that bars the State from continuing to implement various procedures that are currently in place during the current election cycle. Because Plaintiffs request an *appellate court* to issue an emergency injunction in the first instance, they are subject to an elevated standard of review. An appellate injunction, unlike an appellate stay, "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts," and therefore 'demands a significantly higher justification' than that required for a

stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J, in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC,* 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

To obtain injunctive relief of this kind a movant must prove more than that are likely to succeed on the merits; they must show that their "legal rights at issue are *indisputably clear*." *Id.* Thus, an appellate court must deny an injunction even where an applicant "may very well be correct" on the merits of their claims. *Id.* at 1308 (denying appellate injunction to a candidate who challenged an election rule of Virginia Board of Elections in the runup to an election, because "it cannot be said that his right to relief is 'indisputably clear'").

ARGUMENT

Plaintiffs cannot show entitlement to an injunction pending appeal for three reasons. First, as explained in the Board's response to the emergency motion in *Wise*, Dkt. 8 at 10-16, and respectfully incorporated by reference herein, Plaintiffs' claims are barred by collateral estoppel. Second, as explained below, Plaintiffs' claims stand no chance of success on the merits, let alone a prospect of success that is "indisputably clear." *Lux*, 561 U.S. at 1307. And finally, the public

interest and other relevant factors all point clearly against issuing an injunction here.

I. Plaintiffs Cannot Show That They Are Likely To Succeed On Their Elections Clause Claim.

The *Moore* Plaintiffs first argue that the Memoranda violate the Elections Clause of the U.S. Constitution. This argument lacks merit.

A. The *Moore* Plaintiffs Lack Standing To Challenge the Memoranda Under the Elections Clause.

As an initial matter, the district court properly held that Plaintiffs lack standing to challenge the Memoranda under the Elections Clause. *Moore v. Circosta*, 20CV911, 2020 WL 6063332, at *23-24 (Oct. 14, 2020, M.D.N.C.).

Beginning with the Voter-Plaintiffs, the Supreme Court has explicitly held that a "private citizen does not have standing to bring an Elections Clause challenge without further, more particularized harms." *Id.* at 72 (citing *Lance*, 549 U.S. at 441-42). And rightly so. After all, the Voter-Plaintiffs allege only that "the Elections Clause . . . has not been followed"—"precisely the kind of undifferentiated, generalized grievance about the conduct of government" that cannot confer standing. *Lance*, 549 U.S. at 439.

The Legislator-Plaintiffs cannot establish standing either. Like any other private plaintiffs, individual legislators lack a particularized injury under the Elections Clause unless they have been specifically authorized to represent their respective legislative bodies. *See Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018); *see Moore*, 2020 WL 6063332, at *24. The Legislative-Plaintiffs cannot claim any such authority here. Though the Speaker and President Pro Tem try to invoke N.C. Gen. Stat. §§ 1-72.2 and 120-32.6 to bolster their authority (Dkt. 4 at 9-10), those statutes are inapposite, as the district court rightly found. *Moore*, 2020 WL 6063332, at *24. Together, the statutes simply allow the Speaker and President Pro Tem to appear as intervening defendants in actions "in which the 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. Under their own clear terms, the statutes do not empower the legislators to raise *affirmative challenges to executive action* on behalf of the General Assembly as a whole.

B. The State Board's Actions Are Consistent with the Elections Clause.

Even if the *Moore* Plaintiffs had standing to challenge the Memoranda under the Elections Clause, their constitutional arguments would fail.

The Elections Clause authorizes "the Legislature" "in each State" to "prescribe[ ]" "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. "[T]he Legislature," in other words, is to be primarily responsible for establishing the guidelines for federal elections. *See id.* But, as more than a century of Supreme Court precedent has taught, the term "the Legislature" does "not mean the representative body alone." *Ariz. State Legislature*, 576 U.S. at 805 (describing the Court's holding in *Davis v. Hildebrant*, 241 U.S. 565 (1916)).

Instead, the Supreme Court's case law makes two things clear: First, States "retain [the] autonomy" to serve as "laboratories" and "determine [their] own lawmaking processes" in their respective constitutions. *Id.* at 816-17, 824. For example, if a state's constitution requires that elections laws be passed by a General Assembly subject to the Governor's veto, the Governor's involvement does not violate the

Elections Clause. *Id.* at 807; *see Smiley*, 285 U.S. at 368, 372-73. Similarly, if a state's constitution empowers its residents to approve or disapprove certain election laws, that, too, is permissible under the Elections Clause. *Hildebrant*, 241 U.S. at 566-67.

Second, the Clauses' references to "the Legislature" do not preclude a State's representative body from "delegat[ing its] legislative authority" over elections to an executive body. *Ariz. State Legislature*, 576 U.S. at 814; *see Corman*, 287 F. Supp. 3d at 573 ("The Elections Clause, therefore, affirmatively grants rights to state legislatures [to] . . . delegate lawmaking authority."); *Donald J. Trump for President, Inc. v. Bullock*, No. 20-cv-66, 2020 WL 5810556, at *11-12 (D. Mont. Sept. 30, 2020) (Montana legislature's delegation of authority over federal elections is constitutional); *Paher v. Cegavske*, 457 F. Supp. 3d 919 (D. Nev. 2020) (same, for Nevada legislature's delegation to the Secretary of State). "The dominant purpose of the Elections Clause," after all, "was to empower Congress to override state election rules," not to restrict the range of options available to state legislatures in crafting an elections framework. *Ariz. State Legislature*, 576 U.S. at 814-15.

This freedom to delegate is why state legislatures throughout the country—including North Carolina's General Assembly—have been able to enact statutes empowering non-legislative actors to help regulate federal elections. *See* N.C. Gen. Stat. § 163-22. Indeed, if "the Legislature" truly meant a State's legislative body alone—and delegation were impermissible—then *every State's* election regime would likely be unconstitutional. Under that incredible reading of the Constitution, state legislatures could never empower executive officials to make interstitial policy decisions regarding the "Times, Places, and Manner" of an election. Nor could they authorize executive officials to make minor modifications to the laws governing elections in the event of an emergency, such as a hurricane or a software glitch. That simply cannot be the law, as the Supreme Court and other federal courts have confirmed. *See Ariz. State Legislature*, 576 U.S. at 814; *Corman*, 287 F. Supp. 3d at 573; *Bullock*, 2020 WL 5810556, *11-12; *Paher*, 457 F. Supp. 3d at 930-33.

In North Carolina, the General Assembly has chosen to delegate to the State Board broad authority 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). This broad delegation of authority has been approved by the North Carolina Supreme Court. *See Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018) ("consistent with much modern legislation, the General Assembly has delegated to the members of the [State Board] the authority to make numerous discretionary decisions"); *see also Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978) ("A modern legislature must be able to delegate—in proper instances—'a *limited* portion of its legislative powers' to administrative bodies which are equipped to adapt legislation 'to complex conditions involving numerous details with which the Legislature cannot deal directly.'" (quoting *Turnpike Auth. v. Pine Island*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965)).

The General Assembly has also granted the State Board the authority to make narrow modifications to the State's elections regime, particularly where—as here—such adjustments are needed to react to unexpected circumstances. *See* N.C. Gen. Stat. §§ 163-22.2, -27.1. As relevant here, the Board is "authorized, upon recommendation of the

Attorney General, to enter into agreements with the courts in lieu of protracted litigation until such time as the General Assembly convenes." N.C. Gen. Stat. § 163-22.2. This authorization allows 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. In addition, the Board's Executive Director "may exercise emergency powers to conduct an election . . . 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, snowstorms, floods, and "[c]atastrophe[s] arising from natural causes" that "result[ ] in a disaster declaration by the President of the United States or the Governor." 08 N.C. Admin. Code 01.0106.

Because these two statutes explicitly authorize the State Board to implement the kinds of remedial measures set forth in the Memoranda, the Memoranda cannot run afoul of the Elections Clause. *Cf. Ariz. State Legislature*, 576 U.S. at 814; *Corman*, 287 F. Supp. 3d at 573; *Bullock*, 2020 WL 5810556, at *11-12; *Paher*, 457 F. Supp. 3d at 930-33.

First, all three Memoranda were part of an "agreement with the courts" that was devised to avoid "protracted litigation" and provide North Carolina voters with much-needed clarity regarding the elections procedures for the 2020 general election. N.C. Gen. Stat. § 163-22.2. If, for instance, the State Board had not agreed to create a new modest cure process to address witness-signature problems, courts could have struck down the witness requirement altogether in the various pending lawsuits challenging that requirement under the North Carolina Constitution. Section 163-22.2 unquestionably gives the State Board the power to create a new cure process to avoid that possible result and the protracted litigation that might lead to it.

Alternatively, all three Memoranda could have been issued pursuant to the Executive Director's emergency authority to respond to "natural disasters" under § 163-27.1(a)(1). Both the President and the Governor have issued emergency declarations that the COVID-19 pandemic qualifies as a disaster in North Carolina.[2] These declarations

[2] *See* N.C. Exec. Order 116, § 1, 34 N.C. Reg. 1744, 1745 (Mar. 10, 2020); Fed. Emergency Mgmt. Agency, *President Donald J. Trump Approves Major Disaster Declaration for North Carolina* (Mar. 25,

expressly trigger the Executive Director's emergency authority under state law. N.C. Gen. Stat. § 163-27.1(a)(1); 08 N.C. Admin. Code 01.0106(b).

Consistent with this understanding of state law, the Executive Director had already exercised her emergency authority to respond to a natural disaster well before entry of the Consent Judgment in the state court. For example, the Director has issued emergency guidance that sought to ensure that the pandemic did not disrupt in-person voting at polling places.[3] The General Assembly did not challenge this exercise of emergency power. The additional steps that the State Board agreed to

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2020), https://www.fema.gov/news-release/20200723/president-donald-j-trump-approves-major-disaster-declaration-north-carolina.

Like the President and the Governor, courts across the country have also concluded that "the ongoing COVID-19 pandemic equates to a natural disaster." *Penn. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *17 (Penn. Sept. 17, 2020) (ordering extension of ballot receipt deadline to respond to the COVID-19 natural disaster); *see also N.C. Bar & Tavern Ass'n v. Cooper*, No. 2020CVS6358, Doc. No. 35 at 27 (N.C. Super. Ct. June 26, 2020) (holding that Governor Cooper has authority under North Carolina Emergency Management Act "to contain the impact of COVID-19"), https://ncbc.nccourts.org/public/.

[3] *See* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-14_Emergency%20Order%20of%20July%2017%2C%202020.pdf.

take in the Memoranda likewise seek to prevent the surge in absentee voting caused by the pandemic from disrupting the election.

Plaintiffs dispute this understanding of the Board's authority, protesting that the Board cannot implement remedial measures that "nullify[ ]" state statutes. Dkt. 4 at 8-9, 17. But, as the state trial court rightly concluded in *NC Alliance*, this characterization of the State Board's actions is inaccurate. In past election cycles, the State Board has often needed to extend the absentee-ballot receipt deadline to respond to natural disasters, and those extensions have never been understood to nullify any election law. Similarly, while the Memoranda institute a cure process that allows voters to remedy certain minor deficiencies related to the witness requirement, they do not nullify the State's witness requirement. Ballots that fail to adhere to the State's witness requirement will not be counted unless and until voters take steps to cure whatever deficiencies exist. The General Assembly's witness requirement thus remains untouched.

In any event, even if the Numbered Memoranda are understood to make minor modifications to the State's elections regime, the Memoranda still fail to raise any constitutional concern. Both sections

163-22.2 and 163-27.1 expressly contemplate that the State Board may have to make temporary adjustments to the State's elections laws. Section 163-27.1, for example, 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 section 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 the General Assembly has expressly delegated to the State Board the authority to enact all of the remedial measures set forth in the Memoranda, those Memoranda do not violate the Elections Clause.

II. Plaintiffs Cannot Show That They Are Likely To Succeed On Their Equal Protection Claims.

The *Moore* and *Wise* Plaintiffs raise two equal-protection theories, but each is meritless. First, Plaintiffs claim that the Memoranda subject them to arbitrary and unequal treatment. Second, they claim that the Memoranda dilute the value of their votes. These theories fail, both for lack of standing and on the merits.

A. Plaintiffs lack standing to raise an equal protection claim.

As a preliminary matter, Plaintiffs lack standing to bring their equal-protection claim. The standing analysis is straightforward for the legislators, candidates, and political committees: The right to participate in elections on an equal basis is a right that belongs to voters alone. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). But the Plaintiff-voters also lack standing to bring an equal-protection claim in these circumstances.

Plaintiffs cannot complain of their first alleged injury—disparate and arbitrary treatment—because it simply does not exist. As discussed at greater length below, the Memoranda impose the *same* rules for *all voters*. Moreover, to the extent that Plaintiffs allege that

the cure process set forth in Memo 2020-19 inflicts an injury on certain voters, the Plaintiff-voters are not the right persons to raise such a claim. They do not allege that they have been required to participate in the cure process.

Plaintiffs' injury based on vote dilution fares no better. Plaintiffs essentially argue that that the value of their votes is being diluted by unlawful votes. But this argument ignores a determinative fact: a state court has already held that votes counted in accordance with the Memoranda are lawful under state law. App. 249. Any dilutive injury caused by unlawful votes is therefore not traceable to the Memoranda.

The Plaintiff-voters lack standing for one final reason: Their dilution-related injury is a paradigmatic generalized grievance. Under Plaintiffs' theory, all North Carolina voters' votes will be diluted equally. This kind of generalized injury cannot confer standing, as numerous federal courts have already held. *See United States v. Florida*, 4:12cv285, 2012 WL 13034013, *1 (N.D. Fla. Nov. 6, 2012); *Moore*, 2020 WL 6063332, at *14; *Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020); *ACLU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

B. The Memoranda Do Not Subject Plaintiffs to Arbitrary or Disparate Treatment.

Plaintiffs' equal protection claim fails on the merits as well. Below, Plaintiffs relied on *Bush v. Gore* and claimed that the Memoranda denied them equal protection because they allowed for "arbitrary and disparate treatment" that "value[s] one person's vote over that of another." 531 U.S. 98, 104-05 (2000). But *Bush* actually shows why the Memoranda are consistent with equal protection.

In *Bush*, the Supreme Court held that Florida's plans for recounting votes during the 2000 presidential election would deny equal protection if they went forward, because the state had not adopted "uniform rules" to determine if votes should be counted. *Id.* at 106. The Court said that Florida's recount plans denied voters equal protection because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Id.* at 107. Nevertheless, the Court also made clear that Florida could have proceeded with a recount if it had developed "adequate statewide standards for determining what is a legal vote," even after the election was over. *Id.* at 110. The only reason that Florida was not permitted to develop these uniform

standards was because too little time existed to develop them before the State needed to select its presidential electors. *Id.*

Here, however, the Memoranda do precisely what *Bush* contemplated: They establish uniform statewide standards for determining what is a legal vote well in advance of Election Day, let alone the deadline for certifying electors. All voters whose mail-in ballots are mailed by Election Day and received within nine days can have their votes counted. All voters who wish to vote via mail-in absentee ballot must comply with the State's witness requirement, subject to a uniform cure process. All voters who wish to submit a mail-in absentee ballot in person may do so, so long as the person dropping off the ballot provides the information required for the written log. If the Memoranda take effect, these uniform standards will apply to all voters statewide.

Plaintiffs have nevertheless argued that these standards deny voters equal protection, merely because some absentee ballots were cast before all the standards were in place. They reason that the alteration in procedures gives preferential treatment to persons who vote after their adoption. This is not true. If the Memoranda go into effect, they

will apply to all voters—both those who have voted already and those who have not. Any voter whose ballot has not yet been accepted would still be subject to the Memoranda, whether they submitted their ballot before or after the Memoranda went into effect.

Moreover, even if the Memoranda did give rise to some marginally different treatment among voters, that marginal difference would not offend equal protection.[4] Plaintiffs do not allege any *burden* on their right to vote—indeed, the Memoranda institute remedial measures

[4] *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (When plaintiffs "allege[ ] only that a state treated [them] differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used."); *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (same); *see also, e.g.*, *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2020) (rejecting equal-protection challenge to a California law that gradually introduced universal mail voting, because it did "not burden anyone's right to vote," but instead made "it easier for some voters to cast their ballots"); *Wexler v. Anderson*, 452 F.3d 1226, 1227 (11th Cir. 2006) (holding that Florida's use of different voting machines in different counties did not violate equal protection); *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 181 (4th Cir. 1983) ("A state may employ diverse methods of voting, and the methods by which a voter casts his vote may vary throughout the state."); *Donald J. Trump for President v. Boockvar*, No. 2:20-cv-966, 2020 U.S. Dist. LEXIS 188390, at *39, 127 (W.D. Pa. Oct. 10, 2020) (rejecting equal-protection challenge to Pennsylvania rules allowing voters in certain counties alone to vote via dropboxes).

whose express purpose is to *remove burdens* imposed by the pandemic and the USPS delays.

Absent any such burden, minor differences in treatment among voters simply do not support an equal-protection violation. Last week, the U.S. Supreme Court declined to enjoin Montana's plan to offer universal mail voting in certain, but not all, of its counties this fall. *See Lamm v. Bullock*, No. 20A61 (U.S. Oct. 8, 2020); *Bullock*, 2020 WL 5810556, at *14. Similarly, in *Andino v. Middleton*, the Supreme Court specifically ordered South Carolina to apply different procedures for counting absentee ballots, solely based on when the ballots were cast. No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). Under Plaintiffs' logic, the Supreme Court's order in *Andino* would itself give rise to an equal-protection violation. That cannot be correct.[5]

[5] Indeed, some courts have *ordered* election administrators to take steps like those in the Memoranda during elections, to protect the constitutional rights of voters. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1341 (N.D. Ga. 2018) (ordering state to establish new cure process for ballot errors during election), *stay denied by Georgia Muslim Voter Project v. Kemp*, 918 F.3d 1262, 1263 (11th Cir. 2019); *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) (ordering state to extend voter registration deadline due to hurricane).

Indeed, if Plaintiffs were correct that any change made during an election to ensure that all people can vote denies equal protection to those who have already voted, then many other actions of the State Board—and many state statutes—would all be unconstitutional. For example, if it were unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions during a pandemic, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions. *See* N.C. Gen. Stat. § 163-166.01 (granting power to Board to grant this relief). Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps were implemented after voting begins. In the last three years alone, the Board has twice responded to hurricanes by extending the deadline for receipt of absentee ballots until 8 or 9 days after Election Day—one of the same changes at issue here.[6]

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[6] Only a week ago, executive officials in Florida extended the voter-registration deadline beyond the date required by statute, *see* Fla. Stat. § 97.055, because the registration website crashed. *See Florida Extends Deadline After Crash of Voter Registration Site*, NBC 6 South Florida,

For all these reasons, Plaintiffs cannot establish that the Memoranda subject them to arbitrary and disparate treatment, as they must to prove an equal-protection violation.

C. The Memoranda Do Not Dilute Plaintiffs' Votes.

Plaintiffs also claim that the Memoranda deny equal protection because they would result in the "dilution of the weight of a citizen's vote." *Reynolds v. Simms*, 377 U.S. 533, 555 (1964). *Reynolds* and other vote-dilution precedents provide no support for this argument. In *Reynolds*, in striking down malapportioned legislative districts, the Supreme Court noted that intentional "ballot-box stuffing" would deny voters equal protection, because it would dilute lawfully cast votes. *Id.*

Nothing remotely comparable is implicated here. Under Plaintiffs' theory, any claim that a state official wrongly allowed a person to vote would illegally "dilute" votes and deny equal protection to other voters. This novel theory has no basis in the law. With good reason: It

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Oct. 6, 2020, https://www.nbcmiami.com/news/local/florida-looking-into-crash-of-voter-registration-site-just-before-deadline/2303061/. Under Plaintiffs' theory, that common-sense relief would deny equal protection to voters who had already registered.

would transform all election disputes where plaintiffs allege that state officials failed to comply with state law into a constitutional dispute over equal protection.

But even if this theory were valid, it would fail here: the Memoranda in no way let votes be cast unlawfully. They instead simply establish uniform standards that help county boards ascertain which votes are lawful. The State Board was expressly empowered to impose these uniform standards under at least two state statutes. *See supra* pp. 15-16.

III. The Public Interest and Other Relevant Factors Require Denial of the Requested Injunction.

The other relevant factors all also point against issuing the emergency appellate injunction requested by Plaintiffs. *Long*, 432 F.2d at 979. The Board and voters will suffer irreparable harm if the court grants an injunction pending appeal: For the entire remaining voting period, the Board would be enjoined from following procedures that a state court has held are necessary to protect voters' rights under the North Carolina Constitution. For example, an injunction would bar the Board from informing potentially tens of thousands of voters that their ballots contain minor deficiencies, like placing a signature in the wrong

place, and allowing them to cure those problems so they can exercise their right to vote. These voters would risk being irrevocably disenfranchised by an order of this Court. Meanwhile, no other party will suffer harm without an injunction. After all, voters are not harmed simply because other voters can cast their ballots as well.

Granting the Plaintiffs' requested injunction would also prolong the uncertainty over North Carolina's election procedures. Issuing orders that might rovoke this kind of uncertainty is precisely what the Supreme Court has time-and-again cautioned federal courts to refrain from doing. *RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020) ("lower federal courts should ordinarily not alter the election rules on the eve of an election") (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). For this reason, the district court here applied *Purcell* to decline enjoin North Carolina's election procedures while voting is underway. *Moore v. Circosta*, 20CV911, 2020 WL 6063332, at *23-24 (Oct. 14, 2020, M.D.N.C.). *See also Wise v. Circosta*, No. 20-2104, Dkt. 8 at 5-8 (4th Cir. Oct. 16, 2020) (explaining why *Purcell* does not support the requested appellate injunctions).

Finally, granting the requested injunction would give rise to a particularly severe form of irreparable harm, to the voters and to the nation: It would potentially cast a cloud over North Carolina's election results that last long after Election Day passes. Because elections should be decided by the voters, and not the courts, the State Defendants respectfully request that this Court decline Plaintiffs' request that it issue an emergency injunction pending appeal.

CONCLUSION

Defendants respectfully request that this Court deny Plaintiffs' motion for injunctive relief pending appeal.

Respectfully submitted,

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October 16, 2020

CERTIFICATE OF SERVICE

I certify that on this 16th of October, 2020, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Ryan Y. Park

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 5,198 words and was prepared using Century Schoolbook, 14-point font.

/s/ Ryan Y. Park

APPENDIX

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

TIMOTHY K. MOORE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:20CV911
	)	
DAMON CIRCOSTA, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, et al.,	)	
	)	
Defendant-Intervenors.	)	

PATSY J. WISE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	1:20CV912
	)	
THE NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, et al.,	)	
	)	
Defendant-Intervenors.	)	

MEMORANDUM OPINION AND ORDER

OSTEEN, JR., District Judge

Presently before this court are two motions for a preliminary injunction in two related cases.

In the first case, Moore v. Circosta, No. 1:20CV911 ("Moore"), Plaintiffs Timothy K. Moore and Philip E. Berger (together, "State Legislative Plaintiffs"), Bobby Heath, Maxine Whitley, and Alan Swain (together, "Moore Individual Plaintiffs") seek an injunction against the enforcement and distribution of several Numbered Memoranda issued by the North Carolina State Board of Elections pertaining to absentee voting. (Moore v. Circosta, No. 1:20CV911, Mot. for Prelim. Inj. and Mem. in Supp. ("Moore Pls.' Mot.") (Doc. 60).)

In the second case, Wise v. North Carolina State Board of Elections, No. 1:20CV912 ("Wise"), Plaintiffs Patsy J. Wise, Regis Clifford, Samuel Grayson Baum, and Camille Annette Bambini (together, "Wise Individual Plaintiffs"), Donald J. Trump for President, Inc. ("Trump Campaign"), U.S. Congressman Gregory F. Murphy and U.S. Congressman Daniel Bishop (together, "Candidate Plaintiffs"), Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), and North Carolina Republican Party ("NCRP") seek an injunction against the enforcement and

distribution of the same Numbered Memoranda issued by the North Carolina State Board of Elections at issue in Moore. (Wise Pls.' Mem. in Supp. of Mot. to Convert the Temp. Restraining Order into a Prelim. Inj. ("Wise Pls.' Mot.") (Doc. 43).)

By this order, this court finds Plaintiffs have established a likelihood of success on their Equal Protection challenges with respect to the State Board of Elections' procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots. This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.

I. BACKGROUND

A. Parties

1. Moore v. Circosta (1:20CV911)

State Legislative Plaintiffs Timothy K. Moore and Philip E. Berger are the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate, respectively. (Moore v. Circosta, No. 1:20CV911, Compl. for Declaratory and Injunctive Relief ("Moore

Compl.") (Doc. 1) ¶¶ 7-8.) Individual Plaintiffs Bobby Heath and Maxine Whitley are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by the State Board of Elections on September 21, 2020, and September 17, 2020, respectively. (Id. ¶¶ 9-10.) Plaintiff Alan Swain is a resident of Wake County, North Carolina, who is running as a Republican candidate to represent the State's Second Congressional District. (Id. ¶ 11.)

Executive Defendants include Damon Circosta, Stella Anderson, Jeff Carmon, III, and Karen Brinson Bell are members of the State Board of Elections ("SBE"). (Id. ¶¶ 12-15.) Executive Defendant Karen Brinson Bell is the Executive Director of SBE. (Id. ¶ 15.)

Intervenor-Defendants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz ("Alliance Intervenors") are plaintiffs in the related state court action in Wake County Superior Court. (Moore v. Circosta, No. 1:20CV911 (Doc. 28) at 15.)[1] Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and

[1] All citations in this Memorandum Opinion and Order to documents filed with the court refer to the page numbers located at the bottom right-hand corner of the documents as they appear on CM/ECF.

Caren Rabinowitz are individual voters who are concerned they will be disenfranchised by Defendant SBE's election rules, (id.), and North Carolina Alliance for Retired Americans ("NC Alliance") is an organization "dedicated to promoting the franchise and ensuring the full constitutional rights of its members . . . ." (Id.)

2. Wise v. N.C. State Bd. of Elections (1:20CV912)

Individual Plaintiffs Patsy J. Wise, Regis Clifford, Camille Annette Bambini, and Samuel Grayson Baum are registered voters in North Carolina. (Wise v. N.C. State Bd. of Elections, No. 1:20CV912, Compl. for Declaratory and Injunctive Relief ("Wise Compl.") (Doc. 1) ¶¶ 25-28.) Wise has already cast her absentee ballot for the November 3, 2020 election by mail, "in accordance with statutes, including the Witness Requirement, enacted by the General Assembly." (Id. ¶ 25.) Plaintiffs Clifford, Bambini, and Baum intend to vote in the November 3, 2020 election and are "concern[ed] that [their] vote[s] will be negated by improperly cast or fraudulent ballots." (Id. ¶¶ 26-28.)

Plaintiff Trump Campaign represents the interests of President Donald J. Trump, who is running for re-election. (Id. ¶¶ 29-30.) Together, Candidate Plaintiffs Trump Campaign, U.S. Congressman Daniel Bishop, and U.S. Congressman Gregory F.

Murphy are candidates who will appear on the ballot for re-election in the November 3, 2020 general election. (Id. ¶¶ 29-32.)

Plaintiff RNC is a national political party, (id. ¶¶ 33-36), that seeks to protect "the ability of Republican voters to cast, and Republican candidates to receive, effective votes in North Carolina elections and elsewhere," (id. ¶ 37), and avoid diverting resources and spending significant amounts of resources educating voters regarding confusing changes in election rules, (id. ¶ 38).

Plaintiff NRSC is a national political party committee that is exclusively devoted to electing Republican candidates to the U.S. Senate. (Id. ¶ 40.) Plaintiff NRCC is the national organization of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives. (Id. ¶ 41.) Plaintiff NRCP is a North Carolina state political party organization that supports Republican candidates running in North Carolina elections. (Id. ¶¶ 44-45.)

Executive Defendant North Carolina SBE is the agency responsible for the administration of the elections laws of the State of North Carolina. (Id. ¶ 46.) As in Moore, included as Executive Defendants are Damon Circosta, Stella Anderson, Jeff

Carmon, III, and Karen Brinson Bell of the North Carolina SBE. (Id. ¶¶ 47-50.)

Alliance Intervenors from Moore are also Intervenor-Defendants in Wise. (1:20CV912 (Doc. 22).)

B. Factual Background

1. This Court's Decision in *Democracy*

On August 4, 2020, this court issued an order in a third related case, Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) ("the August Democracy Order"), that "left the One-Witness Requirement in place, enjoined several rules related to nursing homes that would disenfranchise Plaintiff Hutchins, and enjoined the rejection of absentee ballots unless the voter is provided due process." (Id. at *1.) As none of the parties appealed that order, the injunctive relief is still in effect.

2. Release of the Original Memo 2020-19

In response to the August Democracy Order, on August 21, 2020, SBE officials released guidance for "the procedure county boards must use to address deficiencies in absentee ballots." (Numbered Memo 2020-19 ("Memo 2020-19" or "the original Memo") (Moore v. Circosta, No. 1:20CV911, Moore Compl. (Doc. 1) Ex. 3 – NC State Bd. of Elections Mem. ("Original Memo 2020-19") (Doc. 1-4) at 2.) This guidance instructed county boards regarding

multiple topics. First, it instructed county election boards to "accept [a] voter's signature on the container-return envelope if it appears to be made by the voter . . . [a]bsent clear evidence to the contrary," even if the signature is illegible. (Id.) The guidance clarified that "[t]he law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record," as "[v]erification of the voter's identity is completed through the witness requirement." (Id.)

Second, the guidance sorted ballot deficiencies into two categories: curable and uncurable deficiencies. (Id. at 3.) Under this version of Memo 2020-19, a ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. (Id.) A ballot error could not be cured, and instead, was required to be spoiled, in the case of all other listed deficiencies, including a missing signature, printed name, or address of the witness; an incorrectly placed witness or assistant signature; or an unsealed or re-sealed envelope. (Id.) Counties were required to notify voters in writing regarding any ballot deficiency – curable or incurable - within one day of the county identifying the defect and to enclose either a cure affidavit or a new ballot, based on the type of deficiency at issue. (Id. at 4.)

In the case of an incurable deficiency, a new ballot could be issued only "if there [was] time to mail the voter a new ballot . . . [to be] receive[d] by Election Day." (Id. at. 3) If a voter who submitted an uncurable ballot was unable to receive a new absentee ballot in time, he or she would have the option to vote in person on Election Day. (Id. at 4.)

If the deficiency was curable by a cure affidavit, the guidance stated that the voter must return the cure affidavit by no later than 5 p.m. on Thursday, November 12, 2020. (Id.)

3. Rescission of Numbered Memo 2020-19

The State began issuing ballots on September 4, 2020, marking the beginning of the election process. (Wise, No. 1:20CV912, Wise Pls.' Mot. (Doc. 43).) On September 11, 2020, SBE directed counties to stop notifying voters of deficiencies in their ballot, as advised in Memo 2020-19, pending further guidance from SBE. (Moore, No. 1:20CV911, Moore Pls.' Mot. (Doc. 60) Ex. 3, Democracy Email Chain (Doc. 60-4) at 6.)

4. Revision of Numbered Memo 2020-19

On September 22, over two weeks after the State began issuing ballots, SBE issued a revised Numbered Memo 2020-19, which set forth a variety of new policies not implemented in the original Memo 2020-19. (Numbered Memo 2020-19 ("the Revised Memo" or "Revised Memo 2020-19") (Moore v. Circosta, No.

1:20CV911 (Doc. 36) Ex. 3, Revised Numbered Memo 2020-19 ("Revised Memo 2020-19") (Doc. 36-3).) In subsequent litigation in Wake County Superior Court, SBE advised the court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen." (Moore v. Circosta, No. 1:20CV911, Exec. Defs.' Br. in Supp. of Joint Mot. for Entry of Consent Judgment ("SBE State Court Br.") (Doc. 68-1) at 15.) Moreover, on September 28, 2020, during a status conference with a district court in the Eastern District of North Carolina prior to transfer to this court, counsel for Defendant SBE stated that Defendant SBE issued the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (Moore v. Circosta, No. 1:20CV911, Order Granting Mot. for Temp. Restraining Order ("TRO") (Doc. 47) at 9.) At that time, counsel for SBE indicated that they had not yet submitted the Revised Memo 2020-19 to this court, "but that it was on counsel's list to get [it] done today." (Id.) (internal quotations omitted.) On September 28, 2020, Defendant SBE filed the Revised Memo 2020-19 with this court in the Democracy action. (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1).)

The revised guidance modified which ballot deficiencies fell into the curable and uncurable categories. Unlike the original Memo 2020-19, the Revised Memo advised that ballots missing a witness or assistant name or address, as well as ballots with a missing or misplaced witness or assistant signature, could be cured via voter certification. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 3.) According to the revised guidance, the only deficiencies that could not be cured by certification, and thus required spoliation, were where the envelope was unsealed or where the envelope indicated the voter was requesting a replacement ballot. (Id. at 4.)

The cure certification in Revised 2020-19 required voters to sign and affirm 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.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

The revised guidance also extended the deadline for civilian absentee ballots to be received to align with that for

military and overseas voters. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) Under the original Memo 2020-19, in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked, by Election Day, by 5:00 p.m. on November 6, 2020. (Moore v. Circosta, No. 1:20CV911, Original Memo 2020-19 (Doc. 1-4) at 5 (citing N.C. Gen. Stat. § 163-231(b)).) Under the Revised Memo 2020-19, however, a late civilian ballot would be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020. (Moore v. Circosta, No. 1:20CV911, Revised Memo 2020-19 (Doc. 36-3) at 5.) This is the same as the deadline for military and overseas voters, as indicated in the Original Memo 2020-19. (Id.)[2]

5. Numbered Memoranda 2020-22 and 2020-23

SBE issued two other Numbered Memoranda on September 22, 2020, in addition to Revised Numbered Memo 2020-19.

First, SBE issued Numbered Memo 2020-22, the purpose of which was to further define the term postmark used in Numbered Memo 2020-19. (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 3,

[2] In Democracy N. Carolina v. N.C. State Board of Elections, No. 1:20CV457, an order is entered contemporaneously with this Memorandum Opinion and Order enjoining certain aspects of the Revised Memo 2020-19.

N.C. State Bd. of Elections Mem. ("Memo 2020-22") (Doc. 1-3) at 2.) Numbered Memo 2020-22 advised that although "[t]he 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. . . . [T]he USPS does not always affix a postmark to a ballot return envelope." (Id.) Recognizing that SBE now offers "BallotTrax," a system in which voters and county boards can track the status of a voter's absentee ballot, SBE said "it is possible for county boards to determine when a ballot was mailed even if does not have a postmark." (Id.) Moreover, SBE recognized that commercial carriers offer tracking services that document when a ballot was deposited with the commercial carrier. (Id.) For these reasons, the new guidance stated that a ballot would be considered postmarked by Election Day if it had a postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.)

Second, SBE issued Numbered Memo 2020-23, which provides "guidance and recommendations for the safe, secure, and controlled in-person return of absentee ballots." (Wise, No. 1:20CV912, Wise Compl. (Doc. 1), Ex. 4, N.C. State Bd. of

Elections Mem. ("Memo 2020-23") (Doc. 1-4) at 2.) Referring to N.C. Gen. Stat. § 163-226.3(a)(5),[3] which prohibits 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.), Numbered Memo 2020-23 confirms that "an absentee ballot may not be left in an unmanned drop box." (Id.) The guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.)

At the same time, the guidance advises county boards that "[f]ailure to comply with the logging requirement, or delivery or 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." (Id. at 3.) Instead, the guidance advises the county board that they "may . . . consider

[3] The Memoranda incorrectly cites this statute as N.C. Gen. Stat. § 163-223.6(a)(5).

the delivery of a ballot . . . in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

6. Consent Judgment in North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections

On August 10, 2020, NC Alliance, the Defendant-Intervenors in the two cases presently before this court, filed an action against SBE in North Carolina's Wake County Superior Court challenging, among other voting rules, the witness requirement for mail-in absentee ballots and rejection of mail-in absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election. (Moore v Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 15.)

On August 12, 2020, Philip Berger and Timothy Moore, Plaintiffs in Moore, filed a notice of intervention as of right in the state court action and became parties to that action as intervenor-defendants on behalf of the North Carolina General Assembly. (Id. at 16.)

On September 22, 2020, SBE and NC Alliance filed a Joint Motion for Entry of a Consent Judgment with the superior court. (Id.) Philip Berger and Timothy Moore were not aware of this "secretly-negotiated" Consent Judgment, (Wise Pls.' Mot. (Doc. 43) at 6), until the parties did not attend a previously

scheduled deposition, (Democracy v. N.C. Bd. of Elections, No. 1:20CV457 (Doc. 168) at 73.)

Among the terms of the Consent Judgment, SBE agreed to extend the deadline for receipt of mail-in absentee ballots mailed on or before Election Day to nine days after Election Day, to implement the cure process established in Revised Memo 2020-19, and to establish separate mail in absentee ballot "drop off stations" at each early voting site and county board of elections office which were to be staffed by county board officials. (Moore v. Circosta, No. 1:20CV911, SBE State Court Br. (Doc. 68-1) at 16.)

In its filings with the state court, SBE frequently cited this court's decision in Democracy as a reason for why the Wake County Superior Court Judge should accept the Consent Judgment. SBE argued that a cure procedure for deficiencies related to the witness requirement were necessary because "[w]itness requirements for absentee ballots have been shown to be, broadly speaking, disfavored by the courts," (id. at 26), and that "[e]ven in North Carolina, a federal court held that the witness requirement could not be implemented as statutorily authorized without a mechanism for voters to have adequate notice of and [an opportunity to] cure materials [sic] defects that might keep their votes from being counted," (id. at 27). SBE argued that,

"to comply with the State Defendants' understanding of the injunction entered by Judge Osteen, the State Board directed county boards of elections not to disapprove any ballots until a new cure procedure that would comply with the injunction could be implemented," (id. at 30), and that ultimately, the cure procedure introduced in Revised Memo 2020-19 as part of the consent judgment would comply with this injunction. (Id.) SBE indicated that it had notified the federal court of the cure mechanism process on September 22, 2020, (id.), although this court was not made aware of the cure procedure until September 28, 2020, (Democracy N.C. v. N.C. State Bd. of Elections, No. 1:20CV457 (Doc. 143-1)), the day before the processing of absentee ballots was scheduled to begin on September 29, 2020, (Moore v. Circosta, No. 20CV911 Transcript of Oral Argument ("Oral Argument Tr.")(Doc. 70) at 109.)

On October 2, 2020, the Wake County Superior Court entered the Stipulation and Consent Judgment. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1).) Among its recitals, which Defendant SBE drafted and submitted to the judge as is customary in state court, (Oral Argument Tr. (Doc. 70) at 91), the Wake County Superior Court noted this court's preliminary injunction in Democracy, finding,

> 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.

(State Court Consent Judgment (Doc. 45-1) at 6.)[4]

7. Numbered Memoranda 2020-27, 2020-28, and 2020-29

In addition to the Numbered Memoranda issued on September 22, 2020, as part of the consent judgment in the state court case, SBE has issued three additional numbered memoranda.

First, on October 1, 2020, SBE issued Numbered Memo 2020-27, which was issued in response to this court's order in Democracy regarding the need for parties to attend a status conference to discuss Numbered Memo 2020-19. (Moore v. Circosta, No. 1:20CV911 (Doc. 40-2) at 2.) The guidance advises county boards that this court did not find Numbered Memo 2020-19:

> "consistent with the Order entered by this Court on August 4, 2020," and indicates that its preliminary injunction order should "not be construed as finding that the failure of a witness to sign the application and certificate as a witness is a deficiency which may

[4] An additional discussion of the facts related to SBE's use of this court's order in obtaining a Consent Judgment is set out in this court's order in Democracy v. North Carolina State Board of Elections, No. 1:20CV457 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure).

> be cured with a certification after the ballot has been returned."

(Id.) "In order to avoid confusion while related matters are pending in a number of courts," the guidance advises 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." (Id.) In all other respects, SBE stated that Revised Numbered Memo 2020-19 remains in effect. (Id.)

Second, on October 4, 2020, SBE issued Numbered Memo 2020-28, which states that both versions of Numbered Memo 2020-19, as well as Numbered Memoranda 2020-22, 2020-23, and 2020-27 "are on hold until further notice" following the temporary restraining order entered in the instant cases on October 3, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 60-5) at 2.) Moreover, the guidance reiterated that "[c]ounty boards that receive an executed absentee container-return envelope with a deficiency shall take no action as to that envelope," including sending a cure notification or reissuing the ballot. (Id. at 2-3.) Instead, the guidance directs county boards to store envelopes with deficiencies in a secure location until further notice. (Id. at 3.) If, however, a county board had previously issued a ballot and the second envelope is returned

without any deficiencies, the guidance permits the county board to approve the second ballot. (Id.)

Finally, on October 4, 2020, SBE issued Numbered Memo 2020-29, which states that it provides "uniform guidance and further clarification on how to determine if the correct address can be identified if the witness's or assistant's address on an absentee container-return envelope is incomplete. (Wise, No. 1:20CV912 (Doc. 43-5).) First, the guidance clarifies that if a witness or assistant does not print their address, the envelope is deficient. (Id. at 2.) Second, the guidance states that failure to list a witness's ZIP code does not require a cure; a witness or assistant's address may be a post office box or other mailing address; and if the address is missing a city or state, but the county board can determine the correct address, the failure to include this information does not invalidate the container-return envelope. (Id.) Third, if both the city and ZIP code are missing, the guidance directs staff to determine whether the correct address can be identified. (Id.) If they cannot be identified, then the envelope is deficient. (Id.)

C. Procedural History

On September 26, 2020, Plaintiffs in Moore filed their action in the United States District Court for the Eastern District of North Carolina. (Moore Compl. (Doc. 1).) Plaintiffs

in Wise also filed their action in the United States District Court for the Eastern District of North Carolina on September 26, 2020. (Wise Compl. (Doc. 1).)

Alliance Intervenors filed a Motion to Intervene as Defendants in Moore on September 30, 2020, (Moore v. Circosta, No. 1:20CV911 (Doc. 27)), and in Wise on October 2, 2020, (Wise, No. 1:20CV912 (Doc. 21)). This court granted Alliance Intervenors' Motion to Intervene on October 8, 2020. (Moore v. Circosta, No. 1:20CV911 (Doc. 67); Wise, No. 1:20CV912 (Doc. 49).)

The district court in the Eastern District of North Carolina issued a temporary restraining order in both cases on October 3, 2020, and transferred the actions to this court for this court's "consideration of additional or alternative injunctive relief along with any such relief in Democracy North Carolina v. North Carolina State Board of Elections . . . ." (Moore v. Circosta, 1:20CV911, TRO (Doc. 47) at 2; Wise, No. 1:20CV912 (Doc. 25) at 2.)

On October 5, 2020, this court held a Telephone Conference, (Moore v. Circosta, No. 1:20CV911, Minute Entry 10/05/2020; Wise, No. 1:20CV912, Minute Entry 10/05/2020), and issued an order directing the parties to prepare for a hearing on the temporary restraining order and/or a preliminary injunction and

to submit additional briefing, (Moore v. Circosta, No. 1:20CV911 (Doc. 51); Wise, No. 1:20CV912 (Doc. 30)). On October 6, 2020, Plaintiffs in Wise filed a Memorandum in Support of Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction, (Wise Pls.' Mot. (Doc. 43)), and Plaintiffs in Moore filed a Motion for a Preliminary Injunction and Memorandum in Support of Same, (Moore Pls.' Mot. (Doc. 60)). Defendant SBE filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, State Defs.' Resp. to Pls.' Mot. for Prelim. Inj. ("SBE Resp.") (Doc. 65); Wise, No. 1:20CV912 (Doc. 45).) Alliance Intervenors also filed a response to Plaintiffs' motions in both cases on October 7, 2020. (Moore v. Circosta, No. 1:20CV911, Proposed Intervenors' Mem. in Opp'n to Pls.' Mot. for a Prelim. Inj. ("Alliance Resp.") (Doc. 64); Wise, No. 1:20CV912 (Doc. 47).)[5]

This court held oral arguments on October 8, 2020, in which all of the parties in these two cases presented arguments with respect to Plaintiffs' motions for a preliminary injunction.

[5] Defendant SBE and Alliance Intervenors' memoranda filed in opposition to Plaintiffs' motions for a preliminary injunction in Moore are identical to those that each party filed in Wise. (Compare SBE Resp. (Doc. 65) and Alliance Resp. (Doc. 64) with Wise, No. 1:20CV912 (Doc. 45) and Wise, No. 1:20CV912 (Doc. 47).) For clarity and ease, this court will cite only to the briefs Defendant SBE and Alliance Intervenors filed in Moore in subsequent citations.

(Moore v. Circosta, No. 1:20CV911, Minute Entry 10/08/2020; Wise, No. 1:20CV912, Minute Entry 10/08/2020.)

This court has federal question jurisdiction over these cases under 28 U.S.C. § 1331. This matter is ripe for adjudication.

D. Preliminary Injunction Standard of Review

"A plaintiff seeking a preliminary injunction must establish 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. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Such an injunction "is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit." Di Biase v. SPX Corp., 872 F.3d 224, 230 (4th Cir. 2017).

II. ANALYSIS

Executive Defendants and Alliance Intervenors challenge Plaintiffs' standing to seek a preliminary injunction regarding their Equal Protection, Elections Clause, and Electors Clause claims. (Alliance Resp. (Doc. 64) at 14-18; SBE Resp. (Doc. 65) at 11-13.) Executive Defendants and Alliance Intervenors also challenge this court's ability to hear this action under abstention, (Alliance Resp. (Doc. 64) at 10-14; SBE Resp. (Doc.

65) at 10-11), Rooker-Feldman (Alliance Resp. (Doc. 64) at 13), and preclusion doctrines, (SBE Resp. (Doc. 65) at 7-10). Finally, Executive Defendants and Alliance Intervenors attack Plaintiffs' motions for preliminary injunction on the merits. (Alliance Resp. (Doc. 64) at 19-26; SBE Resp. (Doc. 65) at 13-18.)

Because Rooker-Feldman, abstention, and preclusion are dispositive issues, this court addresses them first, then addresses Plaintiffs' motions on standing and the likelihood of success on the merits.

As to each of these abstention doctrines, as will be explained further, this court's preliminary injunction order, (Doc. 124), in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457, played a substantial role as relevant authority supporting SBE's request for approval, in North Carolina state court, of Revised Memo 2020-19 and the related Consent Judgment. (See discussion infra Part II.D.3.b.i.) As Berger, Moore, and SBE are all parties in Democracy, this court initially finds that abstention doctrines do not preclude this court's exercise of jurisdiction. This court's August Democracy Order was issued prior to the filing of these state court actions, and that Order was the basis of the subsequent grant of affirmative relief by the state court. This

court declines to find that any abstention doctrine would preclude it from issuing orders in aid of its jurisdiction, or as to parties appearing in a pending case in this court.

A. Rooker-Feldman Doctrine

Rooker-Feldman doctrine is a jurisdictional doctrine that prohibits federal district courts from "'exercising appellate jurisdiction over final state-court judgments.'" See Thana v. Bd. of License Comm'rs for Charles Cnty., 827 F.3d 314, 319 (4th Cir. 2016) (quoting Lance v. Dennis, 546 U.S. 459, 463 (2006) (per curiam)). The presence or absence of subject matter jurisdiction under Rooker-Feldman is a threshold issue that this court must determine before considering the merits of the case. Friedman's, Inc. v. Dunlap, 290 F.3d 191, 196 (4th Cir. 2002).

Although Rooker-Feldman originally limited only federal-question jurisdiction, the Supreme Court has recognized the applicability of the doctrine to cases brought under diversity jurisdiction:

> Rooker and Feldman exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, e.g., § 1330 (suits against foreign states), § 1331 (federal question), and § 1332 (diversity).

See Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-92 (2005). Under the Rooker-Feldman doctrine, courts lack subject matter jurisdiction to hear "cases brought by [1] state-court losers complaining of [2] injuries caused by state-court judgments [3] rendered before the district court proceedings commenced and [4] inviting district court review and rejection of those judgments." Id. at 284. The doctrine is "narrow and focused." Thana, 827 F.3d at 319. "[I]f a plaintiff in federal court does not seek review of the state court judgment itself but instead 'presents an independent claim, it is not an impediment to the exercise of federal jurisdiction that the same or a related question was earlier aired between the parties in state court.'" Id. at 320 (quoting Skinner v. Switzer, 562 U.S. 521, 532 (2011)). Rather, "any tensions between the two proceedings should be managed through the doctrines of preclusion, comity, and abstention." Id. (citing Exxon, 544 U.S. at 292-93).

Moreover, "the Rooker-Feldman doctrine applies only when the loser in state court files suit in federal district court seeking redress for an injury allegedly caused by the state court's decision itself." Davani v. Va. Dep't of Transp., 434 F.3d 712, 713 (4th Cir. 2006); see also Hulsey v. Cisa, 947 F.3d 246, 250 (4th Cir. 2020) ("A plaintiff's injury at the hands of

a third party may be 'ratified, acquiesced in, or left unpunished by' a state-court decision without being 'produced by' the state-court judgment.") (internal citations omitted).

Here, Plaintiffs are challenging SBE's election procedures and seeking injunction of those electoral rules, not attempting to directly appeal results of a state court order. More importantly, however, the Fourth Circuit has previously found that a party is not a state court loser for purposes of Rooker-Feldman if "[t]he [state court] rulings thus were not 'final state-court judgments'" against the party bringing up the same issues before a federal court. Hulsey, 947 F.3d at 251 (quoting Lance, 546 U.S. at 463. In the Alliance state court case, Alliance brought suit against SBE. The Plaintiffs from this case were intervenors. They were not parties to the Settlement Agreement and were in no way properly adjudicated "state court losers." Given the Supreme Court's intended narrowness of the Rooker-Feldman doctrine, see Lance, 546 U.S. at 464, and Plaintiffs' failure to fit within the Fourth Circuit's definition of "state-court losers," this court will decline to abstain under the Rooker-Feldman doctrine.

B. Abstention

1. Colorado River Abstention

Abstention "is the exception, not the rule." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976); see also id. at 817 (noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Thus, this court's task "is not to find some substantial reason for the exercise of federal jurisdiction," but rather "to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' . . . to justify the surrender of that jurisdiction." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25-26 (1983).

First, and crucially for this case, the court must determine whether there are ongoing state and federal proceedings that are parallel. Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) ("The threshold question in deciding whether Colorado River abstention is appropriate is whether there are parallel suits."); Ackerman v. ExxonMobil Corp., 734 F.3d 237, 248 (4th Cir. 2013) (finding that abstention is exercised only "in favor of ongoing, parallel state proceedings" (emphasis added)). In this instance, the parties have failed to allege any ongoing state proceeding that this federal suit might interfere with. In fact, Plaintiffs in this case were excluded as parties in the Consent Judgment and are bringing independent claims in this federal court alleging

violations, inter alia, of the Equal Protection Clause. This court does not find that Colorado River abstention prevents it from adjudicating Equal Protection claims raised by parties who were not parties to the Consent Judgment.

2. Pennzoil Abstention

As alleged by Defendants, Pennzoil does dictate that federal courts should not "interfere with the execution of state judgments." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 14 (1987). However, in the very next sentence, the Pennzoil court caveats that this doctrine applies "[s]o long as those challenges relate to pending state proceedings." Id. In fact, in Pennzoil itself, the Court clarified that abstention was proper because "[t]here is at least one pending judicial proceeding in the state courts; the lawsuit out of which Texaco's constitutional claims arose is now pending before a Texas Court of Appeals in Houston, Texas." Id. at 14 n.13.

Abstention was also justified in Pennzoil because the Texas state court was not presented with the contested federal constitutional questions, and thus, "when [the subsequent] case was filed in federal court, it was entirely possible that the Texas courts would have resolved this case . . . without reaching the federal constitutional questions." Id. at 12. In the present case, Plaintiffs raised their constitutional claims

in the state court prior to the entry of the Consent Judgment. The state court, through the Consent Judgment and without taking evidence, adjudicated those claims as to the settling parties. The Consent Judgment is effective through the 2020 Election and specifies no further basis upon which Plaintiffs here may seek relief. As a result, there does not appear to be any relief available to Plaintiffs for the federal questions raised here. For these reasons, this court will also decline to abstain under Pennzoil.

3. Pullman Abstention

Pullman abstention can be exercised where: (1) there is "an unclear issue of state law presented for decision"; and (2) resolution of that unclear state law issue "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 N.C. State Conference of NAACP v. Cooper, 397 F. Supp. 3d 786, 794 (M.D.N.C. 2019). Pullman does not apply here because any issues of state law are not, in this court's opinion, unclear or ambiguous. Alliance's brief in Moore posits that "whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos" are at the center of this case, thereby urging Pullman abstention.

(Alliance Resp. (Doc. 64 at 12.) SBE has undisputed authority to issue guidance consistent with state law and may issue guidance contrary to state law only in response to natural disasters – the court finds this, though ultimately unnecessary to the relief issued in this case, fairly clear. (See discussion supra at Part II.E.2.b.ii.) Moreover, this court has already expressly assessed and upheld the North Carolina state witness requirement, which is the primary state law at issue in this case. Democracy N. Carolina, 2020 WL 4484063, at *48.

Furthermore, Defendants and Intervenors would additionally need to show how "resolution of . . . state law issues pending in state court" would "eliminate or substantially modify the federal constitutional issues raised in Plaintiffs' Complaint." N.C. State Conference of NAACP, 397 F. Supp. 3d at 796. As Alliance notes, the Plaintiffs did not appeal the state court's conclusions, but sought relief in federal court – there is no state law issue pending in state court here. For all of these reasons, this court declines to abstain under Pullman.

C. Issue Preclusion

Collateral estoppel, or issue preclusion "refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,

whether or not the issue arises on the same or a different claim." New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001). The purpose of this doctrine is to "protect the integrity of the judicial process . . . ." Id. at 749 (internal quotations omitted).

Plaintiffs argue that issue preclusion does not bar their Equal Protection claims. Citing Arizona v. California, 530 U.S. 392 (2000), Plaintiffs in Wise argue that a negotiated settlement between parties, like the consent judgment between the Alliance Intervenors and Defendant SBE in Wake County Superior Court, does not constitute a final judgment for issue preclusion. (Wise Pls.' Mot. (Doc. 43) at 23.) Plaintiffs in Moore, citing In re Microsoft Corp. Antitrust Litig., 355 F.3d 322 (4th Cir. 2004), argue that issue preclusion cannot be asserted because the Individual Plaintiffs in Moore were not parties to the state court litigation that resulted in the consent judgment. (Moore Pls.' Mot. (Doc. 60) at 4.)

In response, Defendant SBE argues that, under North Carolina law, issue preclusion applies where (1) the issue is identical to the issue actually litigated and necessary to a prior judgment, (2) the prior action resulted in a final judgment on the merits, and (3) the plaintiffs in the latter action are the same as, or in privity with, the parties in the

earlier action, (SBE Resp. (Doc. 65) at 7), and the parties in these federal actions and those in the state actions are in privity under the third element of the test, (id. at 8).

This court finds that issue preclusion does not bar Plaintiffs' claims. In Arizona v. California, the Supreme Court held that "[i]n most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented." 530 U.S. at 414 (internal quotations omitted). Moreover, "settlements ordinarily occasion no issue preclusion . . . unless it is clear . . . that the parties intend their agreement to have such an effect." Id.

The Consent Judgment SBE and Alliance entered into does not clearly demonstrate that they intended their agreement to have an issue preclusive effect with regard to claims brought now by Plaintiffs in Moore and Wise. The language of the Consent Judgment demonstrates that it "constitutes a settlement and resolution of Plaintiffs' claims against Executive Defendants pending in this Lawsuit" and that "by signing this Stipulation and Consent Judgment, they are releasing any claims . . . that they might have against Executive Defendants." (State Court Consent Judgment (Doc. 45-1) at 14 (emphasis added).) Although

Timothy Moore and Philip Berger, State Legislative Plaintiffs in Moore, were Defendant-Intervenors in the NC Alliance action, they were not parties to the consent judgment. (Id.) Thus, because the plain language of the agreement did not expressly indicate an intention to preclude Plaintiffs Moore and Berger from litigating the issue in subsequent litigation, neither these State Legislative Plaintiffs, nor any other parties with whom they may or may not be in privity, are estopped from raising these claims now before this court.

D. Plaintiffs' Equal Protection Claims

Plaintiffs raise "two separate theories of an equal protection violation," – a "vote dilution claim, and an arbitrariness claim." (Oral Argument Tr. (Doc. 70) at 52; see also Wise Pls.' Mot. (Doc. 43) at 12-15.)

1. Voting Harms Prohibited by the Equal Protection Clause

Under the Fourteenth Amendment of the U.S. 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 several constitutional provisions 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). Because the Fourteenth Amendment protects not only the "initial allocation of the franchise," as well as "to

the manner of its exercise," Bush v. Gore, 531 U.S. 98, 104 (2000), "lines may not be drawn which are inconsistent with the Equal Protection Clause . . . ." Id. at 105 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966)).

The Supreme Court has identified two theories of voting harms prohibited by the Fourteenth Amendment. First, the Court has identified a harm caused by "debasement or dilution of the weight of a citizen's vote," also referred to "vote dilution." Reynolds, 377 U.S. at 555. Courts find this harm arises where gerrymandering under a redistricting plan has diluted the "requirement that all citizens' votes be weighted equally, known as the one person, one vote principle," and resulted in one group or community's vote counting more than another's. Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 340 (4th Cir. 2016); see also Gill v. Whitford, 585 U.S. ____, ____, 138 S. Ct. 1916, 1930-31 (2018) (finding that the "harm" of vote dilution "arises from the particular composition of the voter's own district, which causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district"); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (finding that vote dilution occurred where congressional districts did not guarantee "equal representation for equal numbers of people"); Wright v. North Carolina, 787

F.3d 256, 268 (4th Cir. 2015) (invalidating a voter redistricting plan).

Second, the Court has found that the Equal Protection Clause is violated where the state, "[h]aving once granted the right to vote on equal terms," through "later arbitrary and disparate treatment, value[s] one person's vote over that of another." Bush, 531 U.S. at 104-05 (2000); see also Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box.") (internal citations omitted). This second theory of voting harms requires courts to balance competing concerns around access to the ballot. On the one hand, a state should not engage in practices which prevent qualified voters from exercising their right to vote. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray v. Sanders, 372 U.S. 368, 379-80 (1963). On the other hand, the state must protect against "the diluting effect of illegal ballots." Id. at 380. Because "the right to have one's vote counted has the same dignity as the right to put a ballot in a box," id., the vote

dilution occurs only where there is both "arbitrary and disparate treatment." Bush, 531 U.S. at 105. To this end, states must have "specific rules designed to ensure uniform treatment" of a voter's ballot. Id. at 106.

2. Standing to Bring Equal Protection Claims

In light of the harms prohibited by the Equal Protection Clause, this court must first consider whether Plaintiffs have standing to bring these claims.

For a case or controversy to be justiciable in federal court, a plaintiff must allege "such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." White Tail Park, Inc. v. Stroube, 413 F.3d 451, 458 (4th Cir. 2005) (quoting Planned Parenthood of S.C. Inc. v. Rose, 361 F.3d 786, 789 (4th Cir. 2004)).

The party seeking to invoke the federal courts' jurisdiction has the burden of satisfying Article III's standing requirement. Miller v. Brown, 462 F.3d 313, 316 (4th Cir. 2006). To meet that burden, a plaintiff must demonstrate three elements: (1) that the plaintiff has suffered an injury in fact that is "concrete and particularized" and "actual or imminent"; (2) that the injury is fairly traceable to the challenged

conduct of the defendant; and (3) that a favorable decision is likely to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

In multi-plaintiff cases, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester v. Laroe Estates, Inc., 581 U.S. ____, ____, 137 S. Ct. 1645, 1651 (2017). Further, if there is one plaintiff "who has demonstrated standing to assert these rights as his own," the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 & n.9 (1977).

In the voting context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue," Baker, 369 U.S. at 206, so long as their claimed injuries are "distinct from a 'generally available grievance about the government,'" Gill, 138 S. Ct. at 1923 (quoting Lance v. Coffman, 549 U.S. 437, 439 (2007) (per curiam)).

Defendant SBE and Alliance Intervenors argue that Individual Plaintiffs in Wise and Moore have not alleged a concrete and particularized injury under either of the two Equal Protection theories. (Alliance Resp. (Doc. 64) at 14-15; SBE Resp. (Doc. 65) at 12-13.)

First, under a vote dilution theory, they argue that courts have "repeatedly rejected this theory as a basis for standing, both because it is unduly speculative and impermissibly generalized." (Alliance Resp. (Doc. 64) at 17.) Second, under an arbitrary and disparate treatment theory, they argue that the injury is too generalized because the Numbered Memoranda apply equally to all voters across the state and that Plaintiffs "cannot claim an injury for not having to go through a remedial process put in place for other voters." (SBE Resp. (Doc. 65) at 12.)

Plaintiffs in Moore and Wise do not address standing for their Equal Protection claims in their memoranda in support of their motions for a preliminary injunction. (See Wise Pls.' Mot. (Doc. 43); Moore Pls.' Mot. (Doc. 60).) At oral argument held on October 8, 2020, however, counsel for the Moore Plaintiffs responded to Defendant SBE and Alliance Intervenor's standing arguments. (Oral Argument Tr. (Doc. 70) at 52-59.)

First, under a vote dilution theory, counsel argued that "the Defendants confuse a widespread injury with not having a personal injury," (id. at 53), and that the Supreme Court's decision in Reynolds demonstrates that "impermissible vote dilution occurs when there's ballot box stuffing," (id.), suggesting that each voter would have standing to sue under the

Supreme Court's precedent in Reynolds because their vote has less value. (Id.) Second, under an arbitrary and disparate treatment theory, counsel argued that Plaintiffs were subjected to the witness requirement and that "[t]here are burdens associated with that" which support a finding of an injury in fact. (Id. at 56.) Counsel argued the harm that is occurring is not speculative because, for example, voters have and will continue to fail to comply with the witness requirement, (id. at 55-56), and ballots will arrive between the third and ninth day following the election pursuant to the Postmark Requirement, (id. at 58). Moreover, counsel argued that the "regime" imposed by the state is arbitrary, citing limitations on assistance allowed to complete a ballot, compared to the lessened restrictions associated with the witness requirement under Numbered Memo 2020-19. (Id. at 59.)

This court finds that Individual Plaintiffs in Moore and Wise have not articulated a cognizable injury in fact for their vote dilution claims. However, all of the Individual Plaintiffs in Moore, and one Individual Plaintiff in Wise have articulated an injury in fact for an arbitrary and disparate treatment claim.

a. Vote Dilution

Although the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.'" Gill, 138 S. Ct. at 1930 (citing Reynolds, 377 U.S. at 561), the Court has expressly held that "vote dilution" refers specifically to "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities, Abbott v. Perez, 585 U.S. ____, ____, 138 S. Ct. 2305, 2314 (2018) (internal quotations and modifications omitted) (emphasis added), a harm which occurs where "the particular composition of the voter's own district . . . causes his vote – having been packed or cracked – to carry less weight than it would carry in another, hypothetical district." Gill, 138 S. Ct. at 1931.

Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. See, e.g., Donald J. Trump for President, Inc. v. Cegavske, Case No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other generally available grievances 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.") (internal quotations and modifications omitted); Martel v. Condos, Case No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) ("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, Case No. 3:20-cv-0234-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.").

Although "[i]t would over-simplify the standing analysis to conclude that no state-wide election law is subject to challenge simply because it affects all voters," Martel, 2020 WL 5755289, at *4, the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing. Compared to a claim of gerrymandering, in which the injury is specific to a group of voters based on

their racial identity or the district where they live, all voters in North Carolina, not just Individual Plaintiffs, would suffer the injury Individual Plaintiffs allege. This court finds this injury too generalized to give rise to a claim of vote dilution, and thus, neither Plaintiffs in Moore nor in Wise have standing to bring their vote dilution claims under the Equal Protection Clause.

b. Arbitrary and Disparate Treatment

In Bush, the Supreme Court held that, "[h]aving 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." 531 U.S. at 104-05. Plaintiffs argue that they have been subjected to arbitrary and disparate treatment because they voted under one set of rules, and other voters, through the guidance in the Numbered Memoranda, will be permitted to vote invalidly under a different and unequal set of rules, and that this is a concrete and particularized injury. (Oral Argument Tr. (Doc. 70) at 70-71.)

For the purposes of determining whether Plaintiffs have standing, is it not "necessary to decide whether [Plaintiffs'] allegations of impairment of their votes" by Defendant SBE's actions "will, ultimately, entitle them to any relief," Baker, 369 U.S. at 208; whether a harm has occurred is best left to

this court's analysis of the merits of Plaintiffs' claims, (see discussion infra Section II.D.3). Instead, the appropriate inquiry is, "[i]f such impairment does produce a legally cognizable injury," whether Plaintiffs "are among those who have sustained it." Baker, 369 U.S. at 208.

This court finds that Individual Plaintiffs in Moore and one Individual Plaintiff in Wise have standing to raise an arbitrary and disparate treatment claim because their injury is concrete, particularized, and not speculative. Bobby Heath and Maxine Whitley, the Individual Plaintiffs in Moore, are registered North Carolina voters who voted absentee by mail and whose ballots have been accepted by SBE. (Moore Compl. (Doc. 1) ¶¶ 9-10.) In Wise, Individual Plaintiff Patsy Wise is a registered voter who cast her absentee ballot by mail. (Wise Compl. (Doc. 1) ¶ 25.)

If Plaintiffs Heath, Whitley, and Wise were voters who intended to vote by mail but who had not yet submitted their ballots, as is the case with the other Individual Plaintiffs in Wise, (Wise Compl. (Doc. 1) ¶¶ 26-28), or voters who had intended to vote in-person either during the Early Voting period or on Election Day, then they would not in fact have been impacted by the laws and procedures for submission of absentee ballots by mail and the complained-of injury would be merely "an

injury common to all other registered voters," Martel, 2020 WL 5755289, at *4. See also Donald J. Trump for President, Inc., 2020 WL 5626974, at *4 ("Plaintiffs never describe how their member voters will be harmed by vote dilution where other voters will not."). Indeed, this court finds that Individual Plaintiffs Clifford, Bambini, and Baum in Wise do not have standing to challenge the Numbered Memoranda, because any "shock[]" and "serious concern[s]" they have that their vote "will be negated by improperly cast or fraudulent ballots," (Wise Compl. (Doc. 1) ¶¶ 26-28), is merely speculative until such point that they have actually voted by mail and had their ballots accepted, which Plaintiffs' Complaint in Wise does not allege has occurred. (Id.)

Yet, because Plaintiffs Heath, Whitley, and Wise have, in fact, already voted by mail, (Moore Compl. (Doc. 1) ¶¶ 9-10; Wise Compl. (Doc. 1) ¶ 25), their injury is not speculative. Under the Numbered Memoranda 2020-19, 2020-22, and 2020-23, other voters who vote by mail will be subjected to a different standard than that to which Plaintiffs Heath, Whitley, and Wise were subjected when they cast their ballots by mail. Assuming this is an injury that violates the Equal Protection Clause, Baker, 369 U.S. at 208, the harm alleged by Plaintiffs is particular to voters in Heath, Whitley, and Wise's position,

rather than a generalized injury that any North Carolina voter could claim. For this reason, this court finds that Individual Plaintiffs Heath, Whitley, and Wise have standing to raise Equal Protection claims under an arbitrary and disparate treatment theory. Because at least one plaintiff in each of these multi-plaintiff cases has standing to seek the relief requested, the court "need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit." Vill. of Arlington Heights, 429 U.S. at 264 & n.9.

3. Likelihood of Success on the Merits

Having determined that Individual Plaintiffs have standing to bring their arbitrary and disparate treatment claims, this court now considers whether Plaintiffs' claims are likely to succeed on the merits. To demonstrate a likelihood of success on the merits, "[a] plaintiff need not establish a certainty of success, but must make a clear showing that he is likely to succeed at trial." Di Biase, 872 F.3d at 230.

a. Parties' Arguments

Plaintiffs argue that four policies indicated in the Numbered Memoranda are invalid under the Equal Protection Clause: (1) the procedure which allows ballots without a witness signature to be retroactively validated through the cure procedure indicated in Revised Numbered Memo 2020-19 ("Witness

Requirement Cure Procedure"); (2) the procedure which allows absentee ballots to be received up to nine days after Election Day if they are postmarked on Election Day, as indicated in Numbered Memo 2020-19 ("Receipt Deadline Extension"); and (3) the procedure which allows for anonymous delivery of ballots to unmanned drop boxes, as indicated in Numbered Memo 2020-23 ("Drop Box Cure Procedure"); (4) the procedure which allows ballots to be counted without a United States Postal Service postmark, as indicated in Numbered Memo 2020-22 ("Postmark Requirement Changes"). (Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124; Wise Pls.' Mot. (Doc. 43) at 13-14.)

Plaintiffs in Wise argue that the changes in these Memoranda "guarantee that voters will be treated arbitrarily under the ever-changing voting regimes." (Wise Pls.' Mot. (Doc. 43) at 11.) Similarly, Plaintiffs in Moore argue that the three Memoranda were issued "after tens of thousands of North Carolinians cast their votes following the requirements set by the General Assembly," which deprives Plaintiffs "of the Equal Protection Clause's guarantee because it allows for 'varying standards to determine what [i]s a legal vote." (Moore Compl. (Doc. 1) ¶ 90 (citing Bush, 531 U.S. at 107).)

In response, Defendants argue that the Numbered Memoranda will not lead to the arbitrary and disparate treatment of

ballots prohibited by the Supreme Court's decision in Bush v. Gore, 531 U.S. 98 (2000). Defendant SBE argues that the consent judgment and Numbered Memos do "precisely what Bush contemplated: It establishes uniform and adequate standards for determining what is a legal vote, all of which apply statewide, well in advance of Election Day. Indeed, the only thing stopping uniform statewide standards from going into effect is the TRO entered in these cases." (SBE Resp. (Doc. 65) at 17.) Moreover, Defendant SBE argues that the consent judgment "simply establishes uniform standards that help county boards ascertain which votes are lawful," and "in no way lets votes be cast unlawfully." (Id. at 18.)

Alliance Intervenors argue that the Numbered Memos "apply equally to all voters," (Alliance Resp. (Doc. 64) at 18), and "Plaintiffs have not articulated, let alone demonstrated, how their right to vote – or anyone else's – is burdened or valued unequally," (id. at 19). Moreover, Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues because, "[e]lection procedures often change after voting has started to ensure that the fundamental right to vote is protected." (Id. at 20.)

Both Defendant SBE and Alliance Intervenors argue that the release of the Numbered Memoranda after the election began does not raise equal protection issues, as election procedures often change after voting has started. (SBE Resp. (Doc. 65) at 18; Alliance Resp. (Doc. 64) at 20.) For example, Defendant SBE argues that "[i]f it is unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions." (SBE Resp. (Doc. 65) at 18 (citing N.C. Gen. Stat. § 163-166.01).) "Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps are implemented after voting begins." (Id.)

b. Analysis

This court agrees with the parties that an Equal Protection violation occurs where there is both arbitrary and disparate treatment. Bush, 531 U.S. at 105. This court also agrees with Defendants that not all disparate treatment rises to the level of an Equal Protection violation. As Defendant SBE argues, the General Assembly has empowered SBE to make changes to voting policies and procedures throughout the election, including extending hours at polling places or adjusting voting in

response to natural disasters. (SBE Resp. (Doc. 65) at 18.) Other federal courts have upheld changes to election procedures even after voting has commenced. For example, in 2018, a federal court enjoined Florida's signature matching procedures and ordered a cure process after the election. 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). Similarly, a Georgia federal court in 2018 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 dismiss sub nom. Martin v. Sec'y of State of Ga., No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018).

A change in election rules that results in disparate treatment shifts from constitutional to unconstitutional when these rules are also arbitrary. The ordinary definition of the word "arbitrary" refers to matters "[d]epending on individual discretion" or "involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures." Arbitrary, Black's Law Dictionary (11th ed. 2019). This definition aligns with the Supreme Court's holding in Reynolds and Bush, that the State must ensure equal treatment of voters both at the time it grants citizens the

right to vote and throughout the election. 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."); 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.").

The requirement that a state "grant[] the right to vote on equal terms," Bush, 531 U.S. at 104, includes protecting the public "from the diluting effect of illegal ballots," Gray, 372 U.S. at 380. To fulfill this requirement, a state legislature must define the manner in which voting should occur and the minimum requirements for a valid, qualifying ballot. In North Carolina, the General Assembly has passed laws defining the requirements for permissible absentee voting, N.C. Gen. Stat. § 163-226 et seq., including as recently as this summer, when it modified the one-witness requirement, 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). As this court found in its order issuing a preliminary injunction in Democracy, these requirements reflect a desire by the General Assembly to prevent voter fraud resulting from illegal voting practices. Democracy N. Carolina, 2020 WL 4484063, at *35.

A state cannot uphold its obligation to ensure equal treatment of all voters at every stage of the election if another body, including SBE, is permitted to contravene the duly enacted laws of the General Assembly and to permit ballots to be counted that do not satisfy the fixed rules or procedures the state legislature has deemed necessary to prevent illegal voting. Any guidance SBE adopts must be consistent with the guarantees of equal treatment contemplated by the General Assembly and Equal Protection.

Thus, following this precedent, and the ordinary definition of the word "arbitrary," this court finds that SBE engages in arbitrary behavior when it acts in ways that contravene the fixed rules or procedures the state legislature has established for voting and that fundamentally alter the definition of a validly voted ballot, creating "preferred class[es] of voters." Gray, 372 U.S. at 380.

This definition of arbitrariness does not require this court to consider whether the laws enacted by the General Assembly violate other provisions in the North Carolina or U.S. Constitution or whether there are better public policy alternatives to the laws the General Assembly has enacted. These are separate inquiries. This court's review is limited to

whether the challenged Numbered Memos are consistent with state law and do not create a preferred class or classes of voters.

i. Witness Requirement Cure Procedure

This court finds Plaintiffs have demonstrated a likelihood of success on the merits with respect to their Equal Protection challenge to the Witness Requirement Cure Procedure in Revised Memo 2020-19.

Under the 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a), a witnessed absentee ballot must be "marked . . . in the presence of at least one [qualified] person . . . ." This clear language dictates that the witness must be (1) physically present with the voter, and (2) present at the time the ballot is marked by the voter.

Revised Memo 2020-19 counsels that ballots missing a witness signature may be cured where voters sign and affirm the following statement:

> 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.

(Moore v. Circosta, No. 1:20CV911 (Doc. 45-1) at 34.)

This "cure" affidavit language makes no mention of whether a witness was in the presence of the voter at the time that the voter cast their ballot, which is the essence of the Legislature's Witness Requirement. 2020 N.C. Sess. Laws 2020-17 (H.B. 1169) § 1.(a). In fact, a voter could truthfully sign and affirm this statement and have their ballot counted by their county board of elections without any witness becoming involved in the process.[6] Because the effect of this affidavit is to

[6] Plaintiffs do not challenge the use of the cure affidavit for ballot deficiencies generally, aside from arguing that the cure affidavit circumvents the statutory Witness Requirement. (See Moore Compl. (Doc. 1) ¶ 93; Wise Compl. (Doc. 1) ¶ 124.) Although not raised by Plaintiffs, this courts finds the indefiniteness of the cure affidavit language troubling as a means of correcting even curable ballot deficiencies.

During oral arguments, Defendants did not and could not clearly define what it means to "vote," (see, e.g., Oral Argument Tr. (Doc. 70) at 130-32), which is all that the affidavit requires voters to attest that they have done. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) Under the vague "I voted" language used in the affidavit, a voter who completed their ballot with assistance from an unauthorized individual; a voter who does not qualify for voting assistance; or a voter who simply delegated the responsibility for completing their ballot to another person could truthfully sign this affidavit, although all three acts are prohibited under state law. See N.C. Gen. Stat. § 163-226.3(a)(1). Because the cure affidavit does not define what it means to vote, voters are permitted to decide what that means for themselves.

This presents additional Equal Protection concerns. A state must ensure that there is "no preferred class of voters but equality among those who meet the basic qualifications." Gray, 372 U.S. at 380. Because the affidavit does not serve as an adequate means to ensure that voters did not engage in unauthorized ballot casting procedures, inevitably, not all

(Footnote continued)

eliminate the statutorily required witness requirement, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Revised Memo 2020-19 is arbitrary.

Based on counsel's statements at oral arguments, Defendant SBE may contend that the guidance in Revised Memo 2020-19 is not arbitrary because it was necessary to resolve the Alliance state court action. (Oral Argument Tr. (Doc. 70) at 105 ("Our reading then of state law is that the Board has the authority to make adjustments in emergencies or as a means of settling protracted litigation until the General Assembly reconvenes.").) However, Defendant SBE's arguments to the state court judge and the court in the Eastern District of North Carolina belie that assertion, as they advised the state court that both the original Memo 2020-19 and the Revised Memo were issued "to ensure full compliance with the injunction entered by Judge Osteen," (SBE State Court Br. (Doc. 68-1) at 15), and they advised the court in the Eastern District of North Carolina that they had issued

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voters will be held to the same standards for casting their ballot. This is, by definition, arbitrary and disparate treatment inconsistent with existing state law.

This court's concerns notwithstanding, however, Plaintiffs do not challenge the use of a cure affidavit in other contexts, so this court will decline to enjoin the use of a cure affidavit beyond its application as an alternative for compliance with the Witness Requirement.

the revised Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the Democracy N.C. action in the Middle District." (TRO (Doc. 47) at 9.) As this court more fully explains in its order issued in Democracy, this court finds that Defendant SBE improperly used this court's August Democracy Order to modify the witness requirement. Democracy N. Carolina, No. 1:20CV457 (M.D.N.C. Oct. 14, 2020) (enjoining witness cure procedure). Because Defendant SBE acted improperly in that fashion, this court declines to accept an argument now that elimination of the witness requirement was a rational and justifiable basis upon which to settle the state lawsuit. Furthermore, it is difficult to conceive that SBE was authorized to resolve a pending lawsuit that could create a preferred class of voters: those who may submit an absentee ballot without a witness under an affidavit with no definition of the meaning of "vote."

This court also finds Plaintiffs have demonstrated a likelihood of success on the merits in proving disparate treatment may result as a result of the elimination of the Witness Requirement. Individual Plaintiffs Wise, Heath, and Whitley assert that they voted absentee by mail, including complying with the Witness Requirement. (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10.) Whether because a voter

inadvertently cast a ballot without a witness or because a voter was aware of the "cure" procedure and thus, willfully did not cast a ballot with a witness, there will be voters whose ballots are cast without a witness. Accordingly, this court finds that Plaintiffs have demonstrated a likelihood of success on the merits in proving that the Witness Requirement Cure Procedure indicated in Memo 2020-19 creates disparate treatment.

Thus, because Plaintiffs have demonstrated a likelihood of success on the merits with respect to arbitrary and disparate treatment that may result from under Witness Requirement Cure Procedure in Revised Memo 2020-19, this court finds Plaintiffs have established a likelihood of success on their Equal Protection claim.

ii. Receipt Deadline Extension

This court finds that Plaintiffs are likely to succeed on their Equal Protection challenge to the Receipt Deadline Extension in Revised Memo 2020-19.

Under N.C. Gen. Stat. § 163-231(b), in order to be counted, civilian absentee ballots must have been received by the county board office by 5 p.m. on Election Day, November 3, 2020, or if postmarked by Election Day, by 5:00 p.m. on November 6, 2020. The guidance in Revised Memo 2020-19 extends the time in which absentee ballots must be returned, allowing a late civilian

ballot to be counted if postmarked on or before Election Day and received by 5:00 p.m. on November 12, 2020 (Revised Memo 2020-19 (Doc. 36-3) at 5.)

Alliance Intervenors argue that, "[t]o 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." (Alliance Resp. (Doc. 64) at 21.)

This court disagrees, finding Plaintiffs have demonstrated a likelihood of success on the merits in proving that this change contravenes the express deadline established by the General Assembly, by extending the deadline from three days after Election Day, to nine days after Election Day. Moreover, it results in disparate treatment, as voters like Individual Plaintiffs returned their ballots within the time-frame permitted under state law, (Wise Compl. (Doc. 1) ¶ 25; Moore Compl. (Doc. 1) ¶¶ 9-10), but other voters whose ballots would otherwise not be counted if received three days after Election Day, will now have an additional six days to return their ballot.

Because Plaintiffs have demonstrated a likelihood of success on the merits in proving arbitrary and disparate treatment may result under the Receipt Deadline Extension, this court finds Plaintiffs have established a likelihood of success on the merits of their Equal Protection claim.

iii. Drop Box Cure Procedure

Plaintiffs have failed to establish a likelihood of success, however, on their Equal Protection challenge to the Drop Box Cure Procedure indicated in Numbered Memo 2020-23. (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4).)

N.C. Gen. Stat. § 163-226.3(a)(5) makes it a 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.

"Because of this provision in the law," and the need to ensure compliance with it, SBE recognized in Memo 2020-23 that, "an absentee ballot may not be left in an unmanned drop box," (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), and directed county boards which have a "drop box, slot, or similar container at their office" for other business purposes to place a "sign indicating that absentee ballots may not be deposited in it." (Id.)

Moreover, the guidance reminds county boards that they must keep a written log when any person returns an absentee ballot in person, which includes the name of the individual returning the ballot, their relationship to the voter, the ballot number, and the date it was received. (Id. at 3.) If the individual who drops off the ballot is not the voter, their near relative, or legal guardian, the log must also record their address and phone number. (Id.) The guidance also advises county boards that "[f]ailure to comply with the logging requirement, or delivery or 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." (Id. at 3.) Instead, the guidance advises the county board that they "may . . . consider the delivery of a ballot . . . in conjunction with other evidence in determining whether the ballot is valid and should be counted." (Id. at 4.)

Plaintiffs argue that this guidance "undermines the General Assembly's criminal prohibition of the unlawful delivery of ballots," (Moore Compl. (Doc. 1) ¶ 68), and "effectively allow[s] voters to use drop boxes for absentee ballots," (Wise Pls.' Mot. (Doc. 43) at 13), and thus, violates the Equal

Protection Clause, (Moore Compl. (Doc. 1) ¶ 93). This court disagrees.

Although Numbered Memo 2020-23 was released on September 22, 2020, (Wise, No. 1:20CV912, Memo 2020-23 (Doc. 1-4) at 2), the guidance it contains is not new. Consistent with the guidance in Numbered Memo 2020-23, SBE administrative rules adopted on December 1, 2018, require that any person delivering a ballot to a county board of elections office provide:

> (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 as defined in [N.C. Gen. Stat § 163-226(f)] or verifiable legal guardian as defined in [N.C. Gen. Stat. § 163-226(e)].

8 N.C. Admin. Code 18.0102 (2018). Moreover, the administrative rule states that "the county board 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 according to the requirements of [N.C. Gen. Stat. § 163-231]," (id.), 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.)

Because the guidance contained in Numbered Memo 2020-23 was already in effect at the start of this election as a result of SBE's administrative rules, Individual Plaintiffs were already subject to it at the time that they cast their votes. Accordingly, because all voters were subject to the same guidance, Plaintiffs have not demonstrated a likelihood of success on the merits in proving disparate treatment.

It is a closer issue with respect to whether Plaintiffs have demonstrated a likelihood of success on the merits in proving that the rules promulgated by Defendant SBE are inconsistent with N.C. Gen. Stat. § 163-226.3(a)(5).

This statute makes it a 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. It would seem logically inconsistent that the General Assembly would criminalize this behavior, while at the same time, permit ballots returned by unauthorized third parties to be considered valid. Yet, upon review of the legislative history, this court finds the felony statute has been in force since 1979, 1979 N.C.

Sess. Laws Ch. 799 (S.B. 519) § 4, https://www.ncleg.gov/enactedlegislation/sessionlaws/pdf/1979-1980/sl1979-799.pdf (last visited Oct. 13, 2020), and in its current form since 2013. 2013 N.C. Sess. Laws 381 (H.B. 589) § 4.6.(a).

That the General Assembly, by not taking legislative action, and instead, permitted SBE's administrative rule and the General Assembly's statute to coexist for nearly two years and through several other elections undermines Plaintiffs' argument that Defendant SBE has acted arbitrarily. For this reason, this court finds that Plaintiffs have not demonstrated a likelihood of success on the merits in proving the arbitrariness of the guidance in Numbered Memo 2020-23 and accordingly, Plaintiffs have failed to establish a likelihood of success on their Equal Protection challenge to Numbered Memo 2020-23.

If the General Assembly believes that SBE's administrative rules are inconsistent with its public policy goals, they are empowered to pass legislation which overturns the practice permitted under the administrative rule.

iv. Postmark Requirement Changes

Similarly, this court finds that Plaintiffs have failed to establish likelihood of success on the merits with respect to their Equal Protection challenge to the Postmark Requirement

Changes in Numbered Memo 2020-22. (Wise, 1:20CV912, Memo 2020-22 (Doc. 1-3).)

Under Numbered Memo 2020-22, a ballot will be considered postmarked by Election Day if it has a USPS postmark, there is information in BallotTrax, or "another tracking service offered by the USPS or a commercial carrier, indicat[es] that the ballot was in the custody of USPS or the commercial carrier on or before Election Day." (Id. at 3.) This court finds that these changes are consistent with N.C. Gen. Stat. § 163-231(b)(2)b, which does not define what constitutes a "postmark," and instead, merely states that ballots received after 5:00 p.m. on Election Day may not be accepted unless the ballot is "postmarked and that postmark is dated on or before the day of the . . . general election . . . and are received by the county board of elections not later than three days after the election by 5:00 p.m."

In the absence of a statutory definition for postmark, this court finds Plaintiffs have not demonstrated a likelihood of success on the merits in proving that Numbered Memo 2020-22 is inconsistent with N.C. Gen. Stat. § 163-231(b)(2)b, and thus, arbitrary. If the General Assembly believes that the Postmark Requirement Changes indicated in Memo 2020-22 are inconsistent with its public policy goals, they are empowered to pass

legislation which further specifies the definition of a "postmark." In the absence of such legislation, however, this court finds that Plaintiffs have failed to establish a likelihood of success on the merits of their Equal Protection challenge.

4. Irreparable Harm

In addition to a likelihood of success on the merits, a plaintiff must also make a "clear showing that it is likely to be irreparably harmed absent preliminary relief" in order to obtain a preliminary injunction. UBS Fin. Servs. Inc. v. Carilion Clinic, 880 F. Supp. 2d 724, 733 (E.D. Va. 2012) (quoting Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 347 (4th Cir. 2009)). Further, an injury is typically deemed irreparable if monetary damages are inadequate or difficult to ascertain. See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir. 1994), abrogated on other grounds by Winter, 555 U.S. at 22. "Courts 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). "[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin th[ese] law[s]." Id.

The court therefore finds Plaintiffs have demonstrated a likelihood of irreparable injury regarding the Equal Protection challenges to the Witness Requirement and the Receipt Deadline Extension.

5. Balance of Equities

The third factor in determining whether preliminary relief is appropriate is whether the plaintiff demonstrates "that the balance of equities tips in his favors." Winter, 555 U.S. at 20.

The Supreme Court's decision in Purcell v. Gonzalez, 549 U.S. 1 (2006), urges that this court should issue injunctive relief as narrowly as possible. The Supreme Court has made clear 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., 589 U.S. ____, ____, 140 S. Ct. 1205, 1207 (2020) (per curiam), as a court order affecting election rules will progressively increase the risk of "voter confusion" as "an election draws closer." Purcell, 549 U.S. at 4-5; see also Texas All. for Retired Americans v. Hughs, ____ F.3d ____, 2020 WL 5816887, at *2 (5th Cir. Sept. 30, 2020) ("The principle . . . is clear: court changes of election laws close in time to the election are strongly disfavored."). This year alone, the Purcell doctrine of noninterference has been invoked by federal courts in cases involving witness requirements and cure provisions during COVID-19, Clark v. Edwards, Civil Action No. 20-283-SDD-RLB, 2020 WL 3415376, at *1-2 (M.D. La. June 22, 2020); the implementation of an all-mail election plan developed by county election officials, Paher, 2020 WL 2748301, at *1, *6; and the use of college IDs for

voting, Common Cause v. Thomsen, No. 19-cv-323-JDP, 2020 WL 5665475, at *1 (W.D. Wis. Sept. 23, 2020) – just to name a few.

Purcell is not a per se rejection of any injunctive relief close to an election. However, as the Supreme Court's restoration of the South Carolina witness requirement last week illustrates, a heavy thumb on the scale weighs against changes to voting regulations. Andino v. Middleton, ____ S. Ct. ____, 2020 WL 5887393, at *1 (Oct. 5, 2020) (Kavanaugh, J., concurring) ("By enjoining South Carolina's witness requirement shortly before the election, the District Court defied [the Purcell] principle and this Court's precedents.").

In this case, there are two SBE revisions where this court has found that Plaintiffs are likely to succeed on the merits. First, the Witness Requirement Cure Procedure, which determines whether SBE will send the voter a cure certification or spoil the ballot and issue a new one. This court has, on separate grounds, already enjoined the Witness Requirement Cure Procedure in Democracy North Carolina v. North Carolina State Board of Elections, No. 1:20CV457 (M.D.N.C. Oct. 24, 2020) (enjoining witness cure procedure). Thus, the issue of injunctive relief on the Witness Requirement Cure Procedure is moot at this time. Nevertheless, in the absence of relief in Democracy, it seems likely that SBE's creation of "preferred class[es] of voters",

Gray, 372 U.S. at 380, with elimination of the witness requirement and the cure procedure could merit relief in this case.

Ripe for this court's consideration is the Receipt Deadline Extension, which contradicts state statutes regarding when a ballot may be counted. Ultimately, this court will decline to enjoin the Receipt Deadline Extension, in spite of its likely unconstitutionality and the potential for irreparable injury. The Purcell doctrine dictates that this court must "ordinarily" refrain from interfering with election rules. Republican Nat'l Comm., 140 S. Ct. at 1207. These issues may be taken up by federal courts after the election, or at any time in state courts and the legislature. However, in the middle of an election, less than a month before Election Day itself, this court cannot cause "judicially created confusion" by changing election rules. Id. Accordingly, this court declines to impose a preliminary injunction because the balance of equities weighs heavily against such an injunction.

E. Plaintiffs' Electors Clause and Elections Clause Claims

As an initial matter, this court will address the substantive issues of the Electors Clause and the Elections Clause together. The Electors Clause of the U.S. Constitution requires "[e]ach State shall appoint, in such Manner as the

Legislature thereof may direct, a Number of Electors" for President. U.S. Const. art. II, § 1, cl. 2. Plaintiffs in Wise argue that, in order to "effectuate" this Electors requirement, "the State must complete its canvas of all votes cast by three weeks after the general election" under N.C. Gen. Stat. § 163-182.5(c). (Wise Pls.' Mot. (Doc. 43) at 15.) Plaintiffs argue that (1) the extension of the ballot receipt deadline and (2) the changing of the postmark requirement "threaten to extend the process and threaten disenfranchisement," as North Carolina "must certify its electors by December 14 or else lose its voice in the Electoral College. (Id.)

The meaning of "Legislature" within the Electors Clause can be analyzed in the same way as "Legislature" within the Elections Clause. For example,

> As an initial matter, the Court finds no need to distinguish between the term 'Legislature' as it is used in the Elections Clause as opposed to the Electors Clause. Not only were both these clauses adopted during the 1787 Constitutional Convention, but the clauses share a "considerable similarity.
>
> . . . .
>
> . . . [T]he Court finds that the term "Legislature" is used in a sufficiently similar context in both clauses to properly afford the term an identical meaning in both instances.

Donald J. Trump for President, Inc. v. Bullock, No. CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020). Nor do

Plaintiffs assert any difference in the meaning they assign to "Legislature" and its authority between the two Clauses.

This court finds that all Plaintiffs lack standing under either Clause. The discussion infra of the Elections Clause applies equally to the Electors Clause.

1. Elections Clause

a. Standing

The Elections Clause standing analysis differs in Moore and Wise, though this court ultimately arrives at the same conclusion in both cases.

i. Standing in Wise

In Wise, Plaintiffs are private parties clearly established by Supreme Court precedent to have no standing to contest the Elections Clause in this manner. Plaintiffs are individual voters, a campaign committee, national political parties, and two Members of the U.S. House of Representatives. Even though Plaintiffs are part of the General Assembly, they bring their Elections Clause claim alleging an institutional harm to the General Assembly. Though the Plaintiffs claim to have suffered "immediate and irreparable harm", (Wise Compl. (Doc. 1) ¶¶ 100, 109), this does not establish standing for their Elections Clause claim or Electors Clause claim. See 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 . . . General Assembly."). The Supreme Court has already held that a private citizen does not have standing to bring an Elections Clause challenge without further, more particularized harms. See Lance, 549 U.S. at 441-42 ("The only injury [private citizen] plaintiffs allege is that . . . the Elections Clause . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past."). Plaintiffs allege no such extra harms, and in fact, do not speak to standing in their brief at all.

ii. Standing in Moore

In Moore, both Plaintiff Moore and Plaintiff Berger are leaders of chambers in the General Assembly. The Plaintiffs allege harm stemming from SBE flouting the General Assembly's institutional authority. (Wise Pls.' Mot. (Doc. 43) at 16.) However, as Proposed Intervenors NC Alliance argue, "a subset of legislators has no standing to bring a case based on purported harm to the Legislature as a whole." (Alliance Resp. (Doc. 64) at 15.) The Supreme Court has held that legislative plaintiffs can bring Elections Clause claims on behalf of the legislature itself only if they allege some extra, particularized harm to

themselves – or some direct authority from the whole legislative body to bring the legal claim. Specifically, the Supreme Court found a lack of standing where "[legislative plaintiffs] have alleged no injury to themselves as individuals"; where "the institutional injury they allege is wholly abstract and widely disperse"; and where the plaintiffs "have not been authorized to represent their respective Houses of Congress in this action." Raines v. Byrd, 521 U.S. 811, 829 (1997).

An opinion in a very similar case in the Middle District of Pennsylvania is instructive:

> [T]he claims in the complaint rest solely on the purported usurpation of the Pennsylvania General Assembly's exclusive rights under the Elections Clause of the United States Constitution. We do not gainsay that these [two] Senate leaders are in some sense aggrieved by the Pennsylvania Supreme Court's actions. But that grievance alone does not carry them over the standing bar. United States Supreme Court precedent is clear — a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.

Corman, 287 F. Supp. 3d at 567. In the instant case, the two members of the legislature do not allege individual injury. The institutional injury they allege is dispersed across the entire General Assembly. The crucial element, then, is whether Moore and Berger are authorized by the General Assembly to represent its interests. The General Assembly has not directly authorized Plaintiffs to represent its interests in this specific case. See

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 802 (2015) (finding plaintiff "[t]he Arizona Legislature" had standing in an Elections Clause case only because it was "an institutional plaintiff asserting an institutional injury" which "commenced this action after authorizing votes in both of its chambers"). Moore and Berger argued the general authorization in N.C. Gen. Stat. Section 120-32.6(b), which explicitly authorizes them to represent the General Assembly "[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." N.C. Gen. Stat. § 120-32.6(b). The text of § 120-32.6 references N.C. Gen. Stat. § 1-72.2, which further specifies that Plaintiffs will "jointly have 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." (emphasis added).

Neither statute, however, authorizes them to represent the General Assembly as a whole when acting as plaintiffs in a case such as this one. See N.C. State Conference of NAACP v. Berger, 970 F.3d 489, 501 (4th Cir. 2020) (granting standing to Moore and Berger in case where North Carolina law was directly challenged, distinguishing "execution of the law" from "defense

of a challenged act"). The facts of this case do not match up with this court's prior application of N.C. Gen. Stat. § 1-72.2, which has been invoked where legislators defend the constitutionality of legislation passed by the legislature when the executive declines to do so. See Fisher-Borne v. Smith, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014). Furthermore, to the extent Plaintiffs Moore and Berger disagree with the challenged provisions of the Consent Judgment, they have not alleged they lack the authority to bring the legislature back into session to negate SBE's exercise of settlement authority. See N.C. Gen. Stat. § 163-22.2.

Thus, even Plaintiff Moore and Plaintiff Berger lack standing to proceed with the Elections Clause claim. Nonetheless, this court will briefly address the merits as well.

2. Merits of Elections Clause Claim

a. The 'Legislature' May Delegate to SBE

The Elections Clause of the U.S. Constitution states that the "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 the General Assembly instituted one such time/place/manner rule regarding the election by passing H.B. 1169. Therefore, Plaintiffs argue, SBE "usurped the General Assembly's authority" when it "plainly modif[ied]" what the General Assembly had implemented. (Wise Pls.' Mot. (Doc. 43) at 14.)

The Elections Clause certainly prevents entities other than the legislature from unilaterally tinkering with election logistics and procedures. However, Plaintiffs fail to establish that the Elections Clause forbids the legislature itself from voluntarily delegating this authority. The "Legislature" of a state may constitutionally delegate the power to implement election rules – even rules that may contradict previously enacted statutes.

State legislatures historically have the power and ability to delegate their legislative authority over elections and remain in compliance with the Elections Clause. Ariz. State Legislature, 576 U.S. at 816 (noting that, despite the Elections

Clause, "States retain autonomy to establish their own governmental processes"). Here, the North Carolina General Assembly has delegated some authority to SBE to contravene previously enacted statutes, particularly in the event of certain "unexpected circumstances." (SBE Resp. (Doc. 65) at 15.)

The General Assembly anticipated that SBE may need to implement rules that would contradict previously enacted statutes. See 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." (emphasis added)). Plaintiffs claim that "[t]he General Assembly could not, consistent with the Constitution of the United States, delegate to the Board of Elections the power to suspend or re-write the state's election laws." (Wise Compl. (Doc. 1) ¶ 97.) This would mean that the General Assembly could not delegate any emergency powers to SBE. For example, if a hurricane wiped out all the polling places in North Carolina, Plaintiffs' reading of the Constitution would prohibit the legislature from delegating to SBE any power to contradict earlier state law regarding election procedures. (See SBE Resp. (Doc. 65) at 15).

As courts have adopted a broad understanding of "Legislature" as written in the Elections Clause, see Corman,

287 F. Supp. 3d at 573, it follows that a valid delegation from the General Assembly allowing SBE to override the General Assembly in certain circumstances would not be unconstitutional. See Donald J. Trump for President, 2020 WL 5810556, at *12 (finding that the legislature's "decision to afford" the Governor certain statutory powers to alter the time/place/manner of elections was legitimate under the Elections Clause).

b. Whether SBE Exceeded Legitimate Delegated Powers

The true question becomes, then, whether SBE was truly acting within the power legitimately delegated to it by the General Assembly. Even Proposed Intervenors NC Alliance note that SBE's actions "could . . . constitute plausible violations of the Elections Clause if they exceeded the authority granted to [SBE] by the General Assembly." (Alliance Resp. (Doc. 64) at 19.)

SBE used two sources of authority to enter into the Consent Agreement changing the laws and rules of the election process after it had begun: N.C. Gen. Stat. § 163-22.2 and § 163-27.1.

i. SBE's Authority to Avoid Protracted Litigation

First, this court finds that, while N.C. Gen. Stat. § 163-22.2 authorizes agreements in lieu of protracted litigation, it

does not authorize the extensive measures taken in the Consent Agreement:

> In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of objection interposed by the United States Justice Department under the Voting Rights Act of 1965 and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of this Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly. The State Board of Elections shall also be 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.

N.C. Gen. Stat. § 163-22.2. While the authority delegated under this statute is broad, it limits SBE's powers to implementing rules that "do not conflict with any provisions of this Chapter." Moreover, this power appears to exist only "until such time as the General Assembly convenes." Id. By eliminating the witness requirement, SBE implemented a rule that conflicted directly with the statutes enacted by the North Carolina legislature.

Moreover, SBE's power to "enter into agreement with the courts in lieu of protracted litigation" is limited by the

language "until such time as the General Assembly convenes." Id. Plaintiffs appear to have a remedy to what they contend is an overreach of SBE authority by convening.

ii. SBE's Power to Override the Legislature in an Emergency

Second, Defendants rely upon N.C. Gen. Stat. § 163-27.1. That statute provides:

> (a) The Executive Director, as chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following:
>
> (1) A natural disaster.
>
> (2) Extremely inclement weather.
>
> (3) An armed conflict involving Armed Forces of the United States, or mobilization of those forces, including North Carolina National Guard and reserve components of the Armed Forces of the United States.

N.C. Gen. Stat. § 163-27.1(a)(1-3). As neither (a)(2) or (3) apply, the parties agree that only (a)(1), a natural disaster, is at issue in this case. On March 10, 2020, the Governor of North Carolina declared a state of emergency as a result of the spread of COVID-19. N.C. Exec. Order No. 116 (March 10, 2020). Notably, the Governor did not declare a disaster pursuant to N.C. Gen. Stat. § 166A-19.21. Instead, on March 25, 2020, it was the President of the United States who declared a state of disaster existed in North Carolina:

> I have determined that the emergency conditions in the State of North Carolina resulting from the Coronavirus Disease 2019 (COVID-19) pandemic beginning on January 20, 2020, and continuing, are of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 et seq. (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of North Carolina.

Notice, North Carolina; Major Disaster and Related Determinations, 85 Fed. Reg. 20701 (Mar. 25, 2020) (emphasis added). The President cited the Stafford Act as justification for declaring a major disaster. See 42 U.S.C. § 5122(2). Notably, neither the Governor's Emergency Proclamation nor the Presidential Proclamation identified COVID-19 as a natural disaster.

On March 12, 2020, the Executive Director of SBE, Karen Brinson Bell ("Bell"), crafted an amendment to SBE's Emergency Powers rule. Bell's proposed rule change provided as follows:

> (a) In exercising his or her emergency powers and determining whether the "normal schedule" for the election has been disrupted in accordance with G.S. ~~163A-750~~, 163-27.1, the Executive Director shall consider whether one or more components of election administration has been impaired. The Executive Director shall consult with State Board members when exercising his or her emergency powers if feasible given the circumstances set forth in this Rule.
>
> (b) For the purposes of G.S. ~~163A-750~~, 163-27.1, the following shall apply:
>
> (1) A natural disaster or extremely inclement weather include —— any of the following:

> (A) Hurricane;
> (B) Tornado;
> (C) Storm or snowstorm;
> (D) Flood;
> (E) Tidal wave or tsunami;
> (F) Earthquake or volcanic eruption;
> (G) Landslide or mudslide; or
> (H) Catastrophe arising from natural causes ~~resulted~~ and resulting in a disaster declaration by the President of the United States or the ~~Governor.~~ Governor, a national emergency declaration by the President of the United States, or a state of emergency declaration issued under G.S. 166A-19.3(19). "Catastrophe arising from natural causes" includes a disease epidemic or other public health incident. The disease epidemic or other public health incident must make [~~that makes~~] it impossible or extremely hazardous for elections officials or voters to reach or otherwise access the voting [~~that creates~~] place, create 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.

https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf at 5 (proposed changes in strikethroughs, or underline.) Shortly after submitting the rule change, effective March 20, 2020, SBE declared COVID-19 a natural disaster, attempting to invoke its authority under the Emergency Powers Statute, § 163-27.1. However, the Rules Review Commission subsequently unanimously rejected Bell's proposed rule change, finding in part that there was a "lack of statutory authority as set forth in G.S. 150B-21.9(a)(1)," and more specifically, that "the [SBE] does not have the authority to

expand the definition of 'natural disaster' as proposed." North Carolina Office of Administrative Hearings, Rules Review Commission Meeting Minutes (May 21, 2020), at 4 https://files.nc.gov/ncoah/Minutes-May-2020.pdf.

In a June 12, 2020 letter, the Rules Review Commission Counsel indicated that Bell had responded to the committee's findings by stating "that the agency will not be submitting a new statement or additional findings," and, as a result, "the Rule [was] returned" to the agency. Letter re: Return of Rule 08 NCAC 01.0106 (June 12, 2020) at 1 https://files.nc.gov/ncoah/documents/Rules/RRC/06182020-Follow-up-Tab-B-Board-of-Elections.pdf. Despite the Rules Review Commission's rejection of Bell's proposed changes, on July 17, 2020, Bell issued an Emergency Order with the following findings:

> 18. N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106 authorize me to exercise emergency powers to conduct an election where the normal schedule is disrupted by a catastrophe arising from natural causes that has resulted in a disaster declaration by the President of the United States or the Governor, while avoiding unnecessary conflict with the laws of North Carolina. The emergency remedial measures set forth here are calculated to offset the nature and scope of the disruption from the COVID-19 disaster.
>
> 19. Pursuant to N.C. Gen. Stat. § 163-27.1 and 08 NCAC 01. 0106(a) and (b), and after consultation with the State Board, I have determined that the COVID-19 health emergency is a catastrophe arising from natural causes — i.e., a naturally occurring virus — resulting in a disaster declaration by the President of the United States and a declaration of a state of

> emergency by the Governor, and that the disaster has already disrupted and continues to disrupt the schedule and has already impacted and continues to impact multiple components of election administration.

(Democracy N. Carolina, No. 1:20CV457 (Doc. 101-1) ¶¶ 18-19.) This directly contradicted the Rules Commission's finding that such a change was outside SBE's authority. In keeping with Bell's actions, the State failed to note in argument before this court that Bell's proposal had been rejected explicitly because SBE lacked statutory authority to exercise its emergency powers. In fact, at the close of a hearing before this court, the State made the following arguments:

> but the Rules Review Commission declined to let it go forward as a temporary rule, I think I'm remembering this right, without stating why. But it did not go through.
>
> In the meantime, the president had declared a state of national -- natural disaster declaration. The president had declared a disaster declaration, so under the existing rule, the powers kicked into place.
>
> . . . .
>
> And the statute that does allow her to make those emergency decisions says in it, in exercising those emergency decisions says in it, in exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of this chapter, this chapter being Chapter 163 of the election laws.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 109.) This court agrees with the Rules Review Commission: re-writing the definition of "natural disaster" is

outside SBE's rulemaking authority. N.C. Gen. Stat. § 163-27.1(a)(1) limits the Executive Director's emergency powers to those circumstances where "the normal schedule for the election is disrupted by any of the following: (1) A natural disaster."[7]

Nor does the President's major disaster proclamation define COVID-19 as a "natural disaster" – at least not as contemplated by the state legislature when § 163-27.1 (or its predecessor, § 163A-750) was passed. To the contrary, the Emergency Powers are limited to an election "in a district where the normal schedule for the election is disrupted." N.C. Gen. Stat. § 163-27.1(a). Nothing about COVID-19 disrupts the normal schedule for the election as might be associated with hurricanes, tornadoes, or other natural disasters.

(a) Elimination of the Witness Requirement

Finally, even if, as SBE argues, it had the authority to enter into a Consent Agreement under its emergency powers, it did not have the power to contradict statutory authority by eliminating the witness requirement. See N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid unnecessary conflict with the provisions of

[7] Notably, Bell makes no finding as to whether this is a Type I, II, or III Declaration of Disaster, which would in turn limit the term of the Disaster Declaration. See, e.g., N.C. Gen. Stat. § 166A-19.21.

this Chapter.") (emphasis added). The legislature implemented a witness requirement and SBE removed that requirement. This is certainly an unnecessary conflict with the legislature's choices.

By the State's own admission, any ballots not subject to witnessing would be unverified. The State of North Carolina argued as much in urging this court to uphold the one-witness requirement:

> As Director Bell testified, it is a basic bedrock principle of elections that you have some form of verifying that the voter is who they say they are; voter verification. As she said, when a voter comes into the poll, whether that is on election day proper or whether it is by –
>
> . . . .
>
> Obviously, you can't do that when it is an absentee ballot. Because you don't see the voter, you can't ask the questions. So the witness requirement, the purpose of it is to have some means that the person who sent me this is the person -- the person who has sent this absentee ballot is who they say they are. That's the purpose of the witness requirement. The witness is witnessing that they saw this person, and they know who they are, that they saw this person fill out the ballot and prepare the ballot to mail in. And that is the point of it.
>
> And, as Director Bell testified, I mean, we've heard a lot from the Plaintiffs about how many states do not have witness requirements. And that is true, that the majority of states, I think at this point, do not have a witness requirement.
>
> But as Director Bell testified, they're going to have one of two things. They're going to either have

> the witness requirement, or they're going to have a means of verifying the signature . . . .
>
> One thing -- and I think that is unquestionably an important State interest. Some means of knowing that this ballot that says it came from Alec Peters actually is from Alec Peters, because somebody else put their name down and said, yes, I saw Alec Peters do this. I saw him fill out this ballot.
>
> Otherwise, we have no way of knowing who the ballot -- whether the ballot really came from the person who voted. It is there to protect the integrity of the elections process, but it is also there to protect the voter, to make sure that the voter knows -- everybody knows that the voter is who they say they are, and so that somebody else is not voting in their place.
>
> Additionally, it is a tool for dealing with voter fraud.

(Democracy N. Carolina, No. 1:20CV457, Evidentiary Hr'g Tr. vol. 3 (Doc. 114) at 111-12.) In this hearing, the State continued on to note that "there needs to be some form of verification of who the voter is," which can "either be through a witness requirement or . . . through signature verification," but "it needs to be one or the other." (Id. at 115-16.) Losing the witness requirement, according to the State, would mean having "no verification." (Id. at 116.) Contravening a legislatively implemented witness requirement and switching to a system of "no verification," (id.), was certainly not a necessary conflict under § 163-27.1(a).

SBE argues that this court does not have authority to address how this switch contradicted state law and went outside its validly delegated emergency powers. This is a state law issue, as the dispute is over the extent of the Executive Director's authority as granted to her by the North Carolina Legislature. The State claims that, since a North Carolina Superior Court Judge has approved this exercise of authority, this court is obligated to follow that state court judgment. (SBE Resp. (Doc. 65) at 16.)

However, when the Supreme Court of a state has not spoken, federal courts must predict how that highest court would rule, rather than automatically following any state court that might have considered the question first. See Doe v. Marymount Univ., 297 F. Supp. 3d 573, 590 (E.D. Va. 2018) ("[F]ederal courts are not bound to follow state trial court decisions in exercising their supplemental jurisdiction."). The Fourth Circuit has addressed this issue directly in diversity jurisdiction contexts as well:

> a federal court sitting in diversity is not bound by a state trial court's decision on matters of state law. In King v. Order of United Commercial Travelers of America, 333 U.S. 153, 68 S. Ct. 488, 92 L. Ed. 608 (1948), the Supreme Court upheld the Fourth Circuit's refusal to follow an opinion issued by a state trial court in a South Carolina insurance case. The Court concluded, "a Court of Common Pleas does not appear to have such importance and competence within South Carolina's own judicial system that its decisions

> should be taken as authoritative expositions of that State's 'law.'" Id. at 161, 68 S. Ct. 488.

Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 370 (4th Cir. 2005). In other words, this court's job is to predict how the Supreme Court of North Carolina would rule on the disputed state law question. Id. at 369 ("If the Supreme Court of [North Carolina] has spoken neither directly nor indirectly on the particular issue before us, [this court is] called upon to predict how that court would rule if presented with the issue.")(quotation omitted); Carter v. Fid. Life Ass'n, 339 F. Supp. 3d 551, 554 (E.D.N.C.), aff'd, 740 F. App'x 41 (4th Cir. 2018) ("Accordingly, the court applies North Carolina law, and the court must determine how the Supreme Court of North Carolina would rule."). In predicting how the North Carolina Supreme Court might decide, this court "consider[s] lower court opinions in [North Carolina], the teachings of treatises, and the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369. This court "follow[s] the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently." Town of Nags Head v. Toloczko, 728 F.3d 391, 397-98 (4th Cir. 2013).

In all candor, this court cannot conceive of a more problematic conflict with the provisions of Chapter 163 of the

North Carolina General Statutes than the procedures implemented by the Revised 2020-19 memo and the Consent Order. Through this abandonment of the witness requirement, some class of voters will be permitted to submit ballots with no verification. Though SBE suggests that its "cure" is sufficient to protect against voter fraud, the cure provided has few safeguards: it asks only if the voter "voted" with no explanation of the manner in which that vote was exercised. (Moore v. Circosta, No. 1:20CV911, State Court Consent Judgment (Doc. 45-1) at 34.) This court believes this is in clear violation of SBE's powers, even its emergency powers under N.C. Gen. Stat. § 163-27.1(a). However, none of this changes the fact that Plaintiffs in both Wise and Moore lack standing to challenge the legitimacy of SBE's election rule-setting power under either the Elections Clause or the Electors Clause.

III. CONCLUSION

This court believes the unequal treatment of voters and the resulting Equal Protection violations as found herein should be enjoined. Nevertheless, under Purcell and recent Supreme Court orders relating to Purcell, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, even in the face of what appear to be clear violations. For the foregoing reasons, this court finds that in

Moore v. Circosta, No. 1:20CV911, Plaintiffs' Motion for Preliminary Injunction should be denied. This court also finds that in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, the Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction should be denied.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction in Moore v. Circosta, No. 1:20CV911, (Doc. 60), is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Convert the Temporary Restraining Order into a Preliminary Injunction in Wise v. N. Carolina State Bd. of Elections, No. 1:20CV912, (Doc. 43), is **DENIED**.

This the 14th day of October, 2020.

William L. Osteen, Jr.
United States District Judge

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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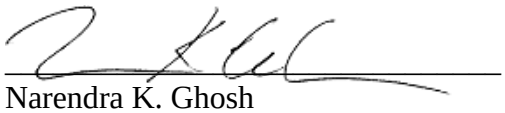
This the 22nd day of September, 2020.



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]

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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,

[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
PERKINS COIE LLP

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

Dated: _____ _____

Superior Court Judge

EXHIBIT A

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

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.

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[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

NORTH CAROLINA
STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

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

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[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

COUNTY LETTERHEAD

DATE

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)**

* 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 in cursive or italics such as is commonly seen with a program such as DocuSign.

EXHIBIT C

NORTH CAROLINA STATE BOARD OF ELECTIONS

Mailing Address:
P.O. Box 27255
Raleigh, NC 27611

(919) 814-0700 or
(866) 522-4723

Fax: (919) 715-0135

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

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[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	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, *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, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; AND NORTH CAROLINA REPUBLICAN PARTY; REPUBLICAN COMMITTEE INTERVENOR-DEFENDANTS.	CASE NO. 20 CVS 8881 **LEGISLATIVE DEFENDANTS' OPPOSITION TO PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT**

Intervenor-Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives ("Legislative Defendants"), respectfully submit this opposition to Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

I. Introduction

The motion for entry of a consent judgment currently before the Court was reached in secret without the involvement or knowledge of Legislative Defendants—the parties with "final decision-making authority with respect to the defense of" the laws Plaintiffs challenge. N.C. GEN. STAT. § 120-32.6(b). With the filing of the motion, the North Carolina State Board of Elections ("NCSBE") has now joined Plaintiffs in seeking to rewrite the North Carolina General Assembly's carefully considered, balanced structure of election laws and substitute their judgment instead. But the U.S. Constitution expressly vests the General Assembly with the authority to prescribe the times, places, and manner of holding elections for federal office in the State of North Carolina, subject to a legislative check by the U.S. Congress. U.S. CONST. art. I, § 4. And the General Assembly recently revised the election laws—on a bipartisan basis—to address concerns related to the COVID-19 pandemic, including by reducing to one the number of individuals required to witness an absentee ballot, *see* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169") § 1.(a); expanding the pool of authorized poll workers to include county residents beyond a particular precinct, *id.* § 1.(b); allowing absentee ballots to be requested online, by fax, or by email, *id.* §§ 2.(a), 7.(a); giving additional time for county boards to canvass absentee ballots, § 4; and providing over $27 million in funding for election administration, *id.* § 11.

Plaintiffs, however, believe they know better than North Carolina's elected officials what needs to be done to balance the State's interests in election administration, access to the polls, and

election integrity during a global pandemic. Apparently unsatisfied with HB1169, which gives them some, but not all, of what they seek, Plaintiffs filed suit on August 10, 2020, nearly two months after HB1169 was signed into law. They now proffer a proposed consent judgment with the NCSBE that would radically change North Carolina election procedures in contradiction to North Carolina law, including by vitiating the witness requirement, extending the absentee ballot receipt deadline, expanding the category of ballots eligible to be counted if received after election day, undermining the General Assembly's criminal prohibition of the unlawful delivery of completed ballots, and providing a clear avenue for ballot harvesters to submit absentee ballots in drop boxes after hours that will nevertheless be counted.

Fortunately for North Carolinians, Plaintiffs' and the NCSBE's proposed consent judgment fails to satisfy the necessary requirements for this Court to enter it for numerous reasons. First, Legislative Defendants are necessary parties to any consent judgment in this case under state law, N.C. GEN. STAT. § 120-32.6(b), and because they do not consent, the consent judgment cannot be entered. Second, Plaintiffs assert facial challenges to the election laws at issue, thereby divesting this court of jurisdiction. *State v. Grady*, 372 N.C. 509, 522 (2019) (internal quotation marks omitted). Third, the evidence indicates that the proposed consent judgment is a product of collusion, not an arm's length agreement between Plaintiffs and the NCSBE. Fourth, the proposed consent judgment is illegal because it violates the federal Constitution's Elections Clause and Equal Protection Clause. Fifth, the consent judgment is not "fair, adequate, and reasonable," *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (internal quotation marks omitted), because the Plaintiffs are unlikely to succeed on the merits of their claims and the relief contemplated by the proposed consent judgment is vastly disproportionate to the expected harm. And sixth, the consent judgment is against the public interest.

For these and the additional reasons explained below, the Court should deny Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

II. Standard

Because a consent judgment is a "judgment" of this Court, it cannot be entered without the Court's "examin[ation]" and "approval." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). When considering whether to grant a consent judgment, the Court should "not blindly accept the terms of a proposed settlement." *North Carolina*, 180 F.3d at 581. As federal appellate courts have explained, approving a consent judgment "requires careful court scrutiny," not a "mechanistic[] 'rubber stamp.'" *Ibarra v. Tex. Emp. Comm'n*, 823 F.2d 873, 878 (5th Cir. 1987); *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1019 (8th Cir. 2002). After all, a "court is more than 'a recorder of contracts' from whom parties can purchase injunctions." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986). It is "an organ of government constituted to make judicial decisions," and it cannot "lend the aid of the . . . court to whatever strikes two parties' fancy." *Id.*; *Kasper v. Bd. of Elections Comm'rs of the City of Chi.*, 814 F.2d 332, 338 (7th Cir. 1987). Instead, every consent judgment must be "examine[d] carefully" to ensure that its terms are "fair, adequate, and reasonable." *United States v. City of Miami*, 664 F.2d 435, 440–41 (5th Cir. 1981) (en banc) (Rubin, J., concurring). The court also "must ensure that the agreement is not illegal, a product of collusion, or against the public interest." *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *Aronov v. Napolitano*, 562 F.3d 84, 91 (1st Cir. 2009) ("A court entering a consent decree must examine its terms to be sure they are fair and not unlawful.").

Particularly where a proposed consent judgment "contains injunctive provisions or has prospective effect, the district court must be cognizant of and sensitive to equitable

considerations." *Ibarra*, 823 F.2d at 878. Moreover, "[i]f the decree also effects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed." *City of Miami*, 664 F.2d at 441 (Rubin, J., concurring); *see also, e.g., Bass v. Fed. Sav. & Loan. Ins. Corp.*, 698 F.2d 328, 330 (7th Cir. 1983). In short, the Court "must assure itself that the parties have validly consented; that reasonable notice has been given possible objectors, that the settlement is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute, or other authority; that it is consistent with the objectives of Congress; and, if third parties will be affected, that it will not be unreasonable or legally impermissible as to them." *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990).

Examination of a plaintiff's likelihood of success on the merits is a necessary component to consideration of whether a consent judgment should enter. The Court must "consider[] the underlying facts and legal arguments" that support or undermine the proposal. *BP Amoco Oil*, 277 F.3d at 1019. While courts need not conduct a full-blown trial, they must "reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.'" *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975).

This Court must determine Plaintiffs' likelihood of success on the merits here for two reasons. First, the proposed consent judgment suspends multiple provisions of North Carolina's duly enacted state election laws. "A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them." *Kasper*, 814 F.2d at 341–42. A "consent judgment in which the executive branch of a state consents not to enforce a law is 'void on its face,'" unless the approving court finds "a probable violation of . . . law." *Id.* at 342. A judge cannot "put the court's sanction on and power behind a decree that

violates Constitution, statute, or jurisprudence." *City of Miami*, 664 F.2d at 441 (Rubin, J., concurring).

Second, the merits are "[t]he most important factor" in determining whether the consent judgment is fair, adequate, and reasonable, since these factors can be examined "only in light of the strength of the case presented by the plaintiffs." *Flinn*, 528 F.2d at 1172. Courts can gauge "the fairness of a proposed compromise" by "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As explained below, the proposed consent judgment here cannot meet the standards necessary for its entry.

While Legislative Defendants recognize that this Court's authority to enter a consent judgment is governed by State, not federal, law, Legislative Defendants' citations to federal cases as persuasive authority on this point are appropriate given the lack of authoritative precedent from the North Carolina courts in this area. *See N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt., LLC*, 836 S.E.2d 754, 758 (N.C. Ct. App. 2019) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance."); *Higgins v. Synergy Coverage Sols., LLC*, No. 18 CVS 12548, 2020 NCBC LEXIS 6, at *54 n.5 (N.C. Super, Ct. Jan. 15, 2020) (unpublished) (explaining that federal cases may be "persuasive to the Court's analysis, especially [in] the absence of North Carolina case law" on a topic); *cf. Lord v. Customized Consulting Specialty, Inc.*, 164 N.C. App. 730, 733 (2004) (recognizing that, when interpreting North Carolina rules of procedure, "[i]n the absence of North Carolina case law, we look to federal cases for guidance"); *Roberts v. Swain*, 353 N.C. 246, 250 (2000) (holding that, in light of the existence of applicable North Carolina precedent, "it was unnecessary for the Court of Appeals to look to federal case law for guidance").

III. Argument

Plaintiffs' and the NCSBE's proposed consent judgment is neither fair nor reasonable nor legal. It suspends constitutional laws that Plaintiffs were unlikely to succeed in attacking. It appears to be not an arm's-length deal between adversaries but a sweetheart deal that gives Plaintiffs substantial changes to the election laws, including some they did not even ask for, while causing North Carolinians confusion and undermining confidence in the integrity of the election. And it is against the public interest, divesting control of the election mechanics from democratically accountable officials and nullifying lawful election provisions. This Court should reject it.

A. The Proposed Consent Judgment Cannot Enter Because Legislative Defendants' Consent, a Necessary Component, Is Lacking

Legislative Defendants intervened as of right in this case as agents of the State on behalf of the General Assembly under N.C. GEN. STAT. §§ 1A-1, 24, 1-72.2(b), and 120-32.6(b). Legislative Defendants are "necessary parties" in every case in which "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," and "in such cases, . . . possess final decision-making authority with respect to the defense of the challenged act . . . or provision of the North Carolina Constitution." *Id.* § 120-32.6(b). Legislative Defendants represent not only the interests of the State in defending its democratically enacted laws, *see Hollingsworth v. Perry*, 570 U.S. 693, 709–10 (2013); *Karcher v. May*, 484 U.S. 72, 82 (1987), but also the interest of the General Assembly itself in defending the constitutionality of the challenged election law provisions, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 803–04 (2015); *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953–54 (2019). Consequently, these provisions mandate that any consent judgment cannot enter without the consent of

Legislative Defendants. *Cf. Guilford County v. Eller*, 146 N.C. App. 579, 581, 553 S.E.2d 235, 236 (2001) ("It is well-settled that the power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto; and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement and promulgates it as a judgment.") (cleaned up). Indeed, entering a consent judgment over the objection of Legislative Defendants would represent an end-run around the statutes making Legislative Defendants a necessary party to this case and giving them primacy in the defense of state laws from constitutional attack. Because Legislative Defendants have not given consent here, the proposed consent judgment must be rejected.

B. This Court Does Not Have Jurisdiction to Enter the Proposed Consent Judgment Because Plaintiffs' Challenges to the Various Election Laws are Facial.

While we acknowledge the Court has decided to the contrary, we respectfully submit that Plaintiffs' claims are facial for the reasons we have explained in our briefing and argument to the Court. As we have explained, the North Carolina Supreme Court has held that a claim is facial to the extent that it seeks relief for individuals beyond the plaintiffs to the case. *See Grady*, 372 N.C. at 546–47 (citing a civil case, *Doe v. Reed*, 561 U.S. 186, 194 (2010)).

What is more, even if the facial nature of Plaintiffs' claims were not clear from the face of their complaint, it is clearly established by the relief requested in the proposed consent judgment, which is programmatic in nature and to be effectuated through the issuance of Numbered Memos to all 100 county boards of elections throughout the state. *See* Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment at 14–16 ("Proposed Consent Judgment"). Indeed, two limitations on the relief sought that Plaintiffs seized upon to assert that their claims are as applied—the limitation of the challenge to the witness requirement to

individuals who do not reside with another adult and the limitation of the challenge to the ballot receipt deadline to ballots sent through the U.S. Postal Service ("USPS"), *see* Plaintiffs' Response to Intervenor-Defendants' Motion and Cross-Motion for Recommendation for Rule 2.1 Designation at 3 (Aug. 24, 2020)—have disappeared in the proposed consent judgment. Plaintiffs and the NCSBE instead seek to relieve *all* voters of the necessity of complying with the witness requirement and to extend the receipt deadline for *all* ballots sent out for delivery by election day, whether through the USPS or a commercial carrier. *See* Proposed Consent Judgment at 15–16.

Further demonstrating the facial nature of the proposed consent judgment before the Court is the fact that the NCSBE's actions are meant to settle not only this lawsuit but also two others that this Court has found raise facial challenges—*Chambers v. State*, No. 20 CVS 500124, and *Stringer v. N.C. State Bd. of Elections*, No. 20 CVS 5615. *See* Bench Memo at 5–7 (Sept. 15, 2020) (attached as Ex. 1 to Affidavit of Nicole Jo Moss in Support of Legislative Defendants' Opposition to Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment ("Moss Aff.")). Indeed, the proposed consent judgment must be intended to buy NCSBE global peace, otherwise it could not possibly achieve its purported objective "to avoid any continued uncertainty and distraction from the uniform administration of the 2020 elections." Proposed Consent Judgment at 14.

For the foregoing reasons, even if Plaintiffs' claims could have been plausibly described as as applied at one time, that is no longer the case. A single judge of this Court therefore lacks jurisdiction to enter the proposed consent judgment, and Plaintiffs' case must be transferred to a three-judge panel immediately. *See* N.C. GEN. STAT. §§ 1A-1, Rule 42, 1-81.1(a1), 1-267.1(a1).

C. This Court Must Not Enter the Proposed Consent Judgment Because There Is a Substantial Risk It Is the Product of Collusion

The substantial risk of collusion at play in this litigation is another reason for the Court to decline to enter the proposed consent judgment. The proposed consent judgment must be rejected because it likely does not reflect arm's-length negotiations and gives a windfall to Plaintiffs. A consent judgment is generally a "request for the court to exercise its equitable powers," which in turn "involves the court's sanction and power and is not a tool bending without question to the litigants' will." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). "[P]arties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction." *Id.* (quoting *Sys. Fed'n No. 91, Ry. Emps. Dep't, AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961)).

Consent judgments must be not only substantively sound but also procedurally fair. Procedural fairness is evaluated "from the standpoint of [both] signatories and nonparties to the decree." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). Consent judgments are procedurally fair when they flow from negotiations "filled with 'adversarial vigor.'" *United States v. City of Waterloo*, No. 15-cv-2087, 2016 U.S. Dist. LEXIS 7224, at *12 (N.D. Iowa Jan. 20, 2016). The parties must "negotiat[e] in good faith and at arm's length." *BP Amoco Oil*, 277 F.3d at 1020. Agreements that lack adversarial vigor become "collusi[ve]," and are, by definition, not fair. *Colorado*, 937 F.2d at 509.

In fact, a consent judgment between non-adverse parties "is no judgment of the court[;] [i]t is a nullity." *Lord v. Veazie*, 49 U.S. 251, 256 (1850). This rule stems from the fundamental requirement that parties be concretely adversarial before a court can act on their claims. *See Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51–52 (2002). The requisite adversity plainly is lacking when "both litigants desire precisely the same result."

Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 47–48 (1971); *see also Time Warner Ent. Advance / Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516 (2013) (internal quotation marks omitted) (explaining that a justiciable controversy "entails an actual controversy between parties having adverse interests in the matter in dispute"). In other words, a collusive suit lacks "the 'honest and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process." *United States v. Johnson*, 319 U.S. 302, 305 (1943).

Regrettably, "it is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental actions because of rifts within the bureaucracy or between the executive and legislative branches." *Ragsdale v. Turnock*, 941 F.2d 501, 517 (7th Cir. 1991) (Flaum, J., concurring in part and dissenting in part). That is why courts must and do look skeptically at consent judgments used to enact or modify governmental policy. Otherwise, non-adverse parties could employ consent judgments to "sidestep political constraints" and obtain relief otherwise unavailable through the political process. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 317; *see also, e.g.*, *Horne v. Flores*, 557 U.S. 443, 448–49 (2009) (observing that "public officials sometimes consent to . . . decrees that . . . bind state and local officials to the policy preferences of their predecessors and may thereby deprive future officials of their legislative and executive powers"); *Nw. Env't Advocates v. EPA*, 340 F.3d 853, 855 (9th Cir. 2003) (Kleinfeld, J., dissenting) (warning that "consent decrees between advocacy groups and agencies present a risk of collusion to avoid executive and ultimately democratic control over the agencies"); *Carcaño v. Cooper*, No. 16-cv-236, 2019 U.S. Dist. LEXIS 123497, at *21 (M.D.N.C. July 23, 2019) ("[W]here there has been little adversarial activity, a federal court must be especially discerning

when presented with a proposal in which elected state officials seek to bind their successors as to a matter about which there is substantial political disagreement . . . ."). In particular, "judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper*, 814 F.2d at 340; *see Dunn v. Carey*, 808 F.2d 555, 560 (7th Cir. 1986) ("A court must be alert to the possibility that a consent decree is a ploy in some other struggle.").

Employing a consent judgment to sidestep political constraints and obtain relief otherwise unavailable through the political process is exactly what is occurring here. The NCSBE, despite Executive Director Bell's March 26, 2020 letter to the General Assembly, failed to convince the General Assembly to adopt all of its recommendations—including many of the same changes that Plaintiffs seek here. For example, the General Assembly considered Executive Director Bell's recommendation that it eliminate the witness requirement but rejected it, deciding to accept her alternative recommendation to reduce to one the witness requirement instead. *See* HB1169 § 1.(a). Moreover, both a state court and a federal 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 at 6–7, *Chambers v. State*, No. 20 CVS 500124 (N.C. Super. Ct. Sept. 3, 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 U.S. Dist. LEXIS 138492, at *103 (M.D.N.C. Aug. 4, 2020). And according to two NCSBE members who recently resigned, the NCSBE entered into the proposed consent judgment without apprising NCSBE members of the fact that "a lot of the concessions" in the consent judgment had been previously rejected by these courts. *See* Ken Raymond Resignation Letter (Sept. 23, 2020) (attached as Ex. 2 to Moss Aff.); David Black Resignation Letter (Sept. 23, 2020) (attached as Ex. 3 to Moss Aff.). Those same board members were also not apprised of the Legislative Defendants' significant involvement in those cases or that the legislature was not being informed of or consulted

with about the proposed settlement. *See* Affidavit of Ken Raymond (attached as Ex. 4 to Moss Aff.); Affidavit of David Black (attached as Ex. 5 to Moss Aff.). The NCSBE provides no justification for its sudden course reversal in the face of its demonstrated successes in court.

There are other circumstances that raise concerns about potential collusion in this case. The claims here are essentially a subset of the claims asserted in *Stringer*, a case filed by Plaintiffs' counsel several months before this one. The principal difference is that Plaintiffs in this case have attempted (unsuccessfully, in Legislative Defendants' view) to plead their claims as as applied challenges—a characterization the NCSBE has endorsed. The chronology and the NCSBE's ready agreement with Plaintiffs that the claims here are as applied are consistent with collusion between the parties. The August 18, 2020 notice of voluntary dismissal of claims against the State of North Carolina, originally a defendant here, also is consistent with collusion, as it appears to have been done to provide an argument (again, unsuccessfully in Legislative Defendants' view) for why Legislative Defendants' agreement was not necessary for the entry of a consent judgment. *See* N.C. GEN. STAT. § 1-72.2(a) ("[W]hen the State of North Carolina is named as a defendant in [cases in state court challenging the validity of an act of the General Assembly] both the General Assembly and the Governor constitute the State of North Carolina.").

At bottom, a court is not a place where parties with mutual interests can "purchase . . . a continuing injunction." *Clements*, 999 F.2d at 846. Yet that is precisely what the proposed consent judgment seeks. The NCSBE is in effect aligned with Plaintiffs, and this Court should find that the proposed consent judgment bears too many hallmarks of collusion to be appropriately entered by the Court. Accordingly, the proposed consent judgment must be rejected—or, at a minimum, Legislative Defendants must be permitted to take discovery before Plaintiffs' and the NCSBE's motion is decided to investigate the evidence of collusion apparent from the public record.

D. This Court Must Not Enter the Proposed Consent Judgment Because It Is Illegal.

The proposed consent judgment undermines North Carolina's election statutes and effectively nullifies 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). The proposed consent judgment violates two provisions of the federal Constitution that protect North Carolina's elections and the right to vote: the Elections Clause and the Equal Protection Clause.

1. The Proposed Consent Judgment Violates 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." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Neither the NCSBE nor this Court have the authority to override the General Assembly's exercise of this authority through the proposed consent judgment. If entered, therefore, the consent judgment would be unconstitutional because it would overrule the enactments of the General Assembly to regulate the times, places, and manner of holding the upcoming federal election.[1]

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

[1] While this Court in *Stringer* did not accept the argument that claims like Plaintiffs' are foreclosed by the political question doctrine (which Legislative Defendants continue to assert), it does not follow that the Elections Clause allows the NCSBE to change the State's election laws without the General Assembly's consent, either with or without this Court's entry of a consent judgment.

judicial powers of the State government shall be forever separate and distinct from each other." *Id.* 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.*, THE FEDERALIST NO. 27, at 174–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (defining "the State legislatures" as "select bodies of men"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "Legislature" as "the body of men in a state or kingdom, invested with power to make and repeal laws"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (defining "Legislature" as "[t]he 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. Indep. Redistricting Comm'n*, 576 U.S. at 814, 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. Redistricting*

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." 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co., 1881).

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." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), *available at* https://bit.ly/3kPvZRu. 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." *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); *Commonwealth 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 NCSBE has clearly violated the Elections Clause by issuing numbered memos to effectuate the proposed consent judgment that purport to adjust the rules of the election that have already been set by statute, and this Court would be doing the same were it to validate the NCSBE's unconstitutional behavior through entry of the consent judgment. Neither the NCSBE nor this Court have freestanding power under the Constitution to rewrite North Carolina's election laws and to "prescribe[]" their own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. Rather, as noted above, the North Carolina Constitution states that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1, and it makes clear that "[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other, *id.* art. I, § 6. And where there is an exception to this separation, it is expressly indicated. *See id.* art. IV, § 1 ("The judicial power of the State shall, *except as provided in Section 3 of this Article*"—addressing administrative agencies—"be vested in a Court for the Trial of Impeachments and in a General Court of Justice.") (emphasis added). Thus, neither the NCSBE nor this Court are the "Legislature" empowered to adjust the rules of the federal election on their own.

Because the People of North Carolina have not granted legislative power to the NCBSE or the Court, 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. Redistricting Comm'n*, 576 U.S. at 795. But here neither the NCSBE nor this Court have legislative power and are not on equal footing with the General Assembly. Indeed, the North Carolina Supreme Court expressly held that a prior version of the NCSBE "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 NCSBE. The current version of the statute does not change the nature of the NCSBE's activities but rather addresses the constitutional infirmities recognized by *Cooper*. *Compare id.* at 114, *with* N.C. GEN. STAT. § 163-19.

Even if it were possible in some circumstances for an executive agency like the NCSBE to exercise the authority to prescribe regulations governing the times, places, and manner of federal elections that the Elections Clause assigns exclusively to the legislature (and it is not), the NCSBE would lack authority to do so here. The NCSBE is a creature of statute. *See* N.C. GEN. STAT. § 163-19(a) ("There is established the State Board of Elections . . . ."). And consistent with being a creature of statute, the NCSBE 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 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. Quite the contrary, the NCSBE is not allowed to issue any rules or regulations that "conflict" with provisions enacted by the General Assembly.

To be sure, 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. 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.*; *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 (May 21, 2020), https://bit.ly/3kLAY5y (attached as Ex. 6 to Moss Aff.). 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 proposed consent judgment will replace the judgment of the General Assembly with that of the NCSBE. But "consent is not enough when litigants seek to grant themselves power they do not hold outside of court." *Clements*, 999 F.2d at 846. Accordingly, "an alteration of the [state] statutory scheme may not be based on consent alone." *Kasper*, 814 F.2d at 342; *see also PG Publ'g Co. v. Aichele*, 705 F.3d 91 (3d Cir. 2013) (finding that where no violation of law had been found, court lacked authority to enter a consent decree "that would violate a valid state law"); *Kasper*, 814 F.2d at 341–42 ("A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986) (holding that a consent judgment was "void on its face" because state Attorney General lacked authority to stipulate that a statute was unconstitutional);

League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052, 1055 (9th Cir. 2007) ("A . . . consent decree . . . cannot be a means for state officials to evade state law.").

Recently, the court in *League of Women Voters of Michigan v. Benson*, No. 17-cv-14148, 2019 U.S. Dist. LEXIS 228463 (E.D. Mich. Feb. 1, 2019), denied a motion to enter a consent decree resolving a partisan gerrymandering case. The League of Women Voters had cut a deal with the newly elected Democrat Michigan Secretary of State to require portions of Michigan's redistricting maps to be redrawn. The Republican congressional delegation and two Republican state legislators, who had intervened, objected to the entry of the consent decree. *Id.* at *4. The court declined to enter the consent decree because under the Michigan constitution, only the Michigan Legislature had authority to "regulate the time, place and manner of all . . . elections." *Id.* at *10. The U.S. Constitution, of course, similarly limits authority to regulate federal elections to the General Assembly. And North Carolina's Constitution states that the grant of legislative power to the General Assembly is exclusive. N.C. CONST. art. I, § 6.

The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. Thus, because the proposed consent judgment purports 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, its entry would violate the Elections Clause.

2. The Proposed Consent Judgment Violates 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 different" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *See 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.

If entered, the proposed consent judgment would violate these constitutional requirements, thereby infringing on the Equal Protection rights of those 153,664 North Carolina voters who had

already cast their absentee ballots before the proposed consent judgment was announced[2] to "participate in" the upcoming election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336, and the Equal Protection right of all North Carolina voters to have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29.

i. The Proposed Consent Judgment Subjects Voters in the Same Election to Different Regulations

First, if the proposed consent judgment is entered, 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* HB1169 § 1.(a). North Carolina 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). And North Carolina also requires absentee ballots to be received, at the latest, by 5:00 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 proposed consent judgment was announced. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the proposed consent judgment.[3] The proposed consent judgment is thus a sudden about-face on the rules governing the ongoing election that upends the careful bipartisan framework that has structured voting so far.

While the proposed consent judgment effectively nullifies the witness requirement and the ballot harvesting ban, the NCSBE has also been plainly inconsistent in what each provision

[2] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

[3] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

requires. On August 21, 2020, the NCSBE 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 ("Original Numbered Memo 2020-19") at 2 (Aug. 21, 2020) (attached as Ex. 7 to Moss Aff.). 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.* 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. ("*Democracy N.C.* 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 as Ex. 8 to Moss Aff.).[4]

The NCSBE then arbitrarily changed course and issued an updated Numbered Memo 2020-19 on September 22, 2020 as part of the proposed consent judgment. 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 NCSBE's proposed consent judgment requires is that the voter merely

[4] Indeed, that is precisely what was happening across the State as the example from Cumberland County provided in the Affidavit of Linda Devore ("Devore Aff.") (attached as Ex. 18 to Moss Aff.) makes clear. Ms. Devore explains how prior to receiving the revised Numbered Memo 2020-19, her county issued hundreds of notifications to voters whose absentee ballot return envelope lacked a witness signature that their ballot would be spoiled and issued them new ballots. *See id.* ¶ 19.

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." Proposed Consent Judgment 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.

The update to Numbered Memo 2020-19 is not required by or even supported by the federal court's preliminary injunction in *Democracy N.C.* This is shown by the text of that order, the evidence in the case, and the chronology of the NCSBE's actions.

The *Democracy N.C.* order enjoined the NCSBE "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." *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *177 (M.D.N.C. Aug. 4, 2020). The evidence in the case made clear that ballots lacking a witness signature are not subject to remediation. As explained above, 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. *Democracy N.C.* Tr. at 122. Thus, since failing to procure a witness is not "subject to remediation," any cure for a voter's failure to comply with the witness requirement is *outside the scope* of the remedy ordered by the Middle District of North Carolina.

This understanding of the *Democracy N.C.* order is reflected in the original Numbered Memo 2020-19 that the NCSBE released on August 21, 2020. *See* Original Numbered Memo 2020-19. This version of the Memo *did not allow* a cure for lack of a witness, but instead listed errors in the witness certification as deficiencies that "cannot be cured by affidavit, because the missing information comes from someone other than the voter," therefore requiring ballots with

such errors "to be spoiled." *Id.* at 2. To be clear, Legislative Defendants are not challenging here Numbered Memo 2020-19 in its original form, but only as amended on September 22, 2020 to eviscerate the witness requirement.

The original form of Numbered Memo 2020-19 makes implausible any claim that the NCSBE understood the *Democracy N.C.* injunction to require the new cure procedures gutting the witness requirement in the amended Numbered Memo 2020-19. As explained above, the court enjoined the NCSBE from "permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation." Yet, in response to this order, the NCSBE issued guidance not only *allowing* but *requiring* the rejection of absentee ballots with witness deficiencies. If the new cure procedures truly were required by the *Democracy N.C.* order, that would mean the NCSBE was acting in open defiance of a court order from August 21 until the amendment of Number Memo 2020-19 on September 22, 2020. While this is implausible standing alone, it is even more so given that the plaintiffs in *Democracy N.C.* have not challenged the scope of Numbered Memo 2020-19 as originally drafted.[5]

The *Democracy N.C.* court has now confirmed our interpretation: "This court does not find Memo 2020-19 'consistent with the Order entered by this Court on August 4, 2020,' and, to the degree this court's order was used as a basis to eliminate the one-witness requirement, this court finds such an interpretation unacceptable." Order at 10, *Democracy N.C.*, No. 20-cv-457, (M.D.N.C. Sept. 30, 2020), ECF No. 145 (citation omitted).

The proposed consent judgment goes further by allowing absentee ballots to be received up to *nine days* after election day. Proposed Consent Judgment at 19, 28. This is both in violation

[5] The NCSBE filed the amended Numbered Memo 2020-19 with the *Democracy N.C.* court on September 28, but in that filing it did not claim that the procedures outlined there are *required* by the preliminary injunction but rather only "consistent with" it. *See* Notice of Filing, *Democracy N.C.* (Sept. 28, 2020), ECF No. 143 (attached as Ex. 21 to Moss Aff.).

of the General Assembly's duly enacted statutes but also a further change in the rules while voting is ongoing. The proposed consent judgment also provides a standardless approach by allowing even the anonymous delivery of ballots—facilitating violations of 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. Proposed Consent Judgment at 38–42.

Accordingly, if the proposed consent judgment is entered, 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 the proposed consent judgment was unveiled, and therefore worked to comply with the witness requirements 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 state court and a North Carolina federal 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 at 6–7, *Chambers*; *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103. For the NCSBE to suddenly reverse course and capitulate to Plaintiffs' demands 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.

ii. The Proposed Consent Judgment Will Dilute Lawfully Cast Votes

Second, if the proposed consent judgment is entered, the NCSBE will be violating North Carolina voters' rights to have their votes counted without dilution. *Reynolds*, 377 U.S. at 555 n.29. The proposed consent judgment ensures that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in four ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Proposed Consent Judgment

at 31–36; (2) by allowing absentee ballots to be counted if received up to nine days after election day, *see id.* at 28–29; and (3) by allowing absentee ballots without a postmark to be counted in certain circumstances if received after election day, *id.*; and (4) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see id.* at 38–42. These changes are open invitations to fraud and ballot harvesting, which will have the direct and immediate effect of diluting the votes of North Carolina voters.

The proposed consent judgment is 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 v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Moreover, those practices, such as the NCSBE'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 NCSBE 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 NCSBE has accepted votes that dilute the weight of lawful North Carolina votes.

* * *

Accordingly, if the proposed consent judgment is entered, the NCSBE will not only be administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast their absentee ballots before the proposed consent judgment was announced "to participate in" the election "on an equal basis with other citizens in" North Carolina, *Dunn*, 405 U.S. at 336, but it will also be purposefully allowing otherwise unlawful votes to be counted,

thereby deliberately diluting and debasing North Carolina voters' votes. These are clear violations of the Equal Protection Clause.

E. This Court Must Not Enter the Proposed Consent Judgment Because It Is Not Fair, Adequate, and Reasonable

The proposed consent judgment must be rejected because it is not fair, adequate, and reasonable. In considering these characteristics, a court must "assess the strength of the plaintiff's case." *North Carolina*, 180 F.3d at 581. The merits of the claims at issue are "[t]he most important factor" because fairness, adequacy, and reasonableness can be examined "only in light of the strength of the case presented by the plaintiffs." *Flinn*, 528 F.2d at 1172. Courts gauge "the fairness of a proposed compromise" by "weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered." *Carson*, 450 U.S. at 88 n.14. Here, because Plaintiffs are unlikely to succeed on the merits of their claims, and because the relief afforded by the proposed consent judgment is vastly disproportionate to the purported harm, the proposed consent judgment is not fair, adequate, and reasonable, and must not be entered.

1. Plaintiffs Are Unlikely to Succeed on the Merits of Their Claims

Plaintiff's legal theories, evidence, and expert reports have significant weaknesses that render their claims unlikely to succeed on the merits. Each will be discussed in turn below.

i. Plaintiffs' Cannot Possibly Succeed In Showing that the Challenged Statutes are Unconstitutional in all of their Challenged Applications.

As explained above, Plaintiffs' claims—particularly viewed in light of the proposed consent judgment—are facial. But regardless of whether the Court agrees with that characterization, to succeed Plaintiffs must demonstrate that the challenged provisions are unconstitutional *in all the applications for which Plaintiffs seek to have them invalidated.* For these purposes, "the label is not what matters and to the extent that a claim and the relief that would

follow reach beyond the particular circumstances of the party before the court, the party must satisfy [the] standards for a facial challenge to the extent of that reach." *Grady*, 372 N.C. at 547 (cleaned up) (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)). It is well established that "[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 138 (2018) (internal quotation marks and brackets omitted), *aff'd*, 139 S. Ct. 2213 (2019). Under this "exacting standard," *id.*, therefore, Plaintiffs "must establish that [the challenged provisions are] unconstitutional in all of [their challenged] applications" during the COVID-19 pandemic. *Grady*, 372 N.C. at 522 (internal quotation marks omitted). Plaintiffs do not even seriously attempt to carry their burden of showing that *all* challenged applications of the challenged provisions are unconstitutional during the pandemic.

As will be explained below, Plaintiffs cannot even credibly demonstrate that *they themselves* are meaningfully injured by North Carolina's generous early voting opportunities, by the requirement to find a single witness, by having to pay the postage for mailing a completed ballot, by the speculative possibility that the delivery of their ballots might suffer from a mail delay, and by the prohibition on third-party ballot harvesting. Indeed, at least two of the Plaintiffs—Tom Kociemba and Rosalyn Kociemba—*have already voted*. *See* N.C. State Bd. of Elections, Voter Search, https://bit.ly/2HNjzLL (search Thomas Kociemba and Rosalyn Kociemba).[6] They certainly have not established that these measures impose an unconstitutional burden in every circumstance. Plaintiffs have not established that the risk of polling place

[6] These are two of the plaintiffs whose depositions Plaintiffs unilaterally cancelled after the filing of the proposed consent judgment. They signed declarations on August 30 stating, "I usually hand-deliver my absentee ballot to the county board of elections, but I do not want to do so this year because of potential exposure to COVID-19" or "to avoid unnecessary exposure to COVID-19." *See* R. Kociemba Aff. ¶ 5; To Kociemba Aff. ¶ 6. According to the NCSBE voter lookup tool cited in the text, their ballots were hand-delivered a little over a week later, on September 8.

consolidation or reduced hours is so dire that it has imposed unconstitutional burdens on *all* in-person voters, and even if "crowds and long lines" occur at some voting locations, Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Pls.' Mem.") at 36, that will obviously not be the case everywhere, so Plaintiffs' facial challenge must fail as a matter of law.

Neither can Plaintiffs carry their burden of showing that all applications of the witness requirement are unconstitutional during the pandemic, even if the analysis is limited to those who do not live with another adult. Indeed, as explained below, each of the individual voters deposed who allege they live alone and are concerned about complying with the witness requirement admitted to one or more of the following: (1) having regular contact with other individuals outside their home since March 2020, (2) having someone they could ask to witness their ballot, or (3) even having already made arrangements for a witness. *See infra* Part III.E.1.vi.c. And presumably these voters were chosen to participate in this lawsuit because they are isolating themselves more than the typical voter. Plaintiffs make no effort to establish the number of voters who live alone but nonetheless would have essentially zero burden to comply with the witness requirement, such as those who attend a physical school, go to a workplace, or frequently visit with family and friends. The witness requirement cannot possibly be unconstitutional in these applications. As for the necessity of paying postage to mail a completed ballot, it simply cannot be maintained with a straight face that having to purchase a single 55-cent stamp unconstitutionally burdens the right to vote of every absentee voter in the State. Nor do Plaintiffs provide any credible explanation supporting the notion that every voter who chooses to vote by mail will face difficulty returning their ballot in time. And Plaintiffs fail to establish that the prohibition on ballot harvesting unconstitutionally burdens all absentee voters, as many North Carolinians will not be burdened in the slightest by the ban.

As Justice Stevens explained in his controlling opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), *see Greater Birmingham Ministries v. Sec'y of State for Ala.*, 966 F.3d 1202, 1222 n.31 (11th Cir. 2020), even if a "neutral, nondiscriminatory regulation of voting procedure" creates "an unjustified burden on *some voters*," the "proper remedy" is not "to invalidate the entire statute," *Crawford*, 553 U.S. at 203 (controlling opinion of Stevens, J.) (emphasis added). But the kind of improper remedy condemned by Justice Stevens in *Crawford* is precisely what Plaintiffs seek here. *Id.* at 202 (internal quotation marks omitted). Plaintiffs' challenges thus are doomed to fail.

ii. Plaintiffs' Challenges Violate the *Purcell* Principle

The U.S. Supreme Court, invoking its decision in *Purcell v. Gonzalez*, "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm.*, 140 S. Ct. 1207. That is because "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." *Riley v. Kennedy*, 553 U.S. 406, 426 (2008). For example, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that will increase "[a]s an election draws closer." *Purcell v. Gonzalez*, 549 U.S 1, 4–5 (2006) (per curiam).

Even if Plaintiffs are correct that the challenged provisions violate the State Constitution, this Court should abstain from entering the proposed consent judgment, thereby disrupting the State's upcoming elections. "In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds*, 377 U.S. at 585. Here, equity favors judicial modesty.

In recent months, other courts faced with election-law challenges prompted by the COVID-19 pandemic have followed the Supreme Court's lead in *Republican National Committee* and have recognized the need to avoid changing "state election rules as elections approach." *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020). And they have exercised caution under *Purcell* even though "the November election itself may be months away," *Thompson*, 959 F.3d at 813, because states cannot reasonably be expected to dramatically alter their election procedures overnight; they need sufficient time to coordinate and plan the logistics of any election-related changes.

The reasons animating the *Purcell* principle apply with full force here. First, should the Court enter the proposed consent decree, it would create a "conflicting court order[]" with recent federal court and state court decisions to uphold the very same provisions against similar federal and state constitutional challenges. *See* Order on Injunctive Relief, *Chambers* (rejecting motion to enjoin witness requirement); *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103, *136–45 (rejecting motion to enjoin the witness requirement and require contactless drop boxes). Second, the November election is merely six weeks away, and "important, interim deadlines that affect Plaintiffs . . . and the State" have already passed. *Thompson*, 959 F.3d at 813. In particular, absentee ballots were made available to voters on September 4, *see* N.C. GEN. STAT. § 163-227.10(a), and as of September 29, 2020, nearly 1.1 million absentee ballots have been requested and over 275,000 voters have already cast their absentee ballots.[7] Moreover, counties have already set their one-stop early voting schedules.[8] If the Court were to enter the proposed consent judgment and change the challenged provisions now—when hundreds of thousands of absentee ballots have

[7] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

[8] *See Vote Early In-Person*, N.C. STATE BD. OF ELECTIONS (Sept. 21, 2020), https://www.ncsbe.gov/voting/vote-early-person.

already been sent to voters and early voting schedules have already been set and disseminated—the Court's order would surely cause massive confusion and consume administrative resources because to implement the order the NCSBE and county boards would have to embark on a public education campaign that would inform voters that the instructions on the ballot envelopes must be disregarded and that the previously stated requirements and receipt deadlines are incorrect. What is more, this Court's order itself would be subject to immediate appellate review which, absent a stay, could lead to a reversion back to the original rules in the days or weeks to come.

In short, whatever the merits of Plaintiffs' legal claims, they have put this Court in an untenable position because the proposed consent judgment they seek is entirely impractical—indeed, affirmatively harmful—because of the proximity to the November election. Under the logic of *Purcell*, this reason alone should be sufficient to deny their motion.

iii. Plaintiffs Failed to Exercise Appropriate Dispatch in Raising Their Challenges

"Equity demands that those who would challenge the legal sufficiency of [legislative] decisions concerning time sensitive public [decisions] do so with haste and dispatch" in particular. *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989); *see also North Iredell Neighbors for Rural Life v. Iredell Cnty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009) (affirming denial of injunction when "some two months elapsed without any contention by plaintiffs of an urgent threat of irreparable harm") (brackets deleted). Here, Plaintiffs did not file their initial complaint until August 10, 2020—nearly five months after the NCSBE's Executive Director raised the potential need for legislative reform to address the impact of the pandemic on the State's elections (including specifically the witness requirement, prepaid return postage for completed absentee ballots, and early voting restrictions) and nearly two months after HB1169 was enacted. Worse still, Plaintiffs did not file their motion for entry of the proposed consent

decree until September 22—over a month after they initiated suit. Indeed, "Plaintiffs have in some respects created the need for the emergency relief" by "wait[ing] more than three months to file this action." *Kishore v. Whitmer*, No. 20-1661, 2020 U.S. App. LEXIS 26827, at *11 (6th Cir. Aug. 24, 2020); *see also Little v. Reclaim Idaho*, No. 20A18, 2020 U.S. LEXIS 3585, at *5 (U.S. July 30, 2020) (Roberts, C.J., joined by Alito, Gorsuch, Kavanaugh, JJ., concurring in the grant of stay) (faulting a party seeking emergency injunctive relief against a state's election law for "delay[ing] unnecessarily its pursuit of relief" (internal quotation marks omitted)).

Plaintiffs could have easily challenged the various election policies and requirements at issue before August 10. The provisions existed—some of them in a more restrictive form—long before the pandemic began. And even after the pandemic hit the State, Plaintiffs clearly delayed in filing their complaint. Contrast their suit with the similar federal challenge in *Democracy North Carolina v. North Carolina State Board of Elections*. There, the plaintiffs filed their complaint on May 22, 2020, *see Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *11, nearly three months before Plaintiffs here, and moved for a preliminary injunction on June 5, 2020—three months before the September 4 deadline for releasing absentee ballots. Plaintiffs also are represented by the same counsel that represent the plaintiffs in the *Stringer* case, which raises similar claims but was filed in May (although they have delayed in moving the case forward since then). Plaintiffs here had no legitimate reason for not acting sooner than they have.

And although Plaintiffs had ample opportunity to file for relief at an earlier date, their delay now risks putting the State in an untenable situation. If the Court enters the proposed consent decree now, the State will have to expend significant administrative resources informing voters of the new election procedures, likely causing massive confusion. This Court should not reward Plaintiffs' delay with a consent judgment.

iv. Plaintiffs' Challenges Second-Guessing State Officials' Responses to the Pandemic Are Not Appropriate

"Under the Constitution, state and local governments . . . have the primary responsibility for addressing COVID-19 matters such as . . . adjustment of voting and election procedures . . . ." *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 U.S. LEXIS 3584, at *29–30 (U.S. July 24, 2020) (Kavanaugh, J., dissenting from denial of application for injunctive relief). As the passage of HB1169 demonstrates, North Carolina legislators and election officials have acted to adapt the State's election laws to account for the COVID-19 pandemic. Moreover, these elected officials are far better positioned than a court to assess the balance of benefits and harms that are likely to result from altering the State's election regulations in the final months before a general election. Indeed, such assessments require officials "to act in areas fraught with medical and scientific uncertainties," where "their latitude must be especially broad," and not "subject to second-guessing by" judges who "lack[] the background, competence, and expertise to assess public health." *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (internal quotation marks omitted). North Carolina officials have not been sitting idly by; they are actively and diligently seeking to accommodate both the State's interests and their voters' interests, all while reacting to the ever-changing effects of COVID-19 on daily life.

The COVID-19 pandemic has not given judges "a roving commission to rewrite state election codes." *Tex. Democratic Party*, 961 F.3d at 394. For this reason, the Supreme Court has shown enormous deference to State election officials during the COVID-19 pandemic. The Court on several occasions during the pandemic has refused to vacate courts of appeals' stays of lower-court preliminary injunctions affecting elections. *See, e.g.*, *id.* at 412 (staying injunction against Texas absentee ballot restrictions), *application to vacate stay denied*, 140 S. Ct. 2015 (2020) (mem.); *Thompson*, 959 F.3d 804 (staying injunction against Ohio initiative signature

requirements), *application to vacate stay denied*, No. 19A1054, 2020 U.S. LEXIS 3376 (U.S. June 25, 2020) (mem.). And it has on even more occasions *granted* stays of lower-court preliminary injunctions that have attempted to change electoral rules in light of the pandemic. *See, e.g.*, *Republican Nat'l Comm.*, 140 S. Ct. 1205 (staying injunction against requirement that absentee ballots be postmarked by election day); *Little*, 2020 U.S. LEXIS 3585; *Clarno v. People Not Politicians Or.*, No. 20A21, 2020 U.S. LEXIS 3631 (U.S. Aug. 11, 2020) (mem.) (staying injunction against initiative signature requirement); *Merrill v. People First of Ala.*, No. 19A1063, 2020 U.S. LEXIS 3541 (U.S. July 2, 2020) (mem.) (staying injunction against absentee ballot witness requirement).

Of particular note is the Supreme Court's ruling in *Merrill*, where the district court enjoined Alabama from enforcing its two-witness requirement for absentee voters to all voters "who determine it is impossible or unreasonable to safely satisfy that requirement in light of the COVID-19 pandemic, and who provide a written statement signed by the voter under penalty of perjury that he or she suffers from an underlying medical condition that the Centers for Disease Control has determined places individuals at a substantially higher risk of developing severe cases or dying of COVID-19." *People First of Ala. v. Merrill*, No. 20-cv-619, 2020 U.S. Dist. LEXIS 104444, at *86–87 (N.D. Ala. June 15, 2020). The Eleventh Circuit refused to stay that injunction pending Alabama's appeal, *see People First of Ala. v. Sec'y of State for Ala.*, 815 F. App'x 505, 505 (11th Cir. 2020), but the Supreme Court stepped in to halt the injunction. And importantly, that injunction was not the kind of blanket prohibition requested by Plaintiffs here. If the Supreme Court concluded that *Merrill*'s comparatively modest injunction was not justified by the pandemic, it is hard to see how an appellate court could find Plaintiffs' proposed consent judgment any more justifiable.

v. Plaintiffs' Challenges Related to Absentee Voting Are All Subject to Rational-Basis Review

All of Plaintiffs' claims challenge aspects of absentee voting—whether limitations on one-stop early voting (a form of absentee voting) or absentee voting by mail. Plaintiffs assert that the challenged provisions "unconstitutionally burden the right to vote" because they violate the North Carolina Constitution's guarantees of the freedom of assembly, the freedom of speech, and equal protection. Pls.' Mem. at 30; *see also* N.C. CONST. art. I, §§ 12, 14, 19. In assessing the merit of this claim, the Court must first ascertain the proper level of scrutiny for reviewing the election policies and requirements at issue. Plaintiffs contend that "[b]ecause [their] claims implicate the fundamental right to vote on equal terms, and the challenged provisions burden constitutionally-protected speech and political association, strict scrutiny applies." Pls.' Mem. at 31. This assertion is meritless.

The view that *all* restrictions on the right to vote are subject to strict scrutiny is plainly foreclosed by precedent. *See Burdick v. Takushi*, 504 U.S. 428, 432 (1992) ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."). In *Libertarian Party of North Carolina v. State*, 365 N.C. 41 (2011), the North Carolina Supreme Court—following the United States Supreme Court's lead—explained that "requiring 'every voting, ballot, and campaign regulation' to meet strict scrutiny 'would tie the hands of States seeking to assure that elections are operated equitably and efficiently,'" *id.* at 50 (quoting *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring)). "Hence, strict scrutiny is warranted only when [the] right [asserted] is *severely burdened*." *Id.* (emphasis added).

Having established that strict scrutiny cannot be reflexively applied in the electoral context, the question remains of how to assess the constitutionality of the challenged provisions. Although

Plaintiffs do not even consider the possibility that rational-basis review may apply to their vote-burdening claims, a careful review of the case law reveals that to be the case.

For starters, it is well established that "there is no constitutional right to an absentee ballot." *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020); *see also Burdick*, 504 U.S. at 433 (explaining that the right to vote does not entail an absolute right to vote in any particular manner); *Crawford*, 553 U.S. at 209 (Scalia, J., concurring the judgment) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *O'Brien v. Skinner*, 414 U.S. 524, 536 (1974) (Blackmun, J., dissenting) ("The State, after all, as a matter of constitutional requirement, need not have provided for any absentee registration or absentee voting.").

Indeed, although the North Carolina Supreme Court long ago held that the North Carolina Constitution does not *preclude* the General Assembly from permitting absentee voting, *see Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 349 (1920), no court in this State has ever held that the North Carolina Constitution *requires* the option of absentee voting. And because there is no constitutional right to cast an absentee ballot, burdens imposed on one's ability to vote absentee are reviewed under heightened scrutiny only in narrowly confined circumstances.

On this score, the Supreme Court's decision in *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), is instructive. *See Libertarian Party of N.C.*, 365 N.C. at 47–53 (adopting the United States Supreme Court's construction of the Federal Constitution for evaluating state constitutional challenges to election law); *see also State v. Packingham*, 368 N.C. 380, 383 (2015) ("[W]hen analyzing alleged violations of our State Constitution's Free Speech Clause, this Court has given great weight to the First Amendment jurisprudence of the United States Supreme Court."), *rev'd on other grounds*, 137 S. Ct. 1730

(2017); *State v. Hicks*, 333 N.C. 467, 484 (1993) ("We . . . give great weight to decisions of the Supreme Court of the United States interpreting provisions of the Constitution which are parallel to provisions of the State Constitution to be construed.").

In *McDonald*, the Court held that an Illinois statute that denied certain inmates absentee ballots did not restrict their right to vote. 394 U.S. at 807. In Illinois, unlike North Carolina, absentee balloting had been made "available [only] to four classes of person," such as those absent from their precinct and the disabled. *Id.* at 803–04. Because incarcerated persons were not among the limited classes, the plaintiffs' applications "were refused." *Id.* at 804. Applying an equal-protection framework, the Supreme Court held that so long as Illinois gave at least one alternative means of voting to the prisoners, the "Illinois statutory scheme" would not "impact" the inmates' "ability to exercise the fundamental right to vote." *Id.* at 807. The Court further explained that restrictions on absentee ballots are reviewed only for rationality unless the putative voter is "in fact *absolutely prohibited* from voting by the State" when looking at the state's election code "as a whole." *Id.* at 807–08 & n.7 (emphasis added). That is because there is a fundamental difference between "a statute which ma[kes] casting a ballot easier for some who were unable to come to the polls" and a "statute absolutely prohibit[ing]" someone "from exercising the franchise." *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969); *see also Goosby v. Osser*, 409 U.S. 512, 521–22 (1973) (striking down an absentee ballot restriction only because the state's statutory scheme "absolutely prohibit[ed]" incarcerated prisoners from voting by other means).

Earlier this year, the Fifth Circuit relied on *McDonald* and its progeny to reaffirm that state regulations of absentee ballots should be examined under rational basis review. In *Texas Democratic Party v. Abbott*, a motions panel of the Fifth Circuit determined that challenges to Texas's statutory scheme were unlikely to succeed on the merits even though Texas provides

absentee ballots only to a few limited classes of voters such as those over the age of 65 or those suffering from disabilities. 961 F.3d at 407. The court explained that in *McDonald*, the Supreme Court held that where a state statute "burden[s] only [an] asserted right to an absentee ballot," it is subject only to rational-basis review unless the plaintiff can produce "evidence that the state would not provide them another way to vote." *Id.* at 403. And as the Fifth Circuit further explained, although COVID-19 "increases the risks of interacting in public," under *McDonald*, state laws limiting access to absentee ballots do not violate the Constitution unless the State itself has "'in fact absolutely prohibited' the plaintiff from voting" and COVID-19 is "beyond the state's control." *Id.* at 404–05 (quoting *McDonald*, 394 U.S. at 808 n.7); *see also Thompson*, 959 F.3d at 810 (emphasizing that courts "cannot hold private decisions to stay home for their own safety against the State"). North Carolina "permits the plaintiffs to vote in person; that is the exact opposite of absolutely prohibiting them from doing so." *Tex. Democratic Party*, 961 F.3d at 404 (internal quotation marks and brackets omitted).[9]

Therefore, "*McDonald* directs [this Court] to review [North Carolina absentee-ballot laws] only for a rational basis." *Id.* at 406. That review demands only that the challenged provisions "bear some rational relationship to a legitimate state end." *Id.* Under this general standard, the Fifth Circuit found that Texas's restrictions on absentee voting were rationally related to the State's interest in deterring voter fraud and preserving efficient, orderly election administration. *See id.* at 406–08.

[9] Although the later merits panel in *Texas Democratic Party* was "hesitant to hold that *McDonald*" applied to plaintiffs' claims challenging Texas's regulations of absentee ballots, it nonetheless made "clear" that it was "not stating, even as *dicta*, that rational basis scrutiny is incorrect." *Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 U.S. App. LEXIS 28799, at *54 (5th Cir. Sept. 10, 2020). The original opinion therefore remains persuasive and has not been repudiated.

If Texas's absentee balloting regime satisfies rational-basis review, then North Carolina's far less restrictive regime is necessarily constitutional. *Any* North Carolinian eligible to vote at the polls is eligible to vote by absentee ballot; the State does not restrict absentee voting to only certain classes of voters. And in North Carolina, any prospective voter can obtain an absentee ballot and the State has provided trained personnel to safely serve as witnesses for voters who require them. *See* N.C. GEN. STAT. §§ 163-226(a), 163-226.3(c). Under the rational-basis standard, the challenged provisions come to this Court "bearing a strong presumption of validity," *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993), and the Court must uphold it against constitutional challenge so long as it "can *envision* some rational basis for the classification." *Huntington Props., LLC v. Currituck County*, 153 N.C. App. 218, 231 (2002). And the burden here is not on the State to prove that the challenged provisions are constitutionally permissible but "on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Armour v. City of Indianapolis*, 566 U.S. 673, 685 (2012). Plaintiffs do not and cannot come close to clearing this hurdle.

The State's "interest in ensuring orderly, fair, and efficient procedures of the election of public officials" is plainly legitimate. *Pisano v. Strach*, 743 F.3d 927, 937 (4th Cir. 2014). The absentee ballot receipt deadline, dates and times for one-stop early voting, and allocation of postage expenses to the voter are bread-and-butter administrative measures of the sort necessary to conduct an election in an orderly and efficient manner. And the witness requirement and the ballot harvesting ban are rational means of promoting the State's interest in deterring, detecting, and punishing voter fraud and in ensuring confidence in the integrity of elections, for when a voter comes to the poll, he or she must provide identifying information in the presence of elections officials, but when would-be voters fill out a ballot remotely, there is no such check. This increases

the risk of ineligible and fraudulent voting. *See, e.g.*, Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. And as the *Democracy N.C.* court pointed out, this potential for abuse has been a reality in North Carolina, particularly in the recently discovered "Dowless scandal," which took place over the course of the 2016 and 2018 elections and threatened the integrity of state and federal elections. That scandal also put into stark relief the risk that absentee balloting may present. That is also probably why a dozen States have adopted witness requirements of some form. *See VOPP: Table 14: How States Verify Voted Absentee Ballots*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 17, 2020), https://bit.ly/33LAqay. The challenged provisions are a rational means for ensuring that the absentee ballot was filled out by the person under whose name the vote will be counted. That is enough to satisfy rational-basis review.

vi. If the *Anderson-Burdick* Balancing Framework Applies, the Challenged Provisions Are Constitutional

Even if Plaintiffs' challenge to the various election policies and requirements at issue were not subject to rational-basis review, the highest level of constitutional scrutiny Plaintiffs' claims could even conceivably merit is the standard known as the *Anderson-Burdick* analysis, which is taken from the United States Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), and their progeny. The North Carolina Supreme Court, considering a ballot-access challenge, explicitly adopted the *Anderson-Burdick* framework to govern voting-rights challenges under the State constitution's equal protection, speech, election, and assembly clauses. *See Libertarian Party of N.C.*, 365 N.C. at 42; *see also James v. Bartlett*, 359 N.C. 260, 270 (2005).

This approach recognizes that "[i]n the interest of fairness and honesty, the State "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce

election- and campaign-related disorder," and accordingly that "requiring every voting, ballot, and campaign regulation to meet strict scrutiny would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Libertarian Party of N.C.*, 365 N.C. at 49–50 (internal quotation marks omitted). Thus, under *Anderson-Burdick*, "requirements constituting an unreasonable, discriminatory burden are the only requirements subject to strict scrutiny review." *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000); *see also Mays*, 951 F.3d at 786 (strict scrutiny is applicable only when "the State totally denie[s] the electoral franchise to a particular class of residents, and there [i]s no way in which the members of that class could have made themselves eligible to vote"). For "reasonable and nondiscriminatory rules," the court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (internal quotation marks and brackets omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate, empirical verification." *Id.* (internal quotation marks omitted). Once the State's interests have been articulated, that is the end of the matter; there is no further analysis of "the extent to which the state's interests make it necessary to burden the plaintiff's rights." *Wood*, 207 F.3d at 716.

Under this framework, then, the first question is whether any of the measures Plaintiffs have challenged "severely burden" the right to vote. *Id.* None do.

a. Postage Expenses

The requirement that voters bear their own postage—a single, 55-cent stamp—when choosing to return their completed ballot by mail is self-evidently a "reasonable, nondiscriminatory restriction[]." *Id.* (internal quotation marks omitted). The vast majority of states nationwide expect absentee voters to bear this minor, incidental expense. *See VOPP: Table 12: States with Postage-Paid Election Mail*, NAT'L CONF. OF STATE LEGISLATURES (2020), https://bit.ly/3hSTFDm; Expert

Affidavit of Dr. M.V. Hood, III, Ph.D. ("Hood Aff.") ¶¶ 38–39 (attached as Ex. 9 to Moss Aff.). While Legislative Defendants are acutely aware of the "devastating economic impact of the pandemic," Pls.' Mem. at 34, Plaintiffs' contention that purchasing a single 55-cent stamp imposes a "significant hurdle[] on North Carolinian's exercise of the franchise" is meritless, *id.* at 31. Indeed, in *Crawford* the U.S. Supreme Court found that Indiana's voter ID law failed to impose a severe burden on voting despite the fact that some voters may have been required to pay between $3 and $12 for a copy of their birth certificate in order to obtain a voter ID. *See* 553 U.S. at 199 n.17 (controlling opinion of Stevens, J.).

If the purchase of a 55-cent postage stamp constituted a severe burden on the right to vote, thereby triggering strict scrutiny, the same scrutiny would also have to be applied to the laws governing in-person voting in every single state. Any voter who lives more than a mile from the polling place will incur at least 55-cents in traveling expenses going to the polls, in either public transit costs or fuel and wear-and-tear. Indeed, Plaintiffs' expert Kenneth Mayer conceded that public transportation and gas costs for in person voters "probably" "are more than 55 cents per voter." Kenneth Mayer Expert Deposition Transcript ("Mayer Tr.") at 107:20–108:9 (attached as Ex. 10 to Moss Aff.). Yet no state reimburses voters for these incidental, *de minimis* expenses, and the courts have "routinely rejected" the notion that having to undergo "a long commute" to reach a polling place imposes "a significant harm to a constitutional right." *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1124 (N.D. Ga. 2020); *cf. Crawford*, 553 U.S. at 199 (controlling opinion of Stevens, J.) ("For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting."); *Lee v. Va. State Bd. of Elections*, 843

F.3d 592, 601 (4th Cir. 2016) ("[E]very polling place will, by necessity, be located closer to some voters than to others.").

Courts have agreed that voters bearing their own postage expenses to submit their completed absentee ballots does not impose a severe burden on the right to vote, even in the context of the COVID-19 pandemic. In *DCCC v. Ziriax*, No. 20-cv-211, 2020 U.S. Dist. LEXIS 170427 (N.D. Okla. Sept. 17, 2020), the court found that postage "is a type of 'usual burden[] of voting,'" *id.* at *68 (quoting *Crawford*, 553 U.S. at 197–98), determined that "plaintiffs have not established that the lack of postage will result in disenfranchisement or an undue burden on any voter," and concluded that the burden the requirement imposed was "light," *id.* Furthermore, the court determined that the policy of the USPS "is to deliver the ballot, irrespective of whether it has postage or not." *Id.* (Plaintiffs' expert Mayer confirmed that the USPS's policy is to "deliver absentee ballots without a stamp," and therefore that "in theory, [it] should be true" that "no one in North Carolina will be disenfranchised because they failed to put a stamp on their absentee ballot return envelope." Mayer Tr. at 106:2–14.) The District Court for the Northern District of Georgia recently rejected a similar claim under *Anderson-Burdick* and did not find a constitutional violation. *New Ga. Project v. Raffensperger*, No. 20-cv-1986, 2020 U.S. Dist. LEXIS 159901, at *63 (N.D. Ga. Aug. 31, 2020).

What little discovery Legislative Defendants have been able to conduct in this case further undermines Plaintiffs' likelihood of success on the merits. With respect to concerns related to the delays in the postal service and lack of access to a stamp, each of the individual voters deposed who plan to vote absentee admitted at least one of the following: (1) they have a stamp, *see* Rebecca Johnson Deposition Transcript ("Johnson Tr.") at 28:14–17 (attached as Ex. 11 to Moss Aff.); Caren Rabinowitz Deposition Transcript ("Rabinowitz Tr.") at 32:24–25 (attached as Ex.

12 to Moss Aff.); and (2) they could ask for a stamp or regularly frequent places that sell stamps, *see* Susan Barker Fowler Deposition Transcript ("Fowler Tr.") at 24:15–17 (attached as Ex. 13 to Moss Aff.) (goes to grocery store); 24:18–19 (goes to drugstore); 24:22–23 (goes to gas stations); 25:20–22 (orders from Amazon); 32:13–15 (could ask parents for stamp).

b. Ballot Receipt Deadline

Likewise, Plaintiffs cannot plausibly claim that North Carolina's deadline for receipt of completed absentee ballots somehow "severely burden[s]" the right to vote. *Libertarian Party of N.C.*, 365 N.C. at 51. Obviously, the need to fairly and expeditiously count the ballots and determine the election results necessitates *some* deadline for submitting absentee ballots; and North Carolina's cutoff—which allows ballots postmarked before the end of election day to come in up to three days later—is more generous than most. *See* Hood Aff. at 13 fig.2. While Plaintiffs complain about anticipated postal delays, it simply cannot be realistically denied that North Carolina's deadline gives absentee voters "ample opportunity"—alleged USPS delays and all—to get their votes in on time, and it therefore does not "burden[] them in any meaningful way." *Pisano*, 743 F.3d at 934–35. All Plaintiffs have to do is mail in their ballots far enough in advance of election day to ensure they are received on time. Presumably, a week in advance of election day would be enough, as that would give their ballots more time to arrive than the relief they are seeking. That is precisely what the NCSBE is advising voters, both on its website and in the judicial voter guide sent to every household in the State. *See* Detailed Instructions for Voting by Mail, Returning a Ballot, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2E4ZxL7 (last accessed Sept. 29, 2020); Judicial Voter Guide 2020 at 14, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2EPP72k ("We strongly recommend mailing your completed ballot before October 27 for a timely delivery."). And this is leaving to the side the options of dropping off a ballot in person rather than

sending it through the mail (as the Plaintiffs Tom Kociemba and Rosalyn Kociemba have done), or voting in person, which, for those at heightened risk of complications from COVID-19 infection, can be done curbside without entering the polling place. *See* N.C. State Bd. of Elections, Numbered Memo 2020-20 (Sept. 1, 2020), https://bit.ly/32Onr5M.

Massachusetts' highest court recently rejected a similar challenge to that State's ballot receipt deadline. In line with the requirement in most states, the Massachusetts deadline at issue required all absentee ballots to be received before the end of election day itself—without North Carolina's extra three-day grace period. *See Grossman v. Sec'y of the Commonwealth*, 151 N.E.3d 429, 2020 Mass. LEXIS 510, at *1–2 (Mass. 2020).[10] The Massachusetts Supreme Judicial Court held that this deadline "does not significantly interfere with the constitutional right to vote," particularly given the obvious necessity of *some* "reasonable deadlines" and the fact that "voters, including those who have requested mail-in ballots, have multiple voting options, and thus are not limited to returning their ballots by mail." *Id.* at *3, *11. So too here. And notably, even when granting relief to plaintiffs challenging Pennsylvania's ballot receipt deadline, the Supreme Court of Pennsylvania extended that deadline from 8:00 p.m. on election day to 8:00 p.m. only three days after—essentially the same deadline that North Carolina currently has and a much shorter extension than the nine-day extension Plaintiffs request. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 Pa. LEXIS 4872, at *89 (Pa. Sept. 17, 2020).

Deposition testimony confirms the lack of merit in Plaintiffs' claim. The one Plaintiff deposed thus far who had experience in the past with her absentee ballot being delayed in the mail

[10] *Grossman* considered a challenge to the Massachusetts deadline for receipt of absentee votes in the September 1 primary election: "before 8 P.M. on September 1." *Grossman*, 2020 Mass. LEXIS 510, at *2. Massachusetts' receipt deadline for the general election is the same as North Carolina's—a ballot is timely if it "is received not later than 5 P.M. on November 6, 2020," *i.e.*, three days after the election, "and mailed on or before November 3, 2020," as evidenced by a November 3 postmark. 2020 MASS. ACTS ch. 115, sec. 6(h)(3).

and who is advocating for extending the ballot receipt deadline admitted the problem was not with her prior ballot not getting back to her county board of election on time, but with her receiving her ballot in the first instance. *See* Fowler Tr. at 19:3–22. She admitted that none of the relief Plaintiffs are seeking would have addressed the problem she experienced in the past, and that she does not intend to wait until the last minute to mail her absentee ballot in this election, but instead to vote and return her ballot the day she gets it. *See id.* at 15:18–20; *cf.* Johnson Tr. at 36:18–24 (plans to mail ballot in September so it will be received before election); 36:25–37:2 (can use Ballottrax to make sure ballot arrives at the county board of election on time); Rabinowitz Tr. at 39:12–17 (agreed no reason she could not mail her ballot to be sure it got in before election day); 39:8–11 (can use Ballottrax to make sure ballot arrives on time).

c. Witness Requirement

North Carolina's absentee voting witness requirement—reduced, for the November 2020 election, to a single witness—likewise does not severely burden the right to vote. Even for those voters who live alone, asking a family member, friend, neighbor, or coworker to take a few minutes to observe that voter cast her vote and then write their name, address, and signature is hardly the type of "severe burden," *Libertarian Party of N.C.*, 365 N.C. at 50, that "totally denie[s]" the right to vote, *Mays*, 951 F.3d at 787.

That is so notwithstanding Plaintiffs' contentions that "interacting with individuals outside of one's household can pose the risk of contracting a highly contagious and dangerous virus." Pls.' Mem. at 33. Even voters who live alone and are social distancing from all other adults can satisfy the witness requirement while abiding by all relevant social-distancing and sanitization guidelines. For example, any family member, friend, neighbor, mail-delivery person, food-delivery person, or multipartisan assistance team ("MAT") member can watch the voter mark their ballot through a

window, glass door, or other barrier. At that point, the voter can pass the ballot under a closed door or through an open window to be marked, signed, and returned (after handwashing or sanitizing) without direct interaction between the two persons. These options are available to practically all voters living alone and would not require the voter or the witness to come within six feet of each other or break other social-distancing guidelines. By engaging in these sorts of protective activities, voters can vote without exposing themselves to any appreciable risk of contracting the virus. Indeed, the NCSBE has expressly advised voters on complying with the witness requirement in a safe manner.[11]

As the federal court for the Middle District of North Carolina recently found in rejecting a similar challenge to the State's witness requirement, "even high-risk voters can comply with the One-Witness Requirement in a relatively low-risk way, as long as they plan ahead and abide by all relevant precautionary measures, like social distancing, using hand sanitizer, and wearing a mask; in other words, the burden on voters is modest at most." *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *102; *see also DCCC*, 2020 U.S. Dist. LEXIS 170427, at *51–57. Once again, there is simply no realistic risk associated with having another adult witness the execution of an absentee ballot through a closed window, so long as the two parties use separate pens and the ballot itself is disinfected before it is passed between them. *See* Expert Affidavit of Philip S. Barie, M.D., M.B.A. ("Barie Aff.") ¶ 35 (attached as Ex. 14 to Moss Aff.).

Moreover, the witness requirement serves the important State interests of protecting the integrity of its elections, preventing fraud, and fostering confidence in the election process. The requirement is "especially important" during the pandemic because it helps "identify potential irregularities with absentee voting," which "takes place entirely out of the sight of election officials

[11] *FAQs: Voting by Mail in North Carolina in 2020*, N.C. STATE BD. OF ELECTIONS (Sept. 1, 2020), https://www.ncsbe.gov/voting/vote-mail/faqs-voting-mail-north-carolina-2020.

and is more susceptive to irregularity and fraud than other methods of voting." Strach Aff. ¶¶ 54–55. Accordingly, the witness requirement was pivotal in allowing the NCSBE to ferret out the patterns of fraudulent absentee ballots submitted as part of the Dowless scandal. *Id.* ¶ 59. Eliminating the requirement would divest the NCSBE and local county boards of elections of a "valuable tool[] [for] detecting and investigating irregularities and fraud." *Id.* ¶ 64.

Plaintiffs' deposition testimony does not help their claim. Each of the individual voters deposed who allege they live alone and are concerned about complying with the witness requirement admitted to one or more of the following: (1) having regular contact with other individuals outside their home since March 2020, *see* Johnson Tr. at 17:14–25; 19:4–15; 21:8–18; 22:10–20; 25:16–18; 26:13–19; 27:5–10 (spent weekend at cousin's lake house, gotten take-out numerous times, gotten haircuts and pedicures, sees her yard man weekly, has visited with a friend outdoors for over an hour, and drove a friend to have lunch at her club); Rabinowitz Tr. at 23:15; 26:7–18 (been to drug store, gotten haircut, been to doctors and took a ride share service to get there and back three times); (2) having someone they could ask to witness their ballot, *see* Johnson Tr. at 28:23–29:8; 36:3–9; Rabinowitz Tr. at 15:6–16; 19:5–15; 35:21–36:21; or (3) even having already made arrangements for a witness, *see* Johnson Tr. at 36:3–9 (stating that "a friend offered to come over – wanted hers witnessed, and we do each other's"). For those witnesses who do not live alone, they readily admitted they could have someone witness their ballots. *See* Fowler Tr. at 12:22–13:2; Jade Jurek Deposition Transcript ("Jurek Tr.") at 12:12–25 (attached as Ex. 15 to Moss Aff.); William Dworkin Deposition Transcript ("Dworkin Tr.") at 19:23–20:5 (attached as Ex. 16 to Moss Aff.).

d. Early Voting

Plaintiffs contend that "limitations on the number of days and hours of early voting that counties may offer burdens in-person voting." Pls.' Mem. at 36. They assert that the "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." *Id.* These "crowded polling places" will force Plaintiffs to "risk[] their health in order to cast their votes." *Id.*

First, the data does not bear out Plaintiffs' dire predictions about polling place crowds. "[T]he number of early voting sites per count remains stable in 2020" as compared to 2016, and the "number of early voting hours and days offered in the 2020 general election represents a large increase over the prior two presidential election years." Expert Affidavit of Keegan Callanan, Ph.D. ("Callanan Aff.") ¶¶ 8, 10 (attached as Ex. 17 to Moss Aff.). Consequently, instead of leading to crowded polling places and long lines, this "significant increase in voting hours and days may logically be expected to reduce average waiting times at North Carolina's early voting sites." *Id.* ¶ 12. Moreover, "voter preference for in-person voting is expected to fall substantially in 2020 as compared to 2012 and 2016," *id.*—nearly 1.1 million absentee ballots have been requested as of September 29, 2020, compared with merely 106,051 requests 36 days before the 2016 election—logically entailing *less crowded* in-person polling places. *See also* Devore Aff. ¶¶ 4–10 (explaining efforts made to enlarge early voting sites and provide more opportunities to vote).

Second, neither does the data support Plaintiffs' claims about risks to health at in-person voting places. Plaintiffs cannot establish that polling places will not abide by necessary and appropriate social distancing and sanitizing protocols specifically designed to mitigate those risks.

See N.C. State Bd. of Elections, Numbered Memo 2020-18 at 2–3 (Aug. 14, 2020), https://bit.ly/3jp2kO9 (requiring election officials to implement such measures, including mandated social distancing, masks for all election workers, and frequent sanitizing of high-touch areas). Recent peer-reviewed research found that the April election in Wisconsin highlighted by Plaintiffs produced "no detectable spike" in COVID-19 infections and thus appears to have been "a low-risk activity."[12] Dr. Fauci, the nation's leading expert on infectious diseases, recently suggested that voting in person, in compliance with recognized social distancing and other protective measures, poses no greater risk of infection than going to the grocery store.[13] And again, any voter who suffers from an elevated risk of COVID-19-related complications is entitled to vote curbside, without ever leaving his or her car. *See* N.C. GEN. STAT. § 163-166.9; Numbered Memo 2020-20. Counties also are authorized to set up walk-up curbside voting areas for voters who do not arrive at the polling place in a vehicle. *See* Numbered Memo 2020-20 at 2.

That leaves Plaintiffs with nothing more than the allegation that there will be "inevitable crowds and long lines" at some polling places in November. Pls.' Mem. at 36. But while "having to wait in line may cause people to be inconvenienced," that minor inconvenience—experienced in *every* election by at least some voters who reside in populous areas—does not alone constitute a severe burden on the right to vote. *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004); *see also Gwinnett Cnty. NAACP*, 446 F. Supp. 3d at 1124 ("[W]hile the Court understands that a long commute or wait in line can be an inconvenience, courts have routinely rejected these factors as a significant harm to a constitutional right—particularly when there is no evidence of improper intent.").

[12] Kathy Leung et al., *No Detectable Surge in SARS-CoV-2 Transmission Attributable to the April 7, 2020 Wisconsin Election*, 110 AM. J. PUB. HEALTH 1169 (2020), https://bit.ly/3gKKWKr.

[13] Nsikan Akpan, *What Fauci Says the U.S. Really Needs To Reopen Safely*, NAT'L GEOGRAPHIC (Aug. 13, 2020), https:/on.natgeo.com/2EQZxhM.

The one Plaintiff deposed thus far who intends to vote in person and alleged concerns about inadequate opportunities to vote leading to long lines and crowds that would necessitate extending the early-voting period admitted that her regular polling place will be open, that in the past she has found times to vote that were not crowded, that she has no idea how the number of days or hours of early voting compare to prior elections, and that she can vote at times that will be less crowded such as during the day in the middle of the week. *See* Jurek Tr. at 23:8–22; 24:3–8; 25:13–23; 27:1–8; 28:1–7. Further undermining her claims, this Plaintiff admitted she could use curbside voting but that she did not want to. *Id.* at 20:22–21:16.

e. Ballot Harvesting Ban

Plaintiffs claim that they are injured by North Carolina's restrictions on third-party assistance with requesting absentee ballots and delivering completed ballots. Pls.' Mem. at 35–36. But, first, none of the Plaintiffs assert that they have been injured by the restrictions on assistance with requesting absentee ballots. Indeed, each of the Plaintiffs deposed thus far who intend to vote absentee admitted to having already requested their absentee ballots, *see* Johnson Tr. at 29:9–20; Rabinowitz Tr. at 16:13–21; Fowler Tr. at 13:3–10; Dworkin Tr. at 9:25–20:5. Thus, there is no evidence of a single Plaintiff who requires assistance from other individuals or organizations in completing and submitting their absentee ballot applications.

Second, although Ms. Johnson, Ms. Rabinowitz, and Rosalyn and Tom Kociemba assert that they are injured by the restrictions on who can deliver completed ballots, Pls.' Mem. at 35–36, they are unlikely to succeed on their challenge to the ballot harvesting ban. Rosalyn and Tom Kociemba, of course, have already voted, so this Court can provide them with no relief. With respect to the others, North Carolina law criminally prohibits anyone 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). But given that no criminal prosecutors are defendants in this case, the Court cannot provide relief from this criminal statute as regardless of what this Court does prosecutors will remain free to prosecute violations.

Plaintiffs' claims fail apart from these fatal defects. Plaintiffs insist that this ballot harvesting ban "erects another barrier to absentee voting" for voters without access to postage, voters who are concerned about their ballot being delivered by the USPS on time, voters who are concerned about the risks of in-person voting, voters without immediate family members available to assist them in submitting their ballots, and voters whose ballots arrive too late to return by mail. Pls.' Mem. at 35–36. But because the ballot harvesting ban is a "reasonable and nondiscriminatory" rule, this Court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va.*, 826 F.3d at 719 (internal quotation marks and brackets omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate empirical verification." *Id.* (internal quotation marks omitted).

The State has met its burden. The Dowless scandal exposed that absentee ballots are particularly susceptible to fraud. *See* Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* 46, CTR. FOR DEMOCRACY & ELECTION MGMT., AM. UNIV. (Sept. 2005), https://bit.ly/2YxXVRh. Indeed, Legislative Defendants' expert found evidence of at least 1,265 voters who voted in both North Carolina and another state in the 2016 general election—64% of whom cast an absentee ballot in North Carolina. Expert Report of Ken Block ¶ 38 (attached as Ex. 19 to Moss Aff.). In the aftermath of the Dowless scandal, the State reasonably and credibly determined that preventing abuse of the ballot collection process required targeted restrictions on handling completed absentee ballots by individuals outside of the voter's family and legal

guardians. The State plainly has a legitimate and important interest in preventing such election fraud from occurring again.

Moreover, with respect to restrictions on who can return an absentee ballot if the voter did not want to use the postal service, each of the individual voters deposed admitted to one or more of the following: (1) regularly leaving their home and being in situations that put them in contact with others for at least the length of time it would take to return their ballots to their county boards of election, *see* Johnson Tr. at 17:14–25; 19:4–15; 21:8–18; 22:10–20; 25:16–18; 26:13–19; 27:5–10 (spent weekend at cousin's lake house, gotten take-out numerous times, gotten haircuts and pedicures, sees her yard man weekly, has visited with a friend outdoors for over an hour, and drove a friend to have lunch at her club); Rabinowitz Tr. at 23:23–24:11 (spent half an hour getting a haircut); (2) having the ability to get to their respective county board by car, walking, or a ride-service, *see* Rabinowitz Tr. at 26:13–18 (has taken a Lyft several times since March 2020); or (3) having a near-relative who could return their ballot for them, *see* Fowler Tr. at 15:1–13, 18–24. William Dworkin, the President of the one organizational Plaintiff in the case, the North Carolina Alliance for Retired Americans, admitted under oath that his organization does not plan to offer assistance to voters in returning their ballots even if the relief Plaintiffs are seeking is granted. *See* Dworkin Tr. at 56:13–18.

* * *

Despite these decided weaknesses in Plaintiffs' claims that render them unlikely to succeed on the merits, there is no evidence that the weaknesses were ever explored by the NCSBE or that they informed the ultimate settlement analysis of either party. Moreover, the State has a compelling interest in deterring voter fraud and protecting election integrity, a theme that underlies the challenged election law provisions. The proposed consent judgment does not meaningfully analyze

these state interests either. The proposed consent judgment fails on the "most important factor"—likelihood of success on the merits—so this Court must reject it. *Flinn*, 528 F.2d at 1172.

2. The Relief Afforded by the Proposed Consent Judgment is Vastly Disproportionate to the Purported Harm

The proposed consent judgment is not fair, adequate, and reasonable for the second, independent basis that the relief it affords is vastly disproportionate to the purported harm. Indeed, in several respects the proposed consent judgment goes *beyond* the relief Plaintiffs are seeking. For example, the proposed consent judgment vitiates the witness requirement for *all* voters, not just those who reside without another adult. *See* Am. Compl. at 39. The proposed consent judgment extends the ballot receipt deadline for ballots sent by commercial carrier despite Plaintiffs limiting their claims to ballots sent through the USPS. *Id.* at 40. And despite Plaintiffs not even seeking to have contactless drop boxes implemented as relief in this case, *see* Am. Compl. at 38–41, and despite that request being denied by the *Democracy N.C.* court, *see* 2020 U.S. Dist. LEXIS 138492, at *128–29, the proposed consent judgment allows such drop boxes to be implemented statewide.

The District of Minnesota recently rejected a consent judgment because of overbreadth problems similar to those plaguing this one. There, the court found that the burdens on particular voters could not possibly support the State's "blanket refusal to enforce [Minnesota's] witness requirement." Fairness Hearing Tr. at 11–12, *League of Women Voters of Minn. Educ. Fund v. Simon*, No. 20-cv-1205 (D. Minn. June 23, 2020). As the court put it, "the consent decree is not substantively fair or reasonable because it would, if approved, impose relief that goes well beyond remedying the harm Plaintiffs allege to suffer in support of their as-applied challenge to Minnesota's witness requirement." *Id.* at 10. It is a well-settled principle that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see Appeal of Barbour*, 112 N.C. App.

368, 373–74 (1993). Because the proposed consent judgment violates this principle, granting Plaintiffs relief that is vastly disproportionate to the purported harm they allege, the proposed consent judgment is not fair, adequate, and reasonable, and this Court must reject it.

F. This Court Must Not Enter the Proposed Consent Judgment Because It Is Against the Public Interest

Entering the proposed consent judgment would disserve the public interest in four ways.

First, the public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members and civil litigants.

Second, because the challenged election laws are constitutional, not entering the consent judgment "is where the public interest lies." *Tex. Democratic Party*, 961 F.3d at 412 (internal quotation marks omitted); *accord Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010); *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Courts should not "lightly tamper with election regulations," *Thompson*, 959 F.3d at 813, so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact," *id.* at 812; *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252 (6th Cir. 2006); *Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 904 (5th Cir. 2012). This is especially true in the context of an approaching election. *Thompson*, 959 F.3d at 813; *Respect Maine*, 622 F.3d at 16. And it remains true even though the NCSBE has chosen to capitulate to Plaintiffs' demands instead of defending its duly enacted election laws. Entering the unconstitutional consent judgment, therefore, would undermine the constitutional election laws.

Third, entering the proposed consent judgment will engender substantial confusion, among both voters and election officials, by changing the election rules after the election has already started. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (explaining that the Supreme Court "has repeatedly emphasized that lower . . . courts

should ordinarily not alter the election rules on the eve of an election"); *Purcell*, 549 U.S at 4–5. To date, voters have requested 1,095,327 absentee ballots and cast 275,144 absentee ballots.[14] These ballots require a witness signature on their face, so eliminating that requirement now would render the instructions on hundreds of thousands, if not over a million, absentee ballots inaccurate. The NCSBE itself admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and engender disparate treatment of voters in the ongoing election. *See* Reply Br. of the State Bd. Defs.-Appellants at 8, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9 ("The proximity to the election . . . make[s] it practically impossible for the State Board to fairly and effectively administer the November 2020 elections under the [challenged election law], particularly in light of the significant administrative and voter-outreach efforts that would be required to do so."); *id.* at 27–35 (discussing the difficulty of changing election procedures in close proximity to the election and acknowledging that late-stage changes "may engender increased confusion among voters and poll workers," *id.* at 34).

Fourth, entering the proposed consent judgment will undermine confidence in the election by eliminating safeguards that protect against ineligible and fraudulent voting and that protect vulnerable voters. *See* Affidavit of Kimberly Westbrook Strach ¶¶ 69, 72, 87 (attached as Ex. 20 to Moss Aff.). For example, eliminating the witness requirement that the General Assembly specifically insisted on retaining (in a relaxed form), could cause some to question the integrity of

[14] Absentee Data, N.C. STATE BD. OF ELECTIONS (Sept. 29, 2020), *available at* https://bit.ly/33SKzAw.

the election, particularly when the NCSBE also has barred signature matching for absentee ballots. Indeed, eliminating the witness requirement will create particularly acute risks vulnerable populations. The witness requirement "protects the most vulnerable voters," including nursing home residents and other vulnerable voters, against being taken advantage of by caregivers or other parties" by "provid[ing] assurances to family members that their loved ones were able to make their own vote choices" and were not victims of absentee ballot abuse. *Id.* ¶ 72.

The proposed consent judgment is thus against the public interest and must not be entered.

IV. Should the Court Grant the Joint Motion for Entry of a Consent Judgment, Legislative Defendants Request a Stay Pending Appeal

In the alternative, should this Court grant the Plaintiffs' and Executive Defendants' joint motion for entry of a consent judgment, Legislative Defendants request that this Court temporarily stay enforcement of the consent judgment pending appeal. This Court has broad authority to enter a stay to protect the rights of the litigants during the pendency of an appeal. *See, e.g.*, N.C. R. Civ. P. 62(d) (allowing the trial court to recognize a stay of execution on a judgment under certain statutes); N.C. R. App. P. 8(a) (allowing the trial court to stay execution or enforcement of an order or judgment pending appeal).

While the Court of Appeals has not articulated a specific test for granting a stay of the enforcement of a trial court's order pending resolution of an appeal, *see Vizant Techs., LLC v. YRC Worldwide Inc.*, No. 15 CVS 20654, 2019 NCBC LEXIS 16, at *12 (N.C. Super. Ct. Mar. 1, 2019) (unpublished), trial courts deciding whether to grant a stay have focused on the prejudice and irreparable harm to the moving party if a stay were not issued, *see, e.g.*, *Vizant*, 2019 NCBC LEXIS 16, at *12–13; *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, No. 14 CVS 711, 2014 NCBC LEXIS 35, at *7–8 (N.C. Super. Ct. July 31, 2014) (unpublished) (citing *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19 (1997); *Rutherford Elec. Membership*

Corp. v. Time Warner Ent. / Advance-Newhouse P'ship, No. 13 CVS 231, 2014 NCBC LEXIS 34, at *10–11 (N.C. Super. Ct. July 25, 2014) (unpublished). Indeed, the Court of Appeals has upheld a trial court's decision to stay enforcement of a judgment pending appeal where the movant's claims were not "wholly frivolous" and thus "[t]here was some likelihood that [movants] would have prevailed on appeal and thus have been irreparably injured." *Abbott v. Town of Highlands*, 52 N.C. App. 69, 79 (1981).

Here, Legislative Defendants will be prejudiced and irreparably injured if this Court does not grant a stay of the proposed consent judgment pending appeal. A stay is necessary to protect Legislative Defendants' interests in defending duly enacted state election laws, the integrity of the ongoing election, and North Carolinians voting rights. Furthermore, the proposed consent decree substantially alters the current election law framework that governs the ongoing election. The NCSBE itself has admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and engender disparate treatment of voters in the ongoing election. *See* Reply Br. of the State Bd. Defs.-Appellants at 8, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9 ("The proximity to the election . . . make[s] it practically impossible for the State Board to fairly and effectively administer the November 2020 elections under the [challenged election law], particularly in light of the significant administrative and voter-outreach efforts that would be required to do so."); *id.* at 27–35 (discussing the difficulty of

changing election procedures in close proximity to the election and acknowledging that late-stage changes "may engender increased confusion among voters and poll workers," *id.* at 34).

Consequently, if the Court grants the motion to enter the consent judgment, a stay of the enforcement of that judgment is necessary to preserve the status quo, prevent confusion, and preserve the appellate court's ability to afford Legislative Defendants relief. Absent a stay, the NCSBE and the county boards of elections will move toward implementing procedures and conducting voter education efforts for extending the absentee ballot receipt deadline to nine days after election day and allowing unmanned drop boxes for voters to deliver completed ballots, efforts that may confuse voters and election officials should Legislative Defendants prevail on appeal and restore the status quo.

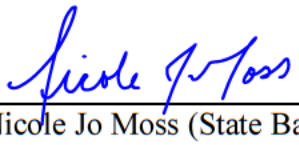
Furthermore, if the Court is inclined to deny Legislative Defendants' request for a stay, then they will seek the same relief from the appellate courts in the form of a motion for temporary stay and petition for writ of supersedeas. *See* N.C. R. App. P. 8(a) ("After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a temporary stay and writ of supersedeas in accordance with Rule 23."); *see also* N.C. R. App. P. 23 (stating procedure for petitions for writs of supersedeas). Thus, at a minimum, the Court should grant the temporary stay to afford the appellate courts the opportunity to rule on the Legislative Defendants' request.

V. Conclusion

For the foregoing reasons, the Court should deny Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

Dated: September 30, 2020

Respectfully Submitted,



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**Motions to Appear Pro Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 30th day of September, 2020, served a copy of the foregoing Motion by electronic mail and by first class mail, on the following parties at the following addresses:

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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,

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, and,

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., and NORTH CAROLINA REPUBLICAN PARTY,

Republican Committee Intervenor-Defendants.

DOCKET NO. 20-CVS-8881

REPUBLICAN COMMITTEES' OPPOSITION TO PLAINTIFFS' AND EXECUTIVE DEFENDANTS' MOTION FOR ENTRY OF CONSENT JUDGMENT

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INTRODUCTION

With a backroom deal announced only last week, Plaintiffs and the Executive Defendants attempt to circumvent the authority of the General Assembly to regulate elections and rewrite statutes recently upheld by two courts—the U.S. District Court for the Middle District of North Carolina and a three-judge Court sitting in Wake County Superior Court. They claim this action is justified by the pandemic, but the General Assembly, vested with authority over election laws by both the Constitution of the United States and the Constitution of the State of North Carolina, has already made adjustments to the election laws to address the pandemic. This illegitimate deal is a plain ploy by an Executive Branch agency working collusively with a partisan group to usurp power from the General Assembly.

More specifically, this deal fails to pass scrutiny for at least five reasons. *First*, the so-called Consent Judgment may be approved, if at all, only by a 3-judge court. The agreement purports to revise certain statutory provisions—such as the ballot receipt deadline and the witness requirement—for all voters in all circumstances. Indeed, as Plaintiffs concede, if approved the deal would resolve the claims not only in *NC Alliance* but also in *Stringer*, which all parties and this Court agree is a facial challenge. *Second*, even if properly before this Court, the purported consent judgment does not meet standards for approval. *Third*, if entered by the Court, the revised election procedures would eviscerate laws enacted by the General Assembly earlier this year, and thereby violate Article I, Section 4 of the U.S. Constitution, which grants exclusive authority to the General Assembly to regulate the time, place, and manner for elections in the state. *See* U.S. Const. art. I, § 4. *Fourth*, even if constitutional, the changes called for in the Consent Judgment exceed the limited statutory authority of the North Carolina State Board of Elections. *Finally*, the deal would cause substantial voter confusion and cause significant disruption to the orderly

administration of voting, which has been underway since September 4. With only five weeks remaining until Election Day, these material, late changes to voting rules will sow confusion among voters and election officials, extend casting and tabulation of votes well past any reasonable deadline, invite post-election controversy, and deprive North Carolina voters of the free, fair, and secure election to which they are entitled. For these reasons, the Republican Committees urge the Court to reject the motion.

BACKGROUND

A. North Carolina's Election Code and the BOE's Role in Administering Elections

Today, North Carolina offers its citizens three ways to vote: (1) absentee voting by mail-in ballot, (2) in-person early voting, and (3) in-person voting on Election Day. The General Assembly created the option for absentee voting in 1917,[1] and more recently expanded the absentee voting option to allow "no excuse" absentee voting; now anyone can vote absentee simply by complying with the safeguards enacted by the General Assembly. The availability of these three options maximizes election participation, but each is also carefully structured to ensure that elections are not only accessible but fair, honest, and secure.

In the order they are available to voters, the first option to vote is by absentee ballot. *See generally* N.C.G.S. § 163 art. 20. The BOE purported to make material modifications to this method through its Consent Judgment and Numbered Memos. North Carolina allows "[a]ny qualified voter of the State [to] vote by absentee ballot in a statewide . . . general . . . election." *Id.* § 163-226(a). In view of the consensus that mail-in ballots present a higher risk of fraud than

[1] *See Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 104 S.E. 346, 347 (1920).

ballots submitted in person,[2] North Carolina enacted measures to deter and detect fraudulent mail-in ballots. As relevant here, the voter must complete and certify the ballot-return envelope in the presence of two witnesses (or a notary), who must certify "that the voter is the registered voter submitting the marked ballot[]" (the "Witness Requirement"). *Id.* § 163-231(a). The voter (or a near relative or verifiable legal guardian) can then deliver the ballot in person to the county board office or transmit the ballot "by mail or by commercial courier service, at the voter's expense, or delivered in person" not "later than 5:00 p.m. on the day of the" general election. *Id.* § 163-231(b)(1). A ballot would be considered timely if it was postmarked by election day (the "Postmark Requirement") and received "by the county board of elections not later than three days after the election by 5:00 p.m." (the "Receipt Deadline"). *Id.* § 163-231(b)(2)(b). With limited exceptions, North Carolina law prohibits anyone except the voter's near relative or legal guardian from assisting a voter with the completion and submission of an absentee ballot (the "Assistance Ban" and "Ballot Delivery Ban"). *Id.* § 163-226.3.

The second option for North Carolina voters is one-stop early voting. *See id.* § 163-227.6. Under this provision, county boards can establish one or more early-voting locations, which the BOE must approve. *Id.* § 163-227.6(a). Those locations open on the third Thursday before Election Day, and early voting must be conducted through the last Saturday before the election.

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[2] For example, a commission chaired by President Jimmy Carter and former Secretary of State James A. Baker, III found that voting by mail is "the largest source of potential voter fraud." Leland Decl., Ex. 1, Carter-Baker Report, at 46. Other commissions have reached the same conclusion, finding that "when election fraud occurs, it usually arises from absentee ballots." Leland Decl., Ex. 2, Morley Redlines Article, at 2. This is true for a number of reasons. For instance, absentee ballots are sometimes "mailed to the wrong address or to large residential buildings" and "might get intercepted." Leland Decl., Ex. 1, Carter-Baker Report, at 46. Absentee voters "who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." *Id.* And "[v]ote buying schemes are far more difficult to detect when citizens vote by mail." *Id.* As one court put it, "absentee voting is to voting in person as a take-home exam is to a proctored one." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

Id. § 163-227.2(b). North Carolina law mandates the hours at which the early voting sites must open, and requires that if "any one-stop site across [a] county is opened on any day . . . all one-stop sites shall be open on that day" ("Uniform Hours Requirement"). *Id.* § 163-227.6(c)(2).

The third option is in-person voting on election day. *See generally* § 163 art. 14A. As with the other two methods of voting, the General Assembly has prescribed a series of rules, to be administered by the BOE and county boards, to ensure that in-person voting is fair, efficient, and secure. *See id.*

The General Assembly created the BOE and empowered it with "general supervision" of elections and the authority "to make such reasonable rules and regulations" for elections. *Id.* § 163-22(a). But the General Assembly also instructed that the BOE's rules cannot "conflict with any provisions of" North Carolina's election code. *Id.* That is true even where exigent circumstances require the BOE to pass temporary rules or exercise emergency powers. The BOE can promulgate temporary rules should any provision of North Carolina's election code be held unconstitutional, provided that those rules "do not conflict with any provisions of . . . Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly." *Id.* § 163-22.2. And consistent with these restrictions, "upon recommendation of the Attorney General," the BOE can "enter into agreement with the courts in lieu of protracted litigation," but it can only do so "until such time as the General Assembly convenes." *Id.*

The Executive Director may also exercise "emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by . . . [a] natural disaster[,] [e]xtremely inclement weather[, or certain] armed conflict[s]." N.C.G.S. § 163-27.1. These powers are similarly limited. To begin, these provisions apply only in exigent circumstances in

which the General Assembly has no opportunity to act. They do not give the BOE a chance to second guess the General Assembly after it has responded to an emergency, as the General Assembly has here. Moreover, the statute provides that in exercising this power, "the Executive Director ***shall*** avoid unnecessary conflict with the provisions of" the voting code. *Id*. (emphasis added). Thus, these statutory provisions cannot support the deal BOE reached in this case.

B. The General Assembly Responds to the COVID-19 Pandemic

The General Assembly took decisive action in response to the COVID-19 pandemic and enacted HB 1169, which passed into law on June 12, 2020. Taking full account of the COVID-19 pandemic and experiences of other states that had conducted primary elections during the pandemic, the General Assembly modified voting laws for the 2020 election and appropriated funding to ensure the election may be conducted in a safe, efficient, and fair manner.

Before enacting HB 1169, the Assembly spent a month and a half working on the bill[3] and considered many proposals. The BOE advanced several proposals, including one to reduce or eliminate the witness requirement for absentee ballots. Leland Decl., Ex. 4, State Bd. Mar. 26, 2020 Ltr. at 3. Moreover, the General Assembly had the benefit of information about other primary elections conducted during the pandemic, and numerous contemporaneous articles recounting challenges faced by the United States Postal Service ("USPS"). *See generally* Leland Decl., Ex. 5, Jordan Fabian, "Trump's Postal Service Feud Risks Riling Voters with Price Hikes," *Bloomberg* (May 22, 2020); Leland Decl., Ex. 6, Nicholas Fandos & Reid J. Epstein, "A Fight Over the Future of the Mail Breaks Down Along Familiar Lines," *New York Times* (May 10, 2020).

[3] Leland Decl., Ex. 3, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020), at 3.

The General Assembly was also familiar with the recent election in North Carolina's Ninth Congressional District, which was so severely tainted by "absentee ballot fraud" that it had to be held anew, and from that incident understood the importance of restricting who can assist voters with the request for, filling out, and delivery of absentee ballots. *See* Leland Decl., Ex. 7, *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.*, Order at 2 (Mar. 13, 2019).

HB 1169 passed with overwhelming bipartisan majorities, by a vote of 105-14 in the House and by a vote of 37-12 in the Senate,[4] and was signed by Governor Cooper. Members lauded the bill: As Democrat representative Allison Dahle remarked, "[n]either party got everything they wanted," but the "compromise bill" was "better for the people of North Carolina."[5] For the November 2020 election, among other things, the General Assembly:

- Reduced the number of witnesses required for absentee ballots to one person instead of two, HB 1169 § 1.(a).
- Allowed voters to call the State or county board of elections to request a blank absentee ballot request form be sent to the voter via mail, e-mail, or fax. *Id* § 5(a).
- Enabled voters to request absentee ballots online. *Id.* § 7.(a).
- Allowed completed requests for absentee ballots to be returned in person or by mail, e-mail, or fax. *Id.* § 2.(a).
- Permitted "multipartisan team" members to help any voter complete and return absentee ballot request forms. *Id.* § 1.(c).
- Provided for a "bar code or other unique identifier" to track absentee ballots. *Id.* § 3.(a)(9).
- Appropriated funds "to prevent, prepare for, and respond to the coronavirus pandemic during the 2020 federal election cycle." *Id.* § 11.1.(a).

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[4] Leland Decl., Ex. 8, HB 1169, Voting Record.

[5] *See* Leland Decl., Ex. 3, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

These changes carefully balanced the public health concerns about the pandemic against the legitimate needs for election security. To achieve this balance, the General Assembly retained several provisions, including (1) the Postmark Requirement, (2) the three-day Receipt Deadline, (3) the Assistance Ban and Ballot Delivery Ban, and (4) a reduced one-person Witness Requirement.

C. The Coordinated Litigation Effort To Subvert HB 1169 and Alter North Carolina's Election Procedures

The General Assembly's bipartisan action to assure North Carolina's general election will be safe, secure, and fair did not satisfy certain Democratic Party operatives, who saw in the COVID-19 pandemic a way to legislate through the courts. *E.g.*, Leland Decl., Ex. 9, Eric Holder: Here's How the Coronavirus Crisis Should Change U.S. Elections—For Good, TIME, at 4 (Apr. 14, 2020) ("Coronavirus gives us an opportunity to revamp our electoral system . . ."). Indeed, Plaintiffs' counsel in this case ventured that if litigation could lead to an increase of "1 percent of the vote [for Democrats], that would be among the most successful tactics that a campaign could engage in." Leland Decl., Ex. 10, Marc Elias Tweet. In North Carolina alone, Democratic Party committees and related organizations have filed at least seven lawsuits attacking various aspects of North Carolina's election code. Plaintiffs in many of these cases filed motions to preliminarily enjoin certain aspects of HB 1169 and the North Carolina election code.

The first North Carolina decision came in *Democracy North Carolina*, 2020 WL 4484063. Several organizations and individuals sued the BOE and moved for a preliminary injunction, claiming that numerous provisions of North Carolina's election code, including the Witness Requirement, Receipt Deadline, Postage Requirement, Assistance Ban, and Ballot Delivery Ban, violated federal constitutional and statutory law. *See id.* at *5–10. The President Pro Tempore of the North Carolina Senate and Speaker of the North Carolina House of Representatives

("Legislative Defendants") intervened to defend the General Assembly's election laws, and the Republican Committees appeared as *amici*. *See id.* *3. Executive Director Bell testified by affidavit and in person, confirming the basis and reasonableness of the challenged restrictions. See p. 17, n. 11 below. On August 4, after a three-day evidentiary hearing and extensive argument, the district court issued a comprehensive 188-page opinion and order. *See generally Democracy North Carolina v. The North Carolina State Board of Elections*, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020). The court rejected nearly all the plaintiffs' claims, finding that plaintiffs could not show a likelihood of success on the merits. *See id.* *1, 64. For instance, the court rejected the challenge to the Witness Requirement finding that even elderly, high-risk voters can fill out a ballot in a short period of time and have the witness observe the process from a safe distance, thereby significantly reducing or eliminating any risk of COVID-19 transmission. *Id.* at *24–33; *see also id.* at *52 (finding that the Ballot Delivery Ban was related to the legitimate purpose of "combating election fraud" and would likely be upheld). Moreover, the court found that even if certain procedures did "present an unconstitutional burden under the circumstances created by the COVID-19 pandemic," it was not the court's role to "undertake a wholesale revision of North Carolina's election laws," particularly so close to an election. *See id.* at *45 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006)).

Although the district court denied nearly all of the plaintiffs' claims, it did find that they were likely to succeed on two discrete issues. First, the court held that one plaintiff (an elderly, blind nursing home resident) was likely to succeed on a Voting Rights Act claim challenging North Carolina's limitation on who could assist him with completing his ballot. *Id.* at *55, 61. It granted limited to relief to that voter. Second, the court held that plaintiffs were likely to succeed in showing that North Carolina's lack of a notification and cure procedure for deficient absentee

ballots violated procedural due process. *Id.* at *55. The court accordingly enjoined the Board "from allowing county boards of elections to reject a delivered absentee ballot without notice and an opportunity to be heard until" the Board could implement a uniform cure procedure. *Id.* at *64.

The BOE responded to the court's procedural due process ruling on August 21, 2020 by issuing Numbered Memo 2020-19. Leland Decl., Ex. 11. The original Numbered Memo 2020-19 had two key parts: (1) it eliminated the requirement that county boards match the signature on the ballot to the voter's signature on file and (2) it defined a cure procedure for deficient absentee ballots. *Id.* §§ 1, 2. A voter's failure to sign the voter certification or signing the certification in the wrong place could be cured through an affidavit. *Id.* § 2.1. In contrast, affidavits could not be used to cure deficiencies related to the Witness Requirement—which the court had upheld—meaning the ballot would be spoiled, the voter notified, and the voter issued a new ballot. *Id.* Collectively, these procedures will be called the "Cure Process."

Notwithstanding the federal court's extensive ruling, which upheld the vast majority of the challenged provisions, as well as the Board's prompt action in implementing the Cure Process, Plaintiffs in this case and related organizations remained undeterred. They have continued to press forward with five other lawsuits in North Carolina state court challenging many of the same provisions upheld in *Democracy North Carolina*, including one claiming that the Cure Process violated North Carolina's Constitution because it arbitrarily distinguished between voters.[6] All of those lawsuits were filed against the BOE, and the Legislative Defendants were granted

[6] *See DSCC v. N.C. State Bd. of Elections*, No. 20-CVS-69947 (Sup. Ct. Wake Cnty. Sept. 8, 2020) (challenging Cure Process); *Chambers v. North Carolina*, Case No. 20-CVS-500124 (Sup. Ct. Wake Cnty. July 10, 2020) (Witness Requirement); *Stringer v. North Carolina*, No. 20-CVS-5615 (Sup. Ct. Wake Cty. May 4, 2020) (challenges similar to those in the *Alliance* case); *Advance North Carolina. v. North Carolina*, No. 20-CVS-2965 (Sup. Ct. Wake Cnty. Mar. 4, 2020) (challenging limitations on who may assist with completion and delivery of absentee ballots); *North Carolina Democratic Party v. North Carolina*, No. 19-CVS-14688 (Sup. Ct. Wake Cnty. Oct. 28, 2019) (challenging Uniform Hours requirement).

intervention in each case. In all of those lawsuits except *Chambers*, the Perkins Coie law firm, led by Partner Marc Elias, represented the plaintiffs against the BOE.

The second decision to address a motion to enjoin portions of HB 1169 was *Chambers*, which challenged the Witness Requirement. On September 3, a three-judge panel[7] denied the *Chambers* plaintiffs' motion to preliminarily enjoin the Witness Requirement. *See* Leland Decl., Ex. 12, *Chambers*, Case No. 20-CVS-500124. After briefing with evidentiary submissions and an oral hearing, the panel held that there was not a substantial likelihood the plaintiffs would prevail on the merits. *Id*. at 6. Furthermore, it held that "the equities do not weigh in [plaintiffs'] favor" because of the proximity of the election, the tremendous costs that the plaintiffs' request would impose on the State, and the confusion it would cause voters. *Id.* at 7. Specifically, the panel determined that changes requested by plaintiffs "will create delays in mailing ballots for *all* North Carolinians voting by absentee ballot in the 2020 general election and would likely lead to voter confusion as to the process for voting by absentee ballot." *Id.* (emphasis in original).

The Board of Elections then proceeded, pursuant to a statutory requirement, to mail absentee ballots to "more than 650,000" voters who had requested them. *See* Leland Decl., Ex. 13, *The November Election Season Has Officially Started, as North Carolina Begins Sending Out Mail Ballots*, The Washington Post (Sept. 4, 2020) (indicating that on Sept. 4, the North Carolina had already begun mailing out more than 650,000 absentee ballots to voters). As of September 30, 1,116,696 absentee ballots had been requested, and 280,353 completed ballots had been returned.[8]

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[7] As discussed below (pp. 14-15), North Carolina law requires all challenges to the facial validity of North Carolina statutes to be heard by a three-judge panel in the Superior Court of Wake County. N.C.G.S. § 1A-1, 42.

[8] *See* https://www.ncsbe.gov/ for a current number of requested ballots; Leland Decl., Ex. 14, BOE Absentee Data.

Notwithstanding defeats in *Democracy North Carolina* and *Chambers*, and the approaching election, plaintiffs in the remaining cases continued to press on. In this case, plaintiffs filed a preliminary injunction motion on August 21, and submitted supporting papers on September 4. Opposition briefs were due on September 28, with a preliminary injunction hearing scheduled for October 2. During that time, the Legislative Defendants and State Defendants began deposing fact and expert witnesses.[9] The Republican Committees, who were awaiting a ruling on their intervention motion, also participated in those depositions.

D. The BOE's Consent Judgment with the *Alliance* Plaintiffs

During the time that the Legislative Defendants and Republican Committees were engaged in depositions, the State Defendants conducted secret settlement negotiations with the *Alliance* plaintiffs. Those negotiations resulted in the plaintiffs' and BOE's agreement to the Consent Judgment, which they submitted to the court for approval on September 22. Not until September 22, after the negotiations were concluded, after execution of the deal, and when one of the plaintiffs' witnesses failed to show up for her deposition did the plaintiffs inform the Legislative Defendants and Republican Committees of the deal.

The proposed Consent Judgment would require plaintiffs to drop their claims against the BOE in exchange for the BOE's implementing significant changes to North Carolina's election code for the November general election. Although the hearing on the joint Consent Judgment motion is scheduled for October 2, it appears that the BOE has deemed its new "Numbered Memos" to be immediately effective, without awaiting this Court's approval.[10]

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[9] The depositions were not completed. After the plaintiffs and the State Board defendants announced the deal, plaintiffs refused to allow any further witnesses to be deposed.

[10] BOE has purported to instruct county boards of election to begin immediate implementation of the revised version of Numbered Memo 2020-19. The Republican Committees, joined by others, and separately the Legislative Defendants, also joined by others, have sought injunctive relief against the Consent

Under the deal, the BOE implemented changes to North Carolina's election code by rewriting Numbered Memo 2020-19 (which established the Cure Process) and issuing three other new memos to county boards. Revised Numbered Memo 2020-19 now (1) requires county boards to accept a ballot signature as long as it appears to have been made by the voter and (2) allows voters to cure a ballot that is deficient due to a (i) lack of signature, (ii) problems with the voter's contact information, or (iii) problems with the witness's certification (for instance, the ballot had no witness or the witness failed to sign the ballot) by submitting a cure affidavit executed by the voter. *See* Leland Decl., Ex. 17, Revised Numbered Memo 2020-19. See also Leland Decl., Ex. 18 (redline comparison of original version of Numbered Memo 2020-19 to revised version).

The Board also issued Numbered Memo 2020-22, which applies only to "remaining elections in 2020," and provides that absentee ballots are timely if "(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." Leland Decl., Ex. 19, Numbered Memo 2020-22. In addition to *tripling* the Receipt Deadline from the statutory requirement of receipt *three* days after Election Day to *nine* days, the BOE eliminated the Postmark Requirement by providing that a ballot is considered "postmarked" if there is information in a tracking service showing that the ballot was "in the custody of USPS or the commercial carrier on or before Election." *Id.*

Finally, the Board issued Numbered Memo 2020-23, which affirms that absentee ballots cannot be left in an unmanned drop box, but then negates that restriction by stating that county boards cannot "disapprove a ballot solely because it is placed in a drop box." Leland Decl., Ex.

Judgment in federal court. *See* Leland Aff., Ex. 15, *Wise, et al. v. N.C. State Bd. of Elections, et al.*, No. 5:20-cv-00505-M, Dkt. No. 1 (E.D.N.C. Sept. 26, 2020); Leland Aff., Ex. 16, *Moore, et al. v. Circosta, et al.*, No. 4:20-cv-00182-D, Dkt. No. 1 (E.D.N.C. Sept. 26, 2020).

20, Numbered Memo 2020-23. The Board ignored North Carolina's strict statutory limits on who may deliver a completed absentee ballot by instructing county boards that they cannot "disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot." *Id*.

LEGAL STANDARD

When considering whether to grant a consent decree, "[t]he authority of a court to sign and enter a consent judgment ***depends upon the unqualified consent of the parties thereto***, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment." *Hill v. Hill*, 97 N.C. App. 499, 501 (1990); *see also Briar Metal Products, Inc. v. Smith*, 64 N.C. App. 173, 176 (1983) (same). In short, a failure of all parties to consent to a judgment, standing alone, precludes entry of the proposed judgment by the Court.

But even if (unlike here) *all* parties have consented, the Court must not blindly accept the terms of a proposed settlement. The Court must satisfy itself that "such settlement is made in good faith and free of fraud, collusion, or other vitiating element." *Weaver v. Hampton*, 204 N.C. 42, 167 S.E. 484, 485–86 (1933); *see also Medford v. Lynch*, 67 N.C. App. 543, 546, 313 S.E.2d 593, 595 (1984) (stating that a consent judgment is not a final judgment if there is evidence of collusion). And, of course, the proposed judgment must be consistent with the state and federal Constitutions, and within the authority of the agreeing parties.

ARGUMENT

Plaintiffs and Executive Defendants have not satisfied the fundamental requirements for entry of the Consent Judgement. Even if they had, entry of the Consent Judgment would be contrary to the laws duly enacted by the North Carolina General Assembly, exceed the authority of the Board to enter, and create confusion about the rules for administering the election while

votes are already being cast and tallied. For these reasons, the Republican Committees urge the Court to deny the Joint Motion.

I. THE CONSENT JUDGMENT IS NOT PROPERLY BEFORE THE COURT.

The Consent Judgment is not properly before this Court. Rather, the three-judge panel in *Stringer v. North Carolina State Board*, No. 20-CVS-5615 (Sup. Ct. Wake Cnty.) has jurisdiction over the Consent Judgment. This Court retained jurisdiction over the *North Carolina Alliance* case based on Plaintiffs' representation, joined by the State Defendants, that it is an "as applied" rather than a facial challenge. In contrast, the Court referred *Stringer* to a three-judge panel because all agreed *Stringer* is a facial challenge. But the Consent Judgment would order relief concerning *the entire North Carolina voting population, regardless of the particular circumstances of any individual voter,* by (1) extending the number of days for all 100 counties to receive all absentee ballot postmarked by election day from November 6 to November 12, (2) implementing new, state-wide procedures for "curing" any non-compliant absentee ballots, and (3) loosening restrictions throughout the state on who may deliver an absentee ballot to a voting location. This relief has broad public policy implications for all voters, and is far beyond the individual issues raised by the voters in *N.C. Alliance.* Indeed, the Plaintiffs and State explicitly state that the order "is in the best interests of the health, safety, and constitutional rights of the citizens of North Carolina, and, therefore, in the public interest." Consent Order Recital, p. 10.

Accordingly, the Consent Decree falls within the three-judge court statute. Any claim seeking an order to enjoin an act of the General Assembly on the basis that it is facially invalid because it violates the North Carolina Constitution or federal law *must* be transferred to a three-judge panel "if [] a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve *any issues* in the case" N.C. Gen. Stat. Ann. § 1-81.1(a1) (emphasis added). "A facial challenge is an attack on a statute itself as opposed to a particular

application." *Holdstock v. Duke Univ. Health Sys., Inc.*, 841 S.E.2d 307, 311 (N.C. Ct. App. 2020); *City of Los Angeles v. Patel*, 576 U.S. 409, __, 135 S. Ct. 2443, 2449, 192 L. Ed. 2d 435, 443 (2015)). It would be anomalous for this Court to approve, in a case asserting an "as applied" challenge, a purported Consent Judgment that provided "facial" relief.

In fact, the relief sought in the Consent Order closely resembles the relief requested by Plaintiffs in *Stringer v. North Carolina State Board*, No. 20-CVS-5615 (Sup. Ct. Wake Cnty.), a case transferred to a three-judge panel on September 22, 2020. *Compare* Stringer Complaint Prayer for Relief ("Requiring the State to extend the Receipt Deadline for ballots postmarked by Election Day") and Consent Order § VI.A ("For the 2020 elections Executive Defendants shall extend the Receipt Deadline for mailed absentee ballots"). It is no wonder, then, that Plaintiffs' lawyers in *Stringer* (who also represent the *NC Alliance* Plaintiffs) have also withdrawn their motion for preliminary injunction in *Stringer*. Accordingly, only a three-judge Court has jurisdiction to review and approve the Consent Judgement.

II. EVEN IF PROPERLY BEFORE THIS COURT, THE PURPORTED CONSENT JUDGMENT DOES NOT MEET STANDARDS FOR APPROVAL.

There are at least three reasons why, even if this Court, and not the three-judge panel, did have jurisdiction, the Consent Judgment still does not met standards for approval.

First, , this court cannot consider a settlement agreement over the objections of other Defendants in the same case. "[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529 (1986); *see also Hill*, 389 S.E.2d at 142 ("The authority of a court to sign and enter a consent judgment *depends upon the unqualified consent of the parties thereto*, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment.") (emphasis

added); *Briar Metal Prods.*, 64 N.C. App. at 176. The Legislative Defendants, representing the institutional interests of the General Assembly, as well as the Republican Committees, who were granted intervention while expressing objections to the deal, were excluded from negotiations leading to the Consent Judgment and alerted to the deal only *after* its submission to the Court. Indeed, the Republican Committees and Legislative Defendants learned of the settlement agreement for the first time on September 22 when one of the Plaintiffs failed to appear for her agreed deposition. *See* emails from Uzoma Nkwonta to Nicole Moss (Sept. 22-24, 2020) (attached as Leland Decl. Ex. 21). But as explicitly stated in the Consent Agreement, "extensive" and "substantial" negotiations between Plaintiffs and the Executive Defendants had been underway for weeks—indeed since the date Plaintiffs first filed their motion for a preliminary injunction in this case (on September 4), and *before* the Executive Defendants acquiesced in Plaintiffs' objection to transfer of this case to the three-judge court along with *Stringer*. By excluding the Legislative Defendants, who wrote and passed the laws in question and are the only parties in this lawsuit that have the power to revise or amend the General Statutes, and the Republican Committees, the Plaintiffs and Executive Defendants have entered and submitted an incomplete deal. This alone is a sufficient reason for the Court not to enter the Consent Judgment.

Second, as evidenced by the announcement of the deal to the Republican Committees and Legislative Defendants, the Consent Judgment is the product of collusion. *Medford*, 313 S.E.2d at 595 (stating that a consent judgment is not a final judgment if there is evidence of collusion); *see also Weaver*, 167 S.E. at 485–86 (1933) (stating that a court must satisfy itself that "such settlement is made in good faith and free of fraud, collusion, or other vitiating element."). The Executive Defendants had vigorously defended the General Assembly's laws in two previous

lawsuits, with Executive Director Bell testifying repeatedly against changes to the challenged provisions.[11]

And then, abandoning her sworn testimony, the Executive Defendants negotiated for weeks with Plaintiffs before striking an *ultra vires* backroom deal that completely cuts out the Legislative Defendants and the Republican Committees. The Consent Judgment and the Numbered Memoranda issued by the Board of Elections purport to rewrite the General Statutes—the exclusive prerogative of the General Assembly—in accordance with the policy preferences of Plaintiffs and their political allies. Indeed, the deal (encompassing both the Consent Judgment and the new and revised Numbered Memos that are part of it) adopts a number of provisions that the General Assembly actually *considered and rejected* earlier this year.

The Consent Judgment appears to be part of a nationwide strategy formulated by lawyers for the Democratic National Committee that have attempted to rewrite the election code of at least 22 states through at least 56 similar lawsuits. Each suit seeks to eliminate statutory protections against election fraud and extend the November 2020 election into mid-November or beyond. Highlighted on a website ironically named the "Democracy Docket," these cases are seldom litigated to conclusion—instead, plaintiffs cut backroom deals with friendly state election officials, exactly like this one.[12] Because the Consent Judgment bears several hallmarks of collusion, and

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[11] Executive Director Bell defended the Witness Requirement, testifying that it can "easily be accomplished" at a "safe and socially distant location." *See* Leland Aff., Ex. 22, Decl. of Karen Brinson Bell ¶ 19–22, *Chambers*. Executive Director Bell also defended the Assistance Ban. Leland Aff., Ex. 23, Trans. of Evid. Hearing Vol. 2, at 60:14–15, *Democracy NC*. She also testified against allowing voters to place their absentee ballots into "drop boxes" because a sufficient number of drop boxes do not exist, and there was not "sufficient time" to allow voters to use drop boxes for their ballots. Leland Aff., Ex. 24, Decl. of Karen Brinson Bell ¶ 35, *Democracy NC*.

[12] Plaintiffs and the Executive Defendants get no help from consent judgments recently entered with other states. Apart from being subject to different state statutes and judicial review standards than this deal, none of them drew an objection from a state party, whereas here the Legislative Intervenors in this case strongly oppose this deal in their capacities as a party to the litigation and as a co-equal branch of State Government. Moreover, in each of those other cases, the modifications to absentee voting provisions had been

appears to be the latest in a long line of similar collusive Consent Judgments, the Republican Committees urge this Court to reject it.

Third, even though the Joint Motion represents (p. 19, para VIII.G.) that "[t]his Stipulation and Consent Judgment is effective upon the date it is entered by the Court," the BOE is not waiting for this Court's approval. It has instructed county election boards to begin applying the standards in revised Numbered Memo 2020-19 immediately, including the provisions emasculating the Witness Requirement. Leland Decl. Ex. 25, Summa Aff. ¶¶ 3-5; *Id.*, Ex. A.

III. ENTRY OF THE CONSENT JUDGMENT WOULD INTRUDE ON THE GENERAL ASSEMBLY'S AUTHORITY TO REGULATE ELECTIONS.

The Elections Clause of the United States Constitution, mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., art. I, § 4, cl. 1. Neither North Carolina's "legislature" nor the United States Congress approved the deal. In fact, as described below at pp. 18-25, the deal purportedly adopts several changes to the law that the General Assembly ***expressly rejected*** this summer.

There is no question that the General Assembly is North Carolina's "Legislature." The North Carolina Constitution provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." N.C. Const. art. II, § 1. *See also Hawke v. Smith*, 253 U.S. 221, 227, 40 S. Ct. 495, 497, 64 L. Ed. 871 (1920) (noting the term "Legislature" in the U.S. Constitution refers to "the representative body

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implemented during primary elections from June through August 2020, meaning that the relief had been implemented months prior to absentee voting in the general election. *See League of Women Voters of Va. v. Va. State Bd.*, ___ F. Supp. 3d ___, No. 6:20-cv-00024, 2020 WL 4927524, at *4 (W.D. Va. Aug. 21, 2020); *LaRose v. Simon*, No. 62-CV-20-3149, at *7 (Ramsey Cty. Dist. Ct. Aug. 3, 2020); *Common Cause R.I. v. Gorbea*, No. 20-cv-00318, 2020 WL 465608, at *4 (D. R.I. July 30, 2020). Here, in contrast, absentee voting for the general election is already underway.

[that] ma[es] the laws of the people."). It is also undisputable that the deal purports to alter the time, place, and manner for the November elections in North Carolina, Art I, Sec. 4, and the manner in which the state will appoint Electors for President, Art. II, sec. X. As explained in more detail below, the deal purports to: (1) effectively eliminate the statutory requirement that one person witness an absentee ballot ("Witness Requirement"), *compare* HB 1169 § 1.(a) with Leland Decl., Ex. 17, Revised Numbered Memo 2020-19 at 2; (2) extend the deadline for receipt of mailed-in ballots from *three days* after election day ("Receipt Deadline"), as plainly specified in the statute, to *nine days* after election day, *compare* N.C.G.S. § 163-231(b)(2) with Leland Decl., Ex. 19, Numbered Memo 2020-22 at 1; (3) eviscerate the statutory requirement that only mailed ballots postmarked by 5:00 p.m. on election day be counted ("Postmark Requirement"), *compare N*.C.G.S. § 163-231(b)(2) with Leland Decl., Ex. 19, Numbered Memo 2020-22 at 2; and (4) undermine restrictions on who can handle and return completed ballots ("Ballot Assistance" and "Ballot Delivery" bans), *compare* N.C.G.S. § 163-229(b); N.C.G.S. § 163-231(a)-(b); N.C.G.S. § 163-223.6(a)(5); HB 1169 §§ 1.(a), 2.(a) with Leland Decl., Ex. 20, Numbered Memo 2020-23 at 2-3. Courts have long rejected similar efforts to intrude upon the authority of state legislatures under the Elections Clause. *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887) (noting that any provision of the Rhode Island constitution that sought to "impose a restraint upon the [Rhode Island legislature's] power [to] prescribe[e] the manner of holding . . . elections [of representatives to Congress]" was void because the Elections Clause of the U.S. Constitution gives the power to the legislature, limited only by Congressional regulations); *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 Opinion of Justices*, 45 N.H. 595, 601 (1864). On these issues the Board is entitled to *no deference* under the United States Constitution.

Witness requirement. The BOE has gutted the critical Witness Requirement. In light of the pandemic, the General Assembly exercised its judgment to reduce, for the 2020 election, the requirement that two individuals witness a voter's absentee ballot to a one-witness requirement. HB 1169 § 1.(a). The BOE's Revised Numbered Memo 2020-19 goes further and would require a voter who submits an absentee ballot without a witness to be sent a certification for ***the voter to sign***, and then upon receipt of that *voter* certification (but still with no *witness*), instructs BOE to count the ballot. Leland Decl., Ex. 17, Revised Numbered Memo 2020-19 at 2. When drafting HB 1169, the General Assembly expressly considered and rejected the BOE's proposal to eliminate the witness requirement—although then (unlike now, in Revised Numbered Memo 2020-19) BOE proposed replacing the witness requirement with signature verification software. *See* Leland Decl., Ex. 28, State Bd. Apr. 22, 2020 Ltr. at 3; Leland Decl., Ex. 4, State Bd. Mar. 26, 2020 Ltr. at 3.

Again, it would be cynical for the Board to argue that the COVID-19 pandemic, as a health emergency, gives it the authority to eliminate this requirement. The General Assembly expressly considered—and indeed made—changes to the Witness Requirement to address the COVID-19 pandemic. The General Assembly has already addressed the emergency. And, as explained (pp. 7-11 above), two courts have already sustained the revised witness requirement against pandemic-related challenges. Thus, the BOE's backroom deal to eliminate the Witness Requirement entirely is not a response to any "emergency" requiring BOE action. Rather, BOE's deal is an *ultra vires* power grab that attempts to override the General Assembly's considered response to the pandemic. For that reason, the deal offends the Constitution and is not justified by the pandemic.

Receipt deadline. Similarly, the BOE's changes to the Receipt Deadline were also not for purposes of addressing the already-addressed emergency, and also plainly conflict with the controlling statute. The statute enacted by the General Assembly requires that absentee ballots be

delivered by 5:00 p.m. on election day, or if they are mailed via the USPS, that they are postmarked by election day and received **no later *than three days after election day*** (by Nov. 6, 2020) by 5:00 p.m. N.C.G.S. § 163-231(b)(2). Flouting this directive, Numbered Memo 2020-22 purports to extend the deadline by six days: "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." Leland Decl., Ex. 19, Numbered Memo 2020-22 at 1.

Since the General Assembly explicitly and responsibly revisited the North Carolina Election Code to address concerns about COVID-19 and USPS challenges observed during primary elections in other states, any suggestion by the Board that this change was necessitated by those issues[13] would lack merit. The Consent Judgment expresses concern that, due to the current mail processing rates by the USPS, completed ballots mailed on election day will not arrive in time to be counted three days later, as required by statute. *E.g.*, Leland Decl., Ex. 28, *Alliance*, No. 20-CVS-8881, Stipulation and Consent Judgment, at **7-10. As shown, the General Assembly was well aware of mail issues encountered during Spring primaries conducted in other states, and made a prudent judgment not to extend the receipt deadline. Moreover, this provision relates to no "emergency" at all; it is wholly within each voter's control to avoid unnecessary delays by mailing

[13] Kenneth R. Mayer, Plaintiffs' expert in the *Alliance* case, testified that he was not aware that the Postal Service is currently experiencing any problems in North Carolina during the current absentee voting period. (Leland Decl., Ex. 27, Deposition of Kenneth R. Mayer at 80.) He also could not identify any instances in which the Postal Service had failed to deliver an absentee ballot in North Carolina for insufficient postage, and was unaware of any North Carolinian who declined to vote because of confusion as to how much postage to affix to a ballot return envelope. *Id.* at 104-06. Mayer also acknowledged that it is the Postal Service's policy to deliver absentee ballots even if they are unstamped. *Id.* at 106. Finally, he had no reason to question statistics showing that in 2019 the Postal Service delivered an average of approximately 472 million mail pieces per delivery day, and that even if every registered voter in the United States voted by mail (about 155 million ballots), those ballots would represent only a small fraction of the total volume of mail. *Id.* at 106-07.

a completed ballot with sufficient time for receipt, as over 200,000 North Carolinians already have done. Indeed, USPS and the BOE, among others, have already encouraged voters to request and return ballots as early as possible within the more than 60-day window before the receipt deadline. Leland Decl., Ex. 30, Plunkett Aff. at ¶ 28; *see also* N.C. Gen. Stat. § 163-227.10(a). Moreover, if a voter waits until the last day to return his or her completed ballot, he or she may return it in person. N.C.G.S. § 163-231(b)(1). The voter may also use "drive through" voting. N.C.G.S. § 163-166.9.

But even if a voter does wait until the last permitted hour of Election Day to mail his or her ballot, USPS will be able to process that ballot within the time parameters set by North Carolina voting statutes. Michael Plunkett, a recognized expert on the operations of the USPS, believes that USPS will be able to deliver absentee ballots in compliance with the statutory deadlines. Under the statutes, a ballot postmarked by Election Day can be received up to 3 days after Election Day. First, in North Carolina, more than 95% of Presort First-Class Mail is delivered within 2 days, Plunkett Aff. at ¶ 17, and no First-Class Mail in the state has more than a three-day service standard, *id*. at ¶ 18. Second, "the increased volume of absentee ballot mail (estimated by plaintiffs as up to 2.3 million ballots) is infinitesimal compared to the normal volume of mail handled by USPS (twelve billion pieces of First-Class Mail in the third quarter of 2020), which has in any event fallen by over a billion pieces in the most recent quarter compared to the same period in 2019. *Id.* at ¶¶ 35-36. Accordingly, USPS's ability to deliver mail in a timely fashion will not be impacted by an increased volume of mail ballots. *Id*. at ¶¶ 33-35. Third, USPS has a plan for delivering election mail, and has established procedures and processes for the upcoming election. *Id*. Thus, even for voters who irresponsibly procrastinate to request and mail their ballots, it is highly likely that USPS will deliver their ballots on time. *Id*. at ¶ 14.

Finally, any attempt to justify the extension based on the UOCAVA deadline for military and overseas ballots would be misguided for two reasons. To begin, the General Assembly has long been aware of the different deadlines, and has elected not to standardize them. Moreover, military and overseas voters receive an extended deadline because of the unique difficulties – military personnel frequently change locations, and international mail takes longer to deliver than domestic mail—and that extension is intended to put them on par with domestic voters. Extending the deadline for domestic voters would again place military and overseas voters at a disadvantage. Leland Decl., Ex. 29, Lockerbie Aff. at ¶ 71.

Postmark requirement. The BOE's modification of the postmark requirement also plainly contradicts the controlling statute. With respect to absentee ballots that are mailed by USPS and received within three days of the election, the General Statutes require that the ballots be "postmarked" on or before the election day by 5:00 p.m. N.C.G.S. § 163-231(b)(2). For remaining elections in 2020, however, which could include run-offs as well as the November 3 election, the BOE has unilaterally declared that 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." Leland Decl., Ex. 24, Numbered Memo 2020-22 at 2 (emphasis added). This rewrites the plain meaning of the statute. A "postmark" is "[a]n official mark put by the post office on an item of mail to cancel the stamp and to indicate the place and date of sending or receipt." *Postmark*, Black's Law Dictionary (11th ed. 2019).[14] The General Assembly has also refused to enact similar changes. Another bill, HB 1184, which the General Assembly did not adopt, included a similar proposal, among other items on the

[14] *See also* USPS processing guidelines, https://about.usps.com/handbooks/po408/ch1_003.htm.

Democrats' "wish list,"[15] and was not enacted.[16] HB 1184 would have similarly amended the voting statute such that "absentee ballots that are received without a postmark through the United States Postal Service mail system shall be deemed properly cast and accepted and counted up to three days after the general election." HB 1184 § 3.6. Once again, the terms of the deal intentionally override express judgments made by the General Assembly.

Moreover, the Board's rewrite is as porous as Swiss Cheese: What "information" is sufficient to "indicate" that a ballot was in the "custody" of the USPS on Election Day? What other "tracking services" besides BallotTrax will the Board deem sufficient to "indicate" when a ballot was in USPS custody. The Board doesn't say. Coupled with the extended receipt deadline, it is not difficult to see where this is going: under the BOE's regime, election officials will be debating what constitutes sufficient information to indicate that a ballot was in custody of the USPS until mid-November and beyond. Postmarks will be the 2020 version of hanging chads.

Ballot delivery and assistance bans. The BOE's modification to the ballot delivery ban also plainly contradicts the voting statutes. Completed mail ballots may be returned in person by the voter, the voter's near relative or verifiable legal guardian, or by mail using USPS or a commercial courier. N.C.G.S. §§ 163-229(b); 163-231(a)-(b); HB 1169 §§ 1.(a), 2.(a). It is a class I felony for any other person to take possession of an absentee ballot of another voter for delivery or return to a county board of elections. N.C.G.S. § 163-223.6(a)(5). With limited exceptions, North Carolina law also prohibits anyone except the voter's near relative or legal guardian from assisting a voter with the completion and submission of an absentee ballot. N.C.G.S. § 163-226.3. The BOE would effectively neuter these protections. Numbered Memo 2020-23 provides that "[a]

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[15] Leland Decl., Ex 3, Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

[16] *Id.*

county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot" and that "a county board may not disapprove a ballot solely because it is placed in a drop box." Leland Decl., Ex. 20, Numbered Memo 2020-23 at 2-3. This is not a change necessitated by COVID-19. Stamps are widely available, *see* Leland Decl., Ex. 30, Plunkett Aff. at ¶¶ 32-34, and there is no reason voters could not mail their ballots.

One need look no further than the Dowless scheme in District 9 to see the justification for the harvesting ban and not accepting ballots tainted by harvesting. That scheme took years to uncover and led to the invalidation of a congressional election. Under the BOE's deal, a county board of elections would be required to count ballots delivered as part of the Dowless scheme.

The Numbered Memos do not merely enforce or interpret the law; they modify it in significant, material, and unnecessary ways. And the BOE lacks the authority to do so.

IV. THE BOARD EXCEEDED ITS STATUTORY AUTHORITY TO ENTER THE DEAL WITH PLAINTIFFS.

Under its limited statutory authority, the State Board is not entitled to nullify or refuse to enforce North Carolina's election laws. The State Board has the power to exercise "general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable," with one significant caveat: those rules and regulations may "*not conflict with any provisions of this Chapter*." N.C.G.S. § 163-22(a) (emphasis added). Similarly, while the State Board has the authority "to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable," those rules must "not conflict with any provisions of this Chapter 163 of the General Statutes." *Id.* § 163-22.2. Indeed, the State Board has an affirmative obligation to follow and enforce North Carolina's election laws, as it "shall

compel observance of the requirements of the election laws by county boards of elections and other election officers." *Id.* § 163-22(c).[17]

As shown above, *see* pp. 18-24, the consent decree's provisions would override several critical components of North Carolina's absentee voting system. The Supreme Court of North Carolina has invalidated similar actions from the State Board that contravened North Carolina's election laws. In *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005), the Court reviewed whether the State Board acted lawfully by counting votes cast in a precinct other than the voter's precinct of residence in the final election tallies—despite North Carolina's requirement that "a voter is 'qualified to register and vote in the precinct in which he resides.'" *Id.* at 267, 607 S.E.2d at 642 (quoting N.C.G.S. § 163-55 (2003) (emphasis omitted)). The Court determined that the State Board exceeded its authority by violating the "plain language of the statute." *Id.* In so doing, the Court made clear that the State Board's actions not only violated its authority but further undermined the fundamental right to vote of those North Carolina citizens who voted lawfully:

> "[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992). This Court is without power to rectify the Board's unilateral decision to instruct voters to cast provisional ballots in a manner not authorized by State law. *To permit unlawful votes to be counted along with lawful ballots in contested elections effectively "disenfranchises" those voters who cast legal ballots*, at least where the counting of unlawful votes determines an election's outcome. Mindful of these concerns, and attendant to our unique role as North Carolina's court of last resort, we cannot allow our reluctance to order the

[17] The State Board may also "exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted" by a "natural disaster," "[e]xtremely inclement weather," or "[a]n armed conflict." *See* N.C.G.S. § 16327.1(a). That statute is inapplicable here, as the COVID-19 pandemic would not fall under any of these three categories. Even if the pandemic fit the definition of an "emergency," however, the General Assembly has already addressed that emergency. It is inconceivable that the statute allows the Board, in the name of the very same "emergency," to ignore the General Assembly's response. Moreover, the emergency powers statute provides that "the Executive Director *shall* avoid unnecessary conflict with the provisions of this Chapter," *id.* § 163-27.1(a), and the State Board has provided no reason for thinking that overriding key provisions of North Carolina's election laws is necessary for responding to COVID-19.

> discounting of ballots to cause us to shirk our responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

James, 359 N.C. at 270, 607 S.E.2d at 644 (emphasis added). Indeed, the nullified precinct requirement served as a "protection against election fraud" and a means for "election officials to conduct elections in a timely and efficient manner," both of which were factors that provided further support for the Court's invalidation of the State Board's abuse of power. *Id.*

The same holds true here. The State Board's consent judgment aims to nullify some of the most significant components of North Carolina's electoral system only five weeks before the general election. This action threatens to cast the election into turmoil by increasing voter confusion, facilitating voter fraud, and undermining the public's confidence in the legitimacy of the electoral results. Both the North Carolina General Assembly and Supreme Court have made clear that the State Board of Elections is bound by North Carolina's election laws and lacks the authority to nullify those laws through unilateral administrative action. For this reason as well, the Consent Judgment is invalid.

V. THE LATE-HOUR CONSENT JUDGMENT WILL DISRUPT THE ORDERLY ADMINISTRATION OF THE NOVEMBER 2020 ELECTION.

The Consent Judgment fails for a final reason: the drastic changes Plaintiffs seek would lead to voter confusion and disrupt the administration of the general election only a month before Election Day and after 1,116,696 North Carolina voters have requested absentee ballots and 280,353 have already marked and returned their ballots.[18]

Under the well-established principle articulated in *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006), courts must consider how rulings issued just "weeks before an election" can lead to voter confusion, uncertainty, and related harms. In *Purcell*, the plaintiffs challenged

[18] *See* https://www.ncsbe.gov/ for current total.

Arizona's voter identification law that was in effect for a November 7 election. *Id.* at 2, 127 S. Ct. at 6. The district court denied the plaintiffs' request for a preliminary injunction, the plaintiffs appealed, and on October 5—just over a month before the election—the court of appeals granted a preliminary injunction pending appeal. *Id.* at 3, 127 S. Ct. at 7. The Supreme Court reversed, emphasizing how "[c]ourt orders affecting elections, especially conflicting orders, can . . . result in voter confusion and consequent incentive to remain away from the polls," a risk that increases "[a]s an election draws closer." *Id.* at 4–5, 127 S. Ct. at 7.

The Supreme Court has repeatedly applied the *Purcell* principle in election litigation. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2553–54 (2018) (determining that the district court did not abuse its discretion in appointing a special master to redraw a challenged election map because doing so reduced the risk of the case's interfering with the election); *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam) (affirming the district court's denial of a preliminary injunction to enjoin Maryland elections because "a due regard for the public interest in orderly elections supported [that] discretionary decision to deny a preliminary injunction and to stay the proceedings").[19] And the Court has continued to recognize that this principle applies even during the COVID-19 pandemic. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1205–07 (2020) (staying preliminary injunction requiring Wisconsin to count absentee ballots postmarked after election day, emphasizing that the injunction "contravened" the rule that courts "should ordinarily not alter the election rules on the eve of an election").

A recent Wisconsin federal district court decision illustrates how the *Purcell* principle applies even where, as here, the plaintiffs seek relief that would arguably expand their ability to

[19] *See also Riley v. Kennedy*, 553 U.S. 406, 426 (2008) ("[P]ractical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.").

vote. In *Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2020 WL 5665475, *1 (W.D. Wis. Sept. 23, 2020), the plaintiffs challenged Wisconsin's restrictions on the use of certain forms of student identification for voting. The parties completed briefing on summary judgment motions on "September 22, 2020, only six weeks before the presidential election, [which was] well within the sensitive time frame" under *Purcell*. *Id.* Voting was already underway at that point, and the state election commission had "issued its Election Day Manual for municipal clerks, explaining the requirements for voting with a student ID as they [stood]." *Id.* In light of that short timeframe, the court denied the plaintiffs' request for relief. *Id.* at *2. It reasoned that "changing the status quo" would (1) leave the election commission "and municipal clerks with little time to issue new guidance and retrain staff"; (2) the "inevitable appeal" would create "weeks of uncertainty"; and (3) an order in favor of the plaintiffs could "lull student voters into complacency, believing that they now held an ID valid for voting, only to find out on the eve of the election that an appellate court had reached a different conclusion," thereby creating the "chaos and confusion that the *Purcell* principle is meant to avoid." *Id.* The court rejected the plaintiffs' argument that the *Purcell* principle does not apply "when voters rights would be vindicated by a change in the law," reasoning that the plaintiffs cited "no authority for that view," which was inconsistent with the Supreme Court's *Republican National Committee* decision where the Court "relied on the *Purcell* principle to reverse a decision extending the deadline for mailing absentee ballots." *Id.* (quotation marks omitted).

The *Purcell* principle similarly weighs in favor of rejecting the Consent Judgment. Even if this Court granted relief today, October 2, there would be only one month and one day until the election, which is well within the "sensitive timeframe" under *Purcell*. *Id.* at *1; *see also Purcell*, 549 U.S. at 3, 127 S. Ct. at 6 (applying principle where court of appeals granted injunction on

October 5, with election on November 7); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (collecting cases where Supreme Court stayed injunctions on voting requirements issued between 30 and 55 days before the election, and observing "the common thread" that these decisions "would change the rules of the election too soon before the election date"). The short timeframe is compounded by the fact that voting is already well underway, with over one million absentee ballots requested as of September 30 and 280,353 completed ballots already returned.

Given this short timeframe, the Consent Judgment would disrupt the voting process in a number of ways. As the Executive Defendants argued in prior cases, not only have absentee ballots begun going out with instructions on how to submit a valid ballot, but the "Judicial Voter Guide," with comprehensive instructions about voting generally, has been printed and is being mailed. Leland Decl., Ex. 22, Bell Aff. at ¶ 12. With conflicting instructions, the voter confusion feared in *Purcell* is a certainty. The Consent Judgment would also create a substantial risk of confusion and chaos for voters. To use an obvious example, the State Board would prohibit voters from using a drop box to submit ballots, but then nevertheless require county boards to count a ballot placed in a drop box. *See* Leland Decl. Ex. 20, Numbered Memo 2020-23 at 3. This new rule is self-contradictory and could confuse voters (not to mention administrators). The extension of the receipt deadline from three days after Election Day to nine days risks giving procrastinating voters another excuse to wait, and perhaps miss the postmark deadline, or even mislead voters if it turns out that the extension is overturned on appeal before Election Day. *See* Leland Decl. Ex. 19, Numbered Memo 2020-22; *cf. Thomsen*, 2020 WL 5665475, at *2 (noting this risk).

Finally, the aggregate impact of the Consent Judgment on election administrators would be material. Extension of the Receipt Deadline and elimination of the Postmark Requirement may prompt voters to delay submission of their votes until Election Day (or after), causing a flood of

last-minute ballots that could swamp election officials and risk lost or miscounted votes. Moreover, the changes procedures would confuse administrators, burden them with training on revised procedures, or both, interfering with their ability to perform their duties. For example, the State Board already issued a cure process to county boards on August 21. If this Court approves a revised process only six weeks later, county board officials and election workers would need additional training on the new cure process (and the other changes in the Board's memos), taking away precious time from handling and processing absentee ballots. Further, the new Memos contain numerous ambiguities. For instance, election workers would have to determine what "information" on a ballot tracking service is enough to "indicat[e]" that a ballot was in the custody of the USPS or another commercial carrier on or before Election Day. *See* Leland Decl. Ex. 19, Numbered Memo 2020-22. And if a ballot return envelope does not contain a postmark, the county boards must conduct "research" to trace the ballot—even though the State Board has not provided any guidance as to how much research to conduct, what sources to examine, and how long to spend on each ballot. *See id.* That is hardly a recipe for orderly, uniform election administration in which each ballot is considered on an equal basis.

The *Purcell* principle recognizes that last-minute changes to election laws can do more harm than good. *See Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1012 (6th Cir. 2006) ("[T]here is a strong public interest in smooth and effective administration of the voting laws that militates against changing the rules in the middle of the submission of absentee ballots."). Here, the Consent Judgment's sweeping changes to North Carolina's election code threaten to sow confusion among administrators and voters, doubling the threat of chaos and disorder. As a result, the *Purcell* principle compels the rejection of the Consent Judgment.

In short, by sowing confusion among voters as to the applicable rules for completion and submission of ballots (for instance, whether it is permissible to drop a ballot in a dropbox), the Consent Judgment would interfere with the right of North Carolinians to cast their ballots with confidence that the election will be conducted fairly, kept secure, and counted accurately. The Consent Judgment must be rejected.

CONCLUSION

For these reasons, the Republican Committees respectfully urge this Court to deny Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment.

Respectfully submitted,

Dated: September 30, 2020

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CERTIFICATE OF SERVICE

I certify that I have on this 30th day of September, 2020, served a copy of the foregoing by email and United States mail, postage prepaid, to counsel for the Plaintiffs, Defendants, and Intervenor-Defendants at the following addresses:

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R. Scott Tobin

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,

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, and,

REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., and NORTH CAROLINA REPUBLICAN PARTY,

Republican Committee Intervenor-Defendants.

DOCKET NO. 20-CVS-8881

DECLARATION OF MATTHEW LELAND

I, Matthew Leland, state the following upon personal knowledge:

1. I am over 18 years old. I am a partner with the law firm of King & Spalding LLP. I am counsel for the Plaintiffs. I am competent to give this affidavit, and have personal knowledge of the facts set forth in this affidavit.

2. Attached as Exhibit 1 is a true and correct excerpt of the Report issued by the Carter-Baker Commission.

3. Attached as Exhibit 2 is a true and correct copy of the Morley Redlines Article.

4. Attached as Exhibit 3 is a true and correct copy of Jordan Wilkie, *NC House Passes Bipartisan Election Bill To Fund COVID-19 Response*, Carolina Public Press (May 29, 2020).

5. Attached as Exhibit 4 is a true and correct copy of a March 26, 2020 Letter issued by the State Board.

6. Attached as Exhibit 5 is a true and correct copy of Jordan Fabian, *Trump's Postal Service Feud Risks Riling Voters with Price Hikes*, Bloomberg (May 22, 2020).

7. Attached as Exhibit 6 is a true and correct copy of Nicholas Fandos & Reid J. Epstein, *A Fight Over the Future of the Mail Breaks Down Along Familiar Lines*, *New York Times* (May 10, 2020).

8. Attached as Exhibit 7 is a true and correct copy of an Order issued in *In The Matter Of: Investigation of Election Irregularities Affecting Counties Within the 9th Cong. Dist.* (Mar. 13, 2019).

9. Attached as Exhibit 8 is a true and correct copy of HB 1169, Voting Record.

10. Attached as Exhibit 9 is a true and correct copy of Eric Holder: Here's How the Coronavirus Crisis Should Change U.S. Elections—For Good, TIME (Apr. 14, 2020).

11. Attached as Exhibit 10 is a true and correct copy of a tweet published by Marc Elias.

12. Attached as Exhibit 11 is a true and correct copy of Numbered Memo 2020-19.

13. Attached as Exhibit 12 is a true and correct copy of an Order issued in the case *Chambers v. N.C.*, Case No. 20-CVS-500124 (Sup. Ct. Wake Cnty. Sept. 3, 2020).

14. Attached as Exhibit 13 is a true and correct copy of *The November Election Season Has Officially Started, as North Carolina Begins Sending Out Mail Ballots*, The Washington Post (Sept. 4, 2020).

15. Attached as Exhibit 14 is a true and correct copy of BOE Absentee Data.

16. Attached as Exhibit 15 is a true and correct copy of the complaint filed in, *Wise, et al. v. N.C. State Bd. of Elections, et al.*, No. 5:20-cv-00505-M, Dkt. No. 1 (E.D.N.C. Sept. 26, 2020).

17. Attached as Exhibit 16 is a true and correct copy of the complaint filed in, *Moore, et al. v. Circosta, et al.*, No. 4:20-cv-00182-D, Dkt. No. 1 (E.D.N.C. Sept. 26, 2020).

18. Attached as Exhibit 17 is a true and correct copy of Revised Numbered Memo 2020-19.

19. Attached as Exhibit 18 is a true and correct copy of a tracked changes version of Numbered Memo 2020-19.

20. Attached as Exhibit 19 is a true and correct copy of Numbered Memo 2020-22.

21. Attached as Exhibit 20 is a true and correct copy of Numbered Memo 2020-23.

22. Attached as Exhibit 21 is a true and correct copy of emails from Uzoma Nkwonta to Nicole Moss (Sept. 22-24, 2020).

23. Attached as Exhibit 22 is a true and correct copy of the Declaration of Karen Brinson Bell in *Chambers v. North Carolina*, Case No. 20-CVS-500124 (Sup. Ct. Wake Cnty.)

24. Attached as Exhibit 23 is a true and correct copy of the Testimony of Karen Brinson Bell in the Evidentiary Hearing in *Democracy North Carolina, et al v. North Carolina* (M.D.N.C.).

25. Attached as Exhibit 24 is a true and correct copy of the Declaration of Karen Brinson Bell in *Democracy North Carolina, et al v. North Carolina* (M.D.N.C.).

26. Attached as Exhibit 25 is a true and correct copy of the Declaration of Mary Summa.

27. Attached as Exhibit 26 is a true and correct copy of an April 22, 2020 Letter issued by the State Board.

28. Attached as Exhibit 27 is a true and correct excerpt of the Deposition of Kenneth R. Mayer in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, No 20-CVS-8881 (Sup. Ct. Wake Cnty.).

29. Attached as Exhibit 28 is a true and correct copy of Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment filed in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, No 20-CVS-8881 (Sup. Ct. Wake Cnty.).

30. Attached as Exhibit 29 is a true and correct copy of the Declaration of Brad Lockerbie.

31. Attached as Exhibit 30 is a true and correct copy of the Declaration of Michael Plunkett.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: September 30, 2020

Matthew Leland

Counsel for the Republican Committees
Intervenor Defendants

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.

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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.	**DOCKET NO. 20-CVS-8881** **MOTION TO INTERVENE AS DEFENDANTS BY THE REPUBLICAN NATIONAL COMMITTEE, NATIONAL REPUBLICAN SENATORIAL COMMITTEE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE, DONALD J. TRUMP FOR PRESIDENT, INC., AND NORTH CAROLINA REPUBLICAN PARTY**

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MOTION TO INTERVENE

Proposed Intervenor-Defendants the Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), National Republican Congressional Committee ("NRCC"), Donald J. Trump for President, Inc. ("DJT Committee"), and the North Carolina Republican Party ("NCRP") (collectively, the "Republican Committees") move to intervene in the above-captioned case pursuant to N.C. Gen. Stat. § 1A-1, Rule 24.

This case is one of five lawsuits filed in North Carolina state courts (plus one in the Middle District of North Carolina) seeking significant and overlapping changes in the state statutes

governing the 2020 election. Notably, national committees of the Democratic Party are Plaintiffs in one of the State actions, and lawyers for those Democratic committees are lead counsel in four of those actions, including this one. Because of their intense and well-recognized interests in such cases, the Republican Groups have moved to intervene in each of the North Carolina cases, including this one, as well as in dozens of similar cases filed in state and federal courts across the country.

INTRODUCTION

1. The Republican Committees are political party and campaign committees that seek to intervene in this case to uphold (1) the regulations regarding the operations for early voting contained in N.C. Gen. Stat. § 163227.2(b), (2) the provisions contained in N.C. Gen. Stat. § 163-231(a) and Session Law 2020-17 ("SL 2020-17"), requiring witnesses to attest to a voter's absentee ballot, collectively referred to herein as the "Witness Requirements," (3) the provisions regarding postage for absentee ballots and ballot request forms contained in N.C. Gen. Stat. § 163-231(b)(1) (the "Postage Requirement"), (4) the absentee voting provisions contained in N.C. Gen. Stat. § 163-231(b)(2) requiring receipt by a certain deadline (the "Receipt Deadline"), (5) the custom of requiring that signatures on a ballot match the signatures on file for that particular voter or otherwise be free of defects (the "Signature Matching Procedures"), (6) the provisions contained in Session Law 2019-239 ("SB 683") which require voters to fill out ballot request forms on their own except in certain limited circumstances (the "Application Assistance Limitation"), and (7) the provisions contained in N.C. Gen. Stat. § 163-226.3(a)(5) prohibiting third parties from collecting and submitting the absentee ballots of others (the "Ballot Harvesting Ban"). Together, these provisions are referred to herein as the "Challenged Provisions." Plaintiffs argue the Challenged Provisions are "unduly burdensome," "pose significant risks to voters' health and safety and will result in the disenfranchisement of untold numbers of North Carolinians." Compl. ¶ 6.

2. The Challenged Provisions, many of which were recently confirmed by large bipartisan legislative majorities, are necessary for the fair, orderly, and efficient administration of the November 3, 2020 General Election. Among other things, they help promote confidence in the election process, help assure consistency of voting procedures among and within counties, allow prompt determination of results, and serve as safeguards against the occurrence of fraud. Through their request for injunctive relief, Plaintiffs risk imposing abrupt and substantial changes to North Carolina's voting procedures. These changes, if ordered by this Court, would cause confusion among voters, candidates, and even among election administrators, divert resources from the Republican Committees' election programs, and threaten the lawfully enacted voting structure for the upcoming election. *See* Affidavits of Christopher White (RNC) (attached as Ex. A), Ryan Dollar (NRSC) (Ex. B), Erin Clark (NRCC) (Ex. C), and Philip Thomas (NCRP) (Ex. D).

3. The Republican Committees have a right to intervene under the liberal standard of Rule 24. Political parties and candidates have strong interests in encouraging like-minded citizens to register and vote, avoiding voter confusion, maintaining the rules that will guide their expenditure of funds to help elect Republican candidates, and protecting the integrity of the voting process. *See* White Aff. ¶¶ 7-11, Dollar Aff. ¶¶ 7-11, Clark Aff. ¶¶ 7-11, Morgan Aff. ¶¶ 7-11, and Thomas Aff. ¶¶ 7-11. No defendant in the case can adequately represent the specific interests asserted by the Republican Committees in identifying, educating, and persuading voters to support Republican candidates for elected office and assisting Republican candidates in the upcoming election. Accordingly, the Republican Committees urge the court to grant their request for intervention.

INTERESTS OF THE APPLICANTS

4. The RNC, NRSC, and NRCC are national committees of the Republican Party, as defined by 52 U.S.C. § 30101(14), that help elect Republican candidates to federal, state, and local

offices in North Carolina and throughout the United States. All three national committees have raised contributions in compliance with federal campaign finance laws and spent substantial amounts in North Carolina and elsewhere to develop and promote the national Republican platform, recruit and support Republican candidates for office (including President Trump), coordinate fundraising and election strategies, and lead voter registration, voter education, and "get-out-the-vote" (GOTV) activities up to and on election day. *See* White Aff. ¶¶ 6-9, 11, Dollar Aff. ¶¶ 6-9, 11, and Clark Aff. ¶¶ 6-9, 11. Among their voter outreach, the national party committees inform individuals about the lawful voting procedures in each state. *See* White Aff. ¶¶ 6-9, Dollar Aff. ¶¶ 6-9, and Clark Aff. ¶¶ 6-9. The national party committees have a longstanding and intense interest in the election procedures in every state, including North Carolina, and have often intervened in cases to protect those interests. *See* note 3 *infra*.

5. The DJT Committee is a principal campaign committee, as defined by 52 U.S.C. § 30101(5) and 11 CFR § 100.5, that supports the re-election of Donald J. Trump as President of the United States. The DJT Committee has raised contributions in compliance with federal campaign finance laws and spent substantial amounts in North Carolina and elsewhere to promote President Trump's re-election and encourage individuals to register and vote for President Trump's re-election in the upcoming general election in November. *See* Morgan Aff. ¶¶ 7-9. Like the national committees, the DJT Committee is intensely interested in the election procedures in all states, and has intervened in cases to protect its interests. *See* note 3 below.

6. The NCRP is a North Carolina state political party organization recognized under state and federal law. *See* 11 C.F.R. 100.15; N.C. Gen. Stat. § 163-96. The NCRP is the statewide organization representing Republican candidates in federal, state, and local elections in North Carolina, as well as Republican voters throughout the state. It supports the election of Republican

candidates through fundraising, voter registration, GOTV drives, and other campaign activities. *See* Thomas Aff. ¶¶ 6-9.

7. The Republican Committees share direct, substantial, and particularized interests in upholding North Carolina's absentee ballot requirements to avoid disruptions to the voting process, prevent confusion among voters and poll workers, encourage finality and prompt posting of results, and ensure that legitimate votes are counted in the November 2020 general election.

STATUS OF THE CASE

8. On August 10, 2020, Plaintiffs filed their Complaint against Defendants The State of North Carolina, the North Carolina State Board of Elections, and Damon Circosta, Chair of the North Carolina State Board of Elections (collectively, the "State"). Plaintiffs have recently dismissed The State of North Carolina as a defendant. On August 18, Plaintiffs amended their Complaint.

9. Plaintiffs allege the Challenged Provisions violate the North Carolina Constitution by: (1) violating the right to Equal Protection under Article I, § 19 by unlawfully burdening the right to vote, and (2) violating the Free Elections Clause under Article I, § 10. Compl. ¶¶ 123-142.

10. Other than Plaintiffs' amendment of their Complaint, and the intervention by the Speaker of the House and the President Pro Tempore of the Senate, there have been no proceedings in this case since Plaintiffs filed their Complaint.

11. The Republican Committees' Motion will not delay or disrupt the proceedings. Filed simultaneously with this motion is an Answer to Plaintiffs' Amended Complaint. The Republican Committees will comply with all deadlines set by the Court, including but not limited to deadlines for responding to the motion for preliminary injunction and any proceedings to address that motion.

STANDARD FOR INTERVENTION

12. The RNC, NRSC, NRCC, DJT Committee, and NCRP are all eligible to intervene on two independent grounds: intervention by right and permissive intervention. *See* N.C. Gen. Stat. § 1A-1, Rules 24(a) & 24(b). Both types of intervention require that the motion to intervene be timely filed, *see id.*, a requirement that is satisfied here.

13. Courts liberally grant requests to intervene by parties with an interest in a proceeding. Indeed, "the laudable purpose of Rule 24 intervention is generally to promote efficiency and avoid delay and multiplicity of suits." *Holly Ridge Assocs., LLC v. N.C. Dep't of Environ. & Nat. Res.*, 361 N.C. 531, 540, 648 S.E.2d 830, 837 (2007). Accordingly, "[a]s a general rule, *motions to intervene made prior to trial are seldom denied*." *Id.* at 537, 835 (quoting *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985)) (emphasis added).

14. Courts around the country have routinely allowed national and state-level major political parties and campaign committees to intervene in lawsuits seeking to enjoin the enforcement of election laws.[1] Indeed, in just the last few months, more than a dozen courts throughout the country have granted motions to intervene similar to this one.[2]

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[1] *See, e.g., Ohio Democratic Party v. Blackwell*, No. 2:04-CV-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26, 2005) (granting Ohio Republican Party's motion to intervene in case seeking an injunction requiring alternative voting options if there are long lines to vote); *Ass'n of Connecticut Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 103 (D. Conn. 2007) (granting intervention motion of prospective candidates for office who supported the state's campaign finance reform laws).

[2] *See, e.g., DSCC and DCCC v. Simon*, Doc. 83, No. 62-CV-20-585 (Minn. Dist. Ct. July 29, 2020) (granting intervention to Republican National Committee and Republican Party of Minnesota); *Pavek v. Simon*, Doc. 96, No. 19-cv-3000-SRN-DTS (D. Minn. July 12, 2020) (granting intervention to Donald J. Trump for President, Inc., Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and Republican Party of Minnesota); *Ariz. Democratic Party v. Hobbs*, Doc. 60, No. 2:20-cv-01143-DLR (D. Ariz. June 26, 2020) (granting intervention to the RNC, Arizona Republican Party, and Donald J. Trump for President, Inc.); *Swenson v. Bostelmann*, Doc. 38, No. 20-cv-459-wmc (W.D.

ARGUMENT

I. THE MOTION IS TIMELY.

15. Whether seeking intervention by right or permissive intervention, the motion must be timely. North Carolina courts weigh five factors when deciding whether a motion is timely, including: "(1) the status of the case, (2) the possibility of unfairness to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Malloy v. Cooper*, 195 N.C. App. 747, 750, 673 S.E.2d 783, 786 (2009) (quoting *Home Builders Ass'n of Fayetteville, N.C., Inc. v. City of Fayetteville*, 170 N.C. App. 625, 630–31, 613 S.E.2d 521, 525 (2005)). "As a general rule, motions to intervene made prior to trial are seldom denied." *Holly Ridge Associates, LLC v. North Carolina Dep't of Environ. & Nat. Res.*, 361 N.C. 531, 537, 648 S.E.2d 830, 835 (2007) (citation and alteration omitted).

Wis. June 23, 2020) (granting intervention to the RNC and Republican Party of Wisconsin); *Edwards v. Vos*, Doc. 27, No. 20-cv-340-wmc (W.D. Wis. June 23, 2020) (same); *League of Women Voters of Minn. Ed. Fund v. Simon*, Doc. 52, No. 20-cv-1205 ECT/TNL (D. Minn. June 23, 2020) (granting intervention to the RNC, the Republican Party of Minnesota, and Donald J. Trump for President, Inc.); *Issa v. Newsom*, 2020 WL 3074351, at *4 (E.D. Cal. June 10, 2020) (granting intervention to the DCCC and the Democratic Party of California); *Nielsen v. DeSantis*, Doc. 101, No. 4:20-cv-236-RH (N.D. Fla. May 28, 2020) (granting intervention to the RNC, NRCC, and Republican Party of Florida); *Priorities USA v. Nessel*, 2020 WL 2615504, at *5 (E.D. Mich. May 22, 2020) (granting intervention to the RNC and Republican Party of Michigan); *Thomas v. Andino*, 2020 WL 2306615, at *4 (D.S.C. May 8, 2020) (granting intervention to the South Carolina Republican Party); *Corona v. Cegavske*, Order Granting Mot. to Intervene, No. CV 20-OC-644-1B (Nev. 1st Jud. Dist. Ct. Apr. 30, 2020) (granting intervention to the RNC and Nevada Republican Party); *League of Women Voters of Va. v. Va. State Bd. of Elections*, Doc. 57, No. 6:20-cv-24-NKM (W.D. Va. Apr. 29, 2020) (granting intervention to the Republican Party of Virginia); *Paher v. Cegavske*, 2020 WL 2042365, at *2 (D. Nev. Apr. 28, 2020) (granting intervention to four Democratic Party entities); *Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1505640, at *5 (W.D. Wis. Mar. 28, 2020) (granting intervention to the RNC and Republican Party of Wisconsin); *Gear v. Knudson*, Doc. 58, No. 3:20-cv-278 (W.D. Wis. Mar. 31, 2020) (same); *Lewis v. Knudson*, Doc. 63, No. 3:20-cv-284 (W.D. Wis. Mar. 31, 2020) (same).

16. Plaintiffs filed their original Complaint just over one week ago, and on August 18 filed an Amended Complaint. Indeed, answers to the Amended Complaint are not yet due, and as of the date of this motion, Defendants have not yet responded to Plaintiffs' original Complaint, let alone the Amended Complaint. Nor has the court entered a scheduling order.

17. This case is in its preliminary phase. Accordingly, this motion is timely and intervention by the Republican Committees will cause no delay or prejudice to the existing parties.

II. THE APPLICANTS HAVE A RIGHT TO INTERVENE.

18. Rule 24 provides a movant the right to intervene when it (1) "claims an interest relating to the property or transaction which is the subject of the action," (2) "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest," and (3) "the applicant's interest is [not] adequately represented by existing parties." N.C. Gen. Stat. § 1A-1, Rule 24(a)(2); *see also Hinton v. Hinton*, 250 N.C. App. 340, 347, 792 S.E.2d 202, 206 (2016). A movant may intervene if it identifies an interest that is "of such direct and immediate character that [it] will either gain or lose by the direct operation and effect of the judgment." *Charles Schwab & Co. v. McEntee*, 225 N.C. App. 666, 672, 739 S.E.2d 863, 867 (2013).

19. As for the first requirement, the Republican Committees have direct and significant interests in laws that are designed to ensure "the integrity of [the] election process," *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the "orderly administration" of elections, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). *See also Hill*, 169 N.C. at 415, 86 S.E.2d at 356. Courts generally recognize that political parties and candidates have an interest in litigation that might impose changes in voting procedures, which affect candidates in that party, as well the voters who associate with that party. *See, e.g., Ohio Democratic Party v. Blackwell*, No. 2:04-CV-1055, 2005 WL 8162665, at *2 (S.D. Ohio Aug. 26,

2005). The Republican Committees have interests in assuring that voting procedures are clear, uniform, and fair to all voters, that they are set sufficiently in advance of the election to avoid confusion, and that they promote promptness and finality of election outcomes. The Committees also have an interest in maximizing the effect of financial resources they devote to voter education and in avoiding the risk of unintentional disenfranchisement of voters. *See* White Aff. ¶¶ 7-11, Dollar Aff. ¶¶ 7-11, Clark Aff. ¶¶ 7-10, Morgan Aff. ¶¶ 7-11, and Thomas Aff. ¶¶ 9-11.

20. In a related case challenging North Carolina's voting procedures, including some of the ones at issue here, a federal court recently recognized that the Republican Party Committees "'have demonstrated a special interest in the outcome of the suit'" and that the matters raised by the Republican Party Committees "are relevant to the case's disposition." June 30, 2020 Order at 7 (Dkt. No. 59) (internal citation omitted), *Democracy North Carolina, et al., v. North Carolina State Bd. of Elections*, Case No. 1:20-cv-00457-WO-JLW (M.D.N.C.). Although the court denied the Republican Party Committee's motion for leave to intervene, it did so primarily based on its concern that intervention by the Republican Party Committees would possibly delay resolution of plaintiffs' pending preliminary injunction motion, which had already been fully briefed. *See* June 24, 2020 Order at 6-7 (Dkt. No. 48). Nevertheless, the court still granted leave for the Republican Party Committees to participate as *amici curiae*, and they did so. *See* June 30, 2020 Order (Dkt. No. 59). The Republican Party Committees have appealed from the decision denying intervention. *See Republican Nat'l Comm. v. League of Women Voters of North Carolina*, Case No. 20-1728 (4th Cir.).

21. The federal court's concern about intervention by the Republican Committees is not present in this case. Unlike that case, Plaintiffs here have only just filed an Amended Complaint and a motion for preliminary injunction, and no hearings or other deadlines are scheduled. But the

Republican Committees' strong interest in this case—which the federal court acknowledged and accepted—*does* remain. Indeed, as explained below (¶¶ 25-26) the Defendants cannot adequately represent the Republican Committees' interests in protecting voter education and GOTV programs.[3]

22. The second requirement for intervention as a matter of right is satisfied for similar reasons. To show possible impairment of interests, North Carolina courts consider "the harm to the intervenor's interest" from "a 'practical' standpoint, rather than technically." *Wichnoski*, 251 N.C. App. at 396, 796 S.E.2d at 38 (quoting Official Comment to N.C. Gen. Stat. § 1A-1, Rule 24). Indeed, Rule 24(a)(2) requires applicants to show only that the case "*may* as a practical matter impair or impede" their interest. *Id.* (emphasis added).

23. The General Assembly has recently responded to the pandemic by revising the statutes governing voting, including requirements for voting by absentee ballot. *See* Session Law 2020-17. If Plaintiffs prevail in this case, voting procedures will be changed yet again. Such changes have the potential to confuse voters, overburden election administrators, and undermine confidence in elections. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) ("Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). Indeed, it appears that printing of absentee ballots is imminent. *See* July 21, 2020 Hearing Transcript [EXHIBIT], at 82:4-8, 126:22-24, *Democracy North Carolina v. North Carolina State Bd. of Elections*, 1:20-CV-

[3] The Court also denied the Republican Committees' motion to intervene by right based on its view that their interests were adequately represented by the Defendants, who are state election officials. *See* June 24, 2020 (Dkt. No. 48). But the court's acknowledgment that Republican Committees have a "*special interest in the outcome of the suit*" undermines that premise. *See* Order (June 30, 2020) (emphasis added). For example, the State Defendants have no role in identifying voters sympathetic to particular candidates and encouraging those voters to register and vote.

00457-WO-JLW (M.D.N.C.) (Karen Brinson Bell—Executive Director of the Board of Elections—testifying that the printing deadline for absentee ballots is "mid-August"). The Republican Committees, which have already begun adapting their programs to inform voters of the new laws, would be required to spend substantial resources to change their programs again and to inform voters of those new court-ordered changes in the law. Such changes will inevitably cause confusion, consume the Committees' resources, and impede the Committees' ability to reach a larger population that might participate in the voting process. *See* White Aff. ¶ 7, 10-12, Dollar Aff. ¶ 7, 10-12, Clark Aff. ¶ 7, 10-12, Morgan Aff. ¶¶ 10-11, and Thomas Aff. ¶ 10-12.

24. It is important for the Republican Committees to intervene in this case to ensure they will have a voice in protecting their investment of substantial financial resources and efforts in voter education and mobilization, and in protecting their interests in preventing the disenfranchisement of voters. *See* White Aff. ¶ 7, 10-12, Dollar Aff. ¶ 7, 10-12, Clark Aff. ¶ 7, 10-12, Morgan Aff. ¶¶ 7-11, and Thomas Aff. ¶ 10-12.

25. The remaining mandatory intervention requirement involves showing "inadequate representation of the interest by existing parties." *Hinton*, 250 N.C. App. at 347, 792 S.E.2d at 206. "[T]he burden on the applicant of demonstrating a lack of adequate representation 'should be treated as minimal.'" *Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

26. The State represents the general public interest in fair and reliable elections. The Legislator Defendants represent institutional interests of the General Assembly. Neither group shares the Republican Committees' desire to elect particular candidates, nor does either group engage in voter identification, voter registration, or GOTV activities targeted at like-minded voters. Unlike the Republican Committees, the State must remain strictly neutral in the election,

often balancing the views of opposing political parties and candidates, while the Legislator Defendants take into account the "desire[] to remain politically popular and effective leaders." *See Meek v. Metro Dade Cty.*, 985 F.2d 1471, 1478 (11th Cir. 1993). Because the Republican Committees' candidates "actively seek [election or] reelection in contests governed by the challenged rules," and because their members' ability to participate in those elections is governed by the challenged rules, movants have a distinct interest in "demand[ing] adherence" to the current lawfully enacted requirements. *Shays v. FEC*, 414 F.3d 76, 88 (D.C. Cir. 2005); *see also Garfield*, 241 F.R.D. at 103 (recognizing that particular parties and candidates often have different interests because "[a]s long as the broader societal impact of the law is preserved, the government has less interest [than political parties or candidates] in whether future candidates . . . are harmed by this litigation."). Moreover, unlike the Defendants, the national Republican Party Committees participate in elections nationwide, and in ongoing litigation concerning the validity of many varied election law structures (*see* note 3 above). As a result, they bring deep, panoramic expertise to the case that could be of invaluable assistance to the Court in evaluating Plaintiffs' allegations and proposed remedies. Notably, the Amended Complaint refers to the experience of other states in holding elections during the pandemic. *See* Am. Compl. ¶¶ 31-39. Although the State Defendants and the Legislative Defendants can be expected to have little knowledge about those elections, the Republican Committees participated in those elections and have a wealth of knowledge about the experiences of other states in dealing with the pandemic, including what worked and what did not. *See* White Aff. ¶ 12.

27. Accordingly, because the State and the Legislator Defendants do not adequately represent the range of interests advocated by the Republican Committees, the Republican Committees urge the Court to grant their motion for leave to intervene as of right.

III. THE APPLICANTS EXCEED THE STANDARDS FOR PERMISSIVE INTERVENTION

28. The Republican Committees' interest in maintaining the current lawfully enacted statutes governing North Carolina's elections, their interest in fair elections, and their substantial investments in this year's electoral process in North Carolina strongly support granting permissive intervention under N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). "In order to be allowed to intervene permissively into a pending action, the potential intervenor's alleged claim or defense must have a question of law or fact in common with the pending action." *Koenig v. Town of Kure Beach*, 178 N.C. App. 500, 507, 631 S.E.2d 884, 889 (2006). Furthermore, the movant must show that "intervention will not result in undue delay or prejudice to the existing parties." *League of Women Voters of Va.*, 2020 WL 2090678, at *2.

29. As shown above, applicants' intervention in this case would not cause delay or unfairly surprise or prejudice the existing parties. *See id.* at *5. The Republican Committees will rigorously adhere to all deadlines.

30. The Republican Committees also seek to preserve North Carolina's voting procedures that help prevent voter confusion and possible disenfranchisement of voters, assure uniformity of procedures among the counties, and encourage finality and prompt reporting of results. Thus, even though they represent different interests and perspectives, their positions "share[] a common factual and legal basis with the main action" that satisfies the standard for permissive intervention. *See id.* at *3; *Democratic National Committee*, 2020 WL 1505640, at *5 ("[T]here is no reasonable dispute that their proposed defense of the challenged laws shares common questions of law and fact with the main action."). Because the Republican Committees and Defendants oppose Plaintiff's requested relief—although from different perspectives and for

different reasons—and because the Republican Committees will not introduce ancillary issues in the case, the requirements for permissive intervention are satisfied.

CONCLUSION

31. For the foregoing reasons, the RNC, NRSC, NRCC, DJT Committee, and NCRP urge the court to grant their motion to intervene and admit them with all the rights of a defendant in this litigation.

Respectfully submitted,

Dated: August 21, 2020

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CERTIFICATE OF SERVICE

I certify that I have on this 21st day of August, 2020, served a copy of the foregoing Proposed Intervener-Defendants' Motion to Intervene, by United States mail, postage prepaid, to counsel for the Plaintiffs and Defendants at the following addresses:

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILED
2020 AUG 24 P 3:55

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

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA; 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.

DOCKET NO. 20-CVS-8881

DECLARATION OF MATTHEW MORGAN
IN SUPPORT OF REPUBLICAN COMMITTEES' MOTION TO INTERVENE

I, Matthew Morgan, state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I am the General Counsel for Donald J. Trump for President, Inc. (the "DJT Committee").

3. I have reviewed the Republican Committees' Motion to Intervene, Memorandum in support of the motion, and proposed Answer.

4. I make this Declaration in support of Republican Committees' motion for leave to intervene as party defendants in this action.

5. The DJT Committee is the principal campaign committee dedicated to the reelection of President Donald J. Trump. It is registered with the Federal Election Commission pursuant to 52 U.S.C. § 30101(5) and 11 C.F.R. § 102.1.

6. The principal aim of the DJT Committee's mission is to support the reelection of President Trump.

7. The DJT Committee has spent substantial amounts in North Carolina and elsewhere to support the reelection of President Trump, develop and promote the national Republican platform, coordinate fundraising and election strategies, and lead voter registration, voter education, and "get-out-the-vote" (GOTV) activities up to and on election day.

8. Among these activities, the DJT Committee informs individuals about the procedures in each state for voting lawfully.

9. The DJT Committee has already spent funds on these activities in anticipation of the 2020 election, and expects to spend significant funds moving forward in an effort to educate voters and encourage them to support President Trump's reelection.

10. The DJT Committee prioritizes its strategic activities in reliance on North Carolina's established voting procedures. Abrupt changes to North Carolina's voting procedures not only risk wasting the DJT Committee's previous efforts, but may also materially affect how the DJT Committee prioritizes its activities moving forward. The DJT Committee would be required to spend substantial resources to change its programs again and to inform voters of those new court-ordered changes in the law. Such changes will inevitably cause confusion, consume the

Committee's resources, and impede the Committee's ability to reach a larger population that might participate in the voting process.

11. In the 2020 election, the DJT Committee will be supporting incumbent Republican President Donald J. Trump. For this reason, the DJT Committee has a strong interest in protecting the integrity, fairness, and security of election procedures throughout the United States, including in North Carolina, and in insuring that properly enacted statutes are respected, enforced, and followed. No other party in this case shares these interests.

12. The DJT Committee requests approval of the Republican Committees' motion to intervene on an expedited basis, and does not seek to intervene for the purpose of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 21, 2020

Matthew Morgan

FILED

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 2020 AUG 24 P 3:54
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ, Plaintiffs, v. THE STATE OF NORTH CAROLINA; 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.	**DOCKET NO. 20-CVS-8881** BY

DECLARATION OF PHILIP R. THOMAS
IN SUPPORT OF REPUBLICAN COMMITTEES' MOTION TO INTERVENE

I, Philip R. Thomas, state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I am Political Director and Chief Counsel of the North Carolina Republican Party ("NCRP").

3. I have reviewed the Republican Committees' Motion to Intervene, Memorandum in support of the motion, and proposed Answer.

4. I make this Declaration in support of Republican Committees' motion for an order allowing the NCRP to participate as a party defendant to this action, permitting the NCRP to respond to the pleadings in this action and participate at trial, and for such other relief that may be proper.

5. The NCRP is a North Carolina state political party organization recognized under state and federal law. *See* 11 C.F.R. 100.15; N.C. Gen. Stat. § 163-96.

6. A critical part of the NCRP's mission is to support Republican candidates running in North Carolina elections.

7. The NCRP conducts fundraising, voter registration and education, get-out-the-vote drives, and other campaign activities in an effort to support this mission.

8. Among these activities, the NCRP informs individuals about the procedures in each state for voting lawfully.

9. In the 2020 election, the NRCP will be supporting a full slate of candidates for elected office in the State of North Carolina. For this reason, the NRCP has a strong interest, on behalf of itself, its members, and those who identify with it, to protect the integrity, fairness, and security of election procedures throughout the United States, including in North Carolina, and in insuring that properly enacted statutes are respected, enforced, and followed.

10. Moreover, the NCRP has already spent funds on these activities in anticipation of the 2020 election, and expects to spend significant funds moving forward in an effort to educate voters and encourage them to support Republican candidates.

11. The NCRP prioritizes its strategic activities in reliance on North Carolina's established voting procedures. Abrupt changes to North Carolina's voting procedures not only risk wasting the NCRP's previous efforts, but may also materially affect how the NCRP prioritizes its activities moving forward. The NCRP would be required to spend substantial resources to change its programs again and to inform voters of those new court-ordered changes in the law. Such changes will inevitably cause confusion, consume the Party's resources, and

impede the Party's ability to reach a larger population that might participate in the voting process.

12. No other party in this case adequately shares the interests of the NCRP in protecting the electoral prospects of Republican candidates who will appear on the ballot on November 3, 2020.

13. The NCRP requests approval of the Republican Committees' motion to intervene on an expedited basis, and does not seek to intervene for the purpose of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 21, 2020

Philip R. Thomas

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.	**DOCKET NO. 20-CVS-8881**

DECLARATION OF CHRISTOPHER WHITE
IN SUPPORT OF REPUBLICAN COMMITTEES' MOTION TO INTERVENE

I, Christopher White, state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I am Senior Counsel for the Republican National Committee ("RNC").

3. I have reviewed the Republican Committees' Motion to Intervene, Memorandum in support of the motion, and proposed Answer.

4. I make this Declaration in support of Republican Committees' motion for an order allowing the RNC to participate as a party defendant to this action, permitting the RNC to respond to the pleadings in this action and participate at trial, and for such other relief that may be proper.

5. The RNC is the national party committee of the Republican Party. It is an unincorporated organization registered with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14).

6. A critical part of the RNC's mission is to support Republican candidates at all levels—local, state, and national—in elections throughout the country, including in North Carolina.

7. The RNC has spent substantial amounts in North Carolina and elsewhere to develop and promote the national Republican platform, recruit Republican candidates for office, coordinate fundraising and election strategies, and lead voter registration, voter education, and "get-out-the-vote" (GOTV) activities up to and on election day.

8. Among these activities, the RNC informs individuals about the procedures in each state for voting lawfully.

9. The RNC has already spent funds on these activities in anticipation of the 2020 election, and expects to spend significant funds moving forward in an effort to educate voters and encourage them to support Republican candidates.

10. The RNC prioritizes its strategic activities in reliance on North Carolina's established voting procedures. Abrupt changes to North Carolina's voting procedures not only risk wasting the RNC's previous efforts, but may also materially affect how the RNC prioritizes its activities moving forward. The RNC would be required to spend substantial resources to alter or change its programs and plans and to inform voters of those new court-ordered changes in the law. Such changes will inevitably cause confusion, consume the Committee's resources, and impede the Committee's ability to reach a larger population that might participate in the voting process.

11. In the 2020 election, the RNC will be supporting a slate of candidates for local, state, and national offices, up to and including the Office of President. For this reason, the RNC has a strong interest, on behalf of itself, its members, and those who identify with it, to protect the integrity, fairness, and security of election procedures throughout the United States, including in North Carolina, and in insuring that properly enacted statutes are respected, enforced, and followed.

12. During 2020, the RNC has closely observed how numerous states around the country conducted primary elections during the current pandemic. Based on this experience, it has actual experience that will be valuable to this Court in evaluating the election law changes proposed by Plaintiffs.

13. No other party presently in this case adequately shares the interests of the RNC in protecting the electoral prospects of Republican candidates who will appear on the ballot on November 3, 2020.

14. The RNC requests approval of the Republican Committees' motion to intervene on an expedited basis, and does not seek to intervene for the purpose of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 21, 2020

Christopher J. White

Christopher White

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 STATE OF NORTH CAROLINA; 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.	**DOCKET NO. 20-CVS-8881**

DECLARATION OF ERIN CLARK
IN SUPPORT OF REPUBLICAN COMMITTEES' MOTION TO INTERVENE

I, Erin Clark, state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I am counsel for the National Republican Congressional Committee ("NRCC").

3. I have reviewed the Republican Committees' Motion to Intervene, Memorandum in support of the motion, and proposed Answer.

4. I make this Declaration in support of Republican Committees' motion for an order allowing the NRCC to participate as a party defendant to this action, permitting the NRCC to respond to the pleadings in this action and participate at trial, and for such other relief that may be proper.

5. The NRCC is the national organization of the Republican Party dedicated to electing Republicans to the U.S. House of Representatives. It is registered with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14).

6. A critical part of the NRCC's mission is to support Republican candidates for the U.S. House of Representatives in elections throughout the country, including in North Carolina.

7. The NRCC has spent substantial amounts in North Carolina and elsewhere to develop and promote the national Republican platform, recruit Republican candidates for office, coordinate fundraising and election strategies, and lead voter registration, voter education, and "get-out-the-vote" (GOTV) activities up to and on election day.

8. Among these activities, the NRCC informs individuals about the procedures in each state for voting lawfully.

9. The NRCC has already spent funds on these activities in anticipation of the 2020 election, and expects to spend significant funds moving forward in an effort to educate voters and encourage them to support Republican candidates.

10. The NRCC prioritizes its strategic activities in reliance on North Carolina's established voting procedures. Abrupt changes to North Carolina's voting procedures not only risk wasting the NRCC's previous efforts, but may also materially affect how the NRCC prioritizes its activities moving forward. The NRCC would be required to spend substantial resources to change its programs again and to inform voters of those new court-ordered changes in the law. Such changes will inevitably cause confusion, consume the Committee's resources, and impede the Committee's ability to reach a larger population that might participate in the voting process.

11. In the 2020 election, the NRCC will be supporting candidates for Congress. For this reason, the NRCC has a strong interest in protecting the integrity, fairness, and security of

election procedures throughout the United States, including in North Carolina, and in insuring that properly enacted statutes are respected, enforced, and followed.

12. No other party in this case shares the interests of the NRCC in protecting the electoral prospects for Republican candidates who will appear on the ballot on November 3, 2020.

13. The NRCC requests approval of the Republican Committees' motion to intervene on an expedited basis, and does not seek to intervene for the purpose of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Erin Clark

Dated: August 21, 2020

Erin Clark

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 STATE OF NORTH CAROLINA; 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.	**DOCKET NO. 20-CVS-8881**

DECLARATION OF RYAN G. DOLLAR
IN SUPPORT OF REPUBLICAN COMMITTEES' MOTION TO INTERVENE

I, Ryan G. Dollar, state the following based on my personal knowledge:

1. I am over 18 years of age and competent to make this Declaration.

2. I am General Counsel for the National Republican Senatorial Committee ("NRSC").

3. I have reviewed the Republican Committees' Motion to Intervene, Memorandum in support of the motion, and proposed Answer.

4. I make this Declaration in support of Republican Committees' motion for an order allowing the NRSC to participate as a party defendant to this action, permitting the NRSC to respond to the pleadings in this action and participate at trial, and for such other relief that may be proper.

5. The NRSC is the national organization of the Republican Party devoted to electing Republican Senators. It is registered with the Federal Election Commission pursuant to 52 U.S.C. § 30101(14).

6. A critical part of the NRSC's mission is to support Republican candidates for the United States Senate in elections throughout the country, including in North Carolina.

7. The NRSC has spent substantial amounts in North Carolina and elsewhere to develop and promote the national Republican platform, recruit Republican candidates for office, coordinate fundraising and election strategies, and lead voter registration, voter education, and "get-out-the-vote" (GOTV) activities up to and on election day.

8. Among these activities, the NRSC informs individuals about the procedures in each state for voting lawfully.

9. The NRSC has already spent funds on these activities in anticipation of the 2020 election, and expects to spend significant funds moving forward in an effort to educate voters and encourage them to support Republican candidates.

10. The NRSC prioritizes its strategic activities in reliance on North Carolina's established voting procedures. Abrupt changes to North Carolina's voting procedures not only risk wasting the NRSC's previous efforts, but may also materially affect how the NRSC prioritizes its activities moving forward. The NRSC would be required to spend substantial resources to change its programs again and to inform voters of those new court-ordered changes in the law. Such changes will inevitably cause confusion, consume the Committee's resources, and impede the Committee's ability to reach a larger population that might participate in the voting process.

11. In the 2020 election, the NRSC will be supporting incumbent Republican Senator Thom Tillis. For this reason, the NRSC has a strong interest in protecting the integrity, fairness,

and security of election procedures throughout the United States, including in North Carolina, and in insuring that properly enacted statutes are respected, enforced, and followed.

12. No other party in this case shares the interests of the NRSC in protecting the electoral prospects of Senator Tillis, who will appear on the ballot on November 3, 2020.

13. The NRSC requests approval of the Republican Committees' motion to intervene on an expedited basis, and does not seek to intervene for the purpose of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 21, 2020

Ryan G. Dollar