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

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| PATSY J. WISE, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>THE NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,<br><br>Defendants, and<br><br>DEMOCRACY NORTH CAROLINA, THE LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, LELIA BENTLEY, MARGARET B. CATES, ROBERT K. PRIDDY II, REGINA WHITNEY EDWARDS, JOHN P. CLARK, and WALTER HUTCHINS,<br><br>Proposed Intervenor-Defendants. | ) | 1:20-cv-00912 |

**PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

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Proposed Intervenor-Defendants Democracy North Carolina, the League of Women Voters of North Carolina, John P. Clark, Margaret B. Cates, Lelia Bentley, Regina Whitney Edwards, Robert K. Priddy II, and Walter Hutchins ("Proposed Intervenor-Defendants") submit this memorandum in opposition to Plaintiffs' Motion for a Preliminary Injunction ("PI Motion").

## INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs Patsy J. Wise, Regis Clifford, Camille Anette Bambini, Samuel Grayson Baum, Donald J. Trump for President Inc., U.S. Congressman Daniel Bishop, U.S. Congressman Gregory F. Murphy, Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and North Carolina Republican Party filed this action, challenging have filed this action, asserting Elections Clause, Article II, Section 1, and Equal Protection Clause claims against the revised Numbered Memorandum 2020-19 (revised September 22, 2020).[1] As to that Memorandum, they seek relief "[e]njoining Defendants from enforcing and distributing Numbered Memo 2020-19 or any similar memoranda or policy statement that does not comply with the requirements of the Elections Clause" and "[e]njoining Defendants from enforcing and distributing the three Numbered Memoranda or any similar memoranda or policy statement that does not comply with the requirements of the Equal Protection Clause." ECF 60 at 6-7.

[1] As Proposed Intervenor-Defendants' interests in this matter are limited to ensuring full compliance with this Court's preliminary injunction in *Democracy N.C. v. N.C. State Board of Elections*, No. 1:20-cv-457, ECF 124 (M.D.N.C. Aug. 4, 2020) ("*Democracy N.C.*"), this Memorandum in Opposition is necessarily limited to that due process remedy in Numbered Memo 2020-19.

This Court lacks jurisdiction over these claims under the *Rooker-Feldman* doctrine, as this case is a thinly-disguised attempt to have this federal Court review a state court judgment. Plaintiffs' first claim is premised on an anomalous, poorly-developed theory of the Elections Clause and Article II, Section 1, which, if adopted, would inject federal court review into every state law dispute between state legislatures, state courts, and state election officials. The consequences of such an extreme interpretation of the Elections Clause would be disastrous for federalism and comity in the fundamental laws governing the mechanics of democratic self-government. Plaintiffs lack Article III injuries to assert their *Bush v. Gore* and Article II, Section 1 claims, as no North Carolina voters' ballots have been finally rejected. Even if the Court were to grant prospective relief on these claims, the Supreme Court has made clear that ballots cast in reliance on laws or injunctions in place at the time of voting need not be disturbed. Finally, the relief Plaintiffs seek, enjoining Numbered Memorandum 2020-19 in its entirety, is overbroad, and this Court lacks subject matter jurisdiction to grant it. A preliminary injunction can reach no farther than is necessary to cure the specific legal violations established. With respect

to Numbered Memorandum 2020, 19, Plaintiffs only contend that it violates the statutory witness certification requirement. ECF 43 at 7. Plaintiffs do not assert that any other North Carolina election statutes, rules, or regulations have been violated by the Memorandum.

**ARGUMENT**

**1. This Court lacks jurisdiction over Plaintiffs' claims under the *Rooker-Feldman* doctrine.**

This Court lacks jurisdiction under the *Rooker-Feldman* doctrine. Plaintiffs effectively ask this Court to review the consent judgment entered by the state court in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections, No 20-CVS- 8881 (Sup. Ct. Wake Cty.)*, and invalidate it. Numbered Memorandum 2020-19 was modified in accordance with a state court consent decree, so, contrary to Plaintiffs' assertions, ECF 43 at 21, their suit also amounts to a challenge to the state court's authority to act when state election laws are challenged on purely state law grounds. In a closely analogous context, the Supreme Court has held that the term "proceedings" under the Anti-Injunction Act includes "the *results* of a completed state proceeding." *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970)

(emphasis added); *see also U.S. Steel Corp. Plan for Empl. Ins. Benefits v. Musisko*, 885 F.2d 1170, 1175 (3d Cir. 1989) ("[T]he prohibition[s] of § 2283 cannot be evaded by addressing the order to the parties or *prohibiting utilization of the results of a completed state proceedings*.") (citing *Atl. Coast*, 398 U.S. at 287 (emphasis added).

The *Rooker-Feldman* doctrine jurisdictionally bars federal court review of a state court judgment:

> Under the *Rooker-Feldman* doctrine, a 'party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court.' *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). We regard the doctrine as jurisdictional. *See Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 196 (4th Cir.2002) ("Because the *Rooker-Feldman* doctrine is jurisdictional, we are obliged to address it before proceeding further in our analysis.").

*Am. Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 316 (4th Cir. 2003).

This doctrine is fundamentally concerned with maintaining the Supreme Court's jurisdiction to review state court rulings under 28 U.S.C. § 1257(a). *See Thana v. Bd. of License Comm'rs for Charles Cnty.*, 827 F.3d 314, 320 (4th Cir. 2016) (quoting *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005)). Thus, the doctrine "precludes federal

district courts from exercising what would be, in substance, appellate jurisdiction over final state-court judgments." *Hulsey v. Cisa*, 947 F.3d 246, 250 (4th Cir. 2020).

The plaintiffs and defendants in *North Carolina Alliance of Retired Americans* have entered a joint motion for entry of a consent judgment in that matter, which the state court granted. A number of the Plaintiffs in this action successfully intervened in that state court case. ECF 1, ¶ 51. To comply with that judgment, SBE Defendants issued revisions to Numbered Memorandum 2020-19 on September 22, which Plaintiffs allege caused the constitutional injuries identified in their pleadings for this action. Simply put, Plaintiffs[2] lost in state court and now seek relief in federal court, instead of seeking expedited review in the North Carolina Supreme Court and, perhaps ultimately, relief from the U.S. Supreme Court.

[2] While the individual plaintiffs were not parties to the state court action, the principles of equity, comity, and the federalist judicial system that underlie federal abstention doctrines support deference to the state court and avoidance of the necessity for federal adjudication of state judgments. *See Gottfried v. Med. Planning Servs., Inc.*, 142 F.3d 326, 332 (6th Cir. 1998) ("[T]he preferable option for a nonparty who questions the constitutional validity of a state court injunction is to ask the state court for relief from the injunction before disobeying it.") (citing *Walker v. Birmingham*, 388 U.S. 307, 315-21 (1967).

All of their federal constitutional claims could be raised in a petition to the U.S. Supreme Court after exhausting the state court system. State courts have concurrent jurisdiction over federal constitutional claims or defenses, *see Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020) ("We have recognized a deeply rooted presumption in favor of concurrent state court jurisdiction over federal claims." (internal quotations omitted)), and the U.S. Supreme Court has jurisdiction to review state court rulings under 28 U.S.C. § 1257(a).

Plaintiffs cite *Washington v. Wilmore*, 407 F.3d 274, 280 (4th Cir. 2005) for the proposition that "*Rooker-Feldman* does not apply where [a] claim rests on violation of constitutional rights instead of state court judgment," ECF 43 at 21, but that is not what the Fourth Circuit held. *Washington* "challenge[d] not his conviction but rather one aspect of the means by which that conviction was achieved" on federal constitutional grounds. 407 F.3d at 280. The Fourth Circuit cited to *Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 202 (4th Cir. 1997), which distinguished between "actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court

decisions resulted." *Id.* Here, Plaintiffs do not challenge the process by which the state court consent judgment was ordered, but rather its contents and the revisions to the Numbered Memoranda. They raised their federal constitutional claims in state court, but that court ruled against them. ECF 1 ¶ 78. Plaintiffs could appeal the state court consent judgment. Instead, they seek this Court's review of a state court consent judgment.

Thus, Plaintiffs' claims violate the *Rooker-Feldman* doctrine, and no preliminary injunction should issue. Additionally, this case should be dismissed for lack of jurisdiction.

**2. Plaintiffs' Elections Clause and Article II, Section 1 claims are meritless, extreme, and in gross conflict with America's system of federalism.**

The language of the Elections Clause and Article II, Section 1 clearly confer authority for enacting election laws on state legislatures and establishing the manner of selecting presidential electors. This means that any right of action under the Clause would belong to a state legislature, but none of the Plaintiffs is a state legislator. Plaintiffs' interest in the enforcement of state election laws is no different than that held by the general public, and their alleged injury is

not sufficiently particularized to confer standing. *See also Lance v. Coffman*, 549 U.S. 437, 442 (2007) (holding that voters lacked standing to assert Elections Clause claim).

If the Court reaches the merits of these claims, it should reject both of them. Plaintiffs[3] argue that the State Board of Elections' ("SBE") Numbered Memoranda, including 2020-19, violate the Elections Clause and Article II, Section 1 by usurping state legislative authority.

This constitutional challenge to state courts' and state agencies' authority to interpret and enforce election laws is an assault on federalism. Adopting this theory—whereby the Elections Clause opens the door for federal courts to inject themselves into every dispute among state courts, state agencies, and state legislatures over the scope and meaning of state election laws—eliminates any limiting principle on the role of federal courts in the context of elections run by the states. The fact is, Plaintiffs do not like the results of *North Carolina Alliance for Retired Americans*—nor do they like the result of the litigation before this court in *Democracy*

[3] Without conceding Plaintiffs' standing to bring this claim, Proposed Intervenor-Defendants submit that, at a minimum, the individual Plaintiffs have no standing to bring a challenge to vindicate state legislative authority under the Elections Clause.

*N.C.*-and instead of pursuing avenues for appeal, they turned to E.D.N.C., arguing the Elections Clause may pave a path to collaterally attack the relief granted in the prior cases.

The consequences of Plaintiffs' theory are extreme. It would mean that every dispute over a *state* rule, regulation, memorandum, or other directive because it allegedly exceeded or violated a *state* statute, could be brought to *federal* court under the Elections Clause. However, a federal court cannot interpret state law definitively and cannot issue an injunction to enforce state law, and North Carolina is the only state that does not permit federal court certification of state law questions to the state's supreme court. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). Therefore, under Plaintiffs' theory, this Court would be forced by the mere filing of an Elections Clause lawsuit to rubber-stamp the requested injunction against any purportedly offending state agency rule, regulation, or memorandum or state court ruling, without even being able to engage and resolve the state law dispute. This cannot be. The Elections Clause is not a font of such unfettered federal judicial intervention in state election law disputes. *Cf. Ariz. St. Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 78, 814-15 ("The dominant

purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation."

If the law is to undergo the kind of sea change that Plaintiffs desire, it will need to come from the U.S. Supreme Court, and the Court will soon decide an emergency application on Elections Clause and Article II Section 1 grounds in a case recently decided by the Supreme Court of Pennsylvania. *Scarnati v. Boockvar*, *Republican Party of Pennsylvania v. Boockvar*, Nos. 20A53, 20A54 (Applications for Stay Pending Disposition of a Petition for a Writ of Certiorari). If this claim is not rejected outright, at a minimum, the PI Motion should be denied without prejudice as to this claim or held in abeyance pending the resolution of the *Scarnati* litigation.

**3. Plaintiffs lack an Article III injury in fact to assert their Equal Protection Clause claims.**

Plaintiffs assert two different Equal Protection Clause claims: a *Bush v. Gore* claim and a voter dilution claim, but it unclear how they differ. *Bush v. Gore* held that "the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. 98, 104-05 (2000). Plaintiffs' voter dilution claim is that "the right to

vote includes the right to have votes counted at full value without dilution or discount." ECF 43 at 10 (citation and quotation marks omitted). As Plaintiffs have not clearly articulated what, if any, difference there is between these two claims, Proposed Intervenor-Defendants treat them as interchangeable and coterminous for purposes of this Memorandum.

Plaintiffs plead that "[t]he changes made by the Board of Elections contravene validly enacted election laws and eliminate or drastically weaken protections against voter fraud, and risk dilution of honest votes by enabling the casting of fraudulent or illegitimate votes. This dramatically enhanced risk of fraudulent voting violates the right to vote." ECF 1, ¶ 114. Again, Plaintiffs assert a generalized interest in the enforcement of the state's election laws, an "interest" shared by every voter in North Carolina. Indeed, Plaintiffs' equal protection theory is unsupported by law and fundamentally inconsistent with any change to a voting law, practice or procedure that opens the ballot box to more voters. Under Plaintiffs' theory, challengers suffer an injury to the weight of their vote by having more voters counted. Federal courts do not recognize this as a cognizable form of vote dilution.

This is not a vote dilution case like in the malapportionment case. In *Reynolds v. Sims*, the Supreme Court distinguished vote dilution from voter disenfranchisement, noting "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964). In the malapportioned districting plan challenged in *Reynolds*, all voters had an equal vote, but district lines were drawn in such a way as to grossly skew the relative weight of the votes. Indeed, the Supreme Court has recently recommitted to a definition of "vote dilution" that does not support a claim as made here. *See, e.g., Abbot v. Perez*, 138 S. Ct. 2305, 2314 (2018) (defining "vote dilution" as "'invidiously … minimiz[ing] or cancel[ing] out the voting potential of racial or ethnic minorities'") (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980) (plurality opinion)); *see also, Paher v. Cegavske*, --- F. Supp. 3d ---, 2020 WL 2089813, at *5 n.7 (D. Nev. Apr. 30, 2020) ("Even if the Court had concluded . . . there was a violation of Nevada law in the implementation of the all-mail provisions . . . , the Court finds that Plaintiffs have not established a nexus between such alleged violations and the alleged injury of vote

dilution."); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) (finding "the risk of vote dilution" to be "speculative and, as such, more akin to a generalized grievance about the government than an injury in fact.").

All Plaintiffs lack an Article III concrete and particularized injury in fact to assert their Equal Protection claims. The cure process this Court ordered to vindicate North Carolina voters' due process rights prevents disenfranchisement and does not weigh any voter's votes differently from any other voter's. Even if the cure procedure were modified, no votes would be diluted.

To satisfy the Article III standing requirement, plaintiffs must show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). An injury must be "concrete and particularized," *id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)), which requires more than a showing of mere "generalized grievances" shared by the population as a whole.

*Id.* (quoting *Lance v. Coffman*, 549 U.S. 437, 439 (2007)). Plaintiffs lack standing to assert any of their claims, because they are raising generalized grievances that could be asserted by any voter.

Further, the individual Plaintiffs' votes have not been weighed or treated differently than any other voter's votes. *Bush v. Gore* has not been violated. Crucially, in *Bush v. Gore*, a vague "intent of the voter" standard applied in a ***post-election*** recount, and similarly- or identically-situated ballots were being treated differently such that some were counted and some were rejected. 531 U.S. at 105-06. Indeed, the only *Bush v. Gore* case since 2000 that has resulted in a final judgment enjoining an election law was brought in a *post-election* context. *See Hunter v. Hamilton Cty. Bd. of Elections*, 850 F. Supp. 2d 795, 847 (S.D. Ohio 2012) (issuing order for declaratory judgment and permanent injunction) (holding lack of specific standards for assessing role of poll worker error in counting and rejecting provisional ballots cast on Election Day violated equal protection).

Here, by contrast, some 27 days before Election Day, no North Carolina voter's ballot has been finally rejected; not one vote has been denied because of anything in the challenged

Numbered Memorandum 2020-19. *See* Declaration of Candela Cerpa ("Cerpa Decl.") ¶ 12 . Indeed, in the North Carolina election code, "rejection" is a term only used in the post-Election Day context of processing and counting ballots. *See, e.g.*, N.C. Gen. Stat. § 163-182.1(a)(2) ("No official ballot shall be *rejected* because of technical errors in marking it, unless it is impossible to clearly determine the voter's choice.") (emphasis added); N.C. Gen. Stat. § 163-258.12(b) ("If the ballot is timely received, it may not be *rejected* on the basis that it has a late postmark, an unreadable postmark, or no postmark.") (emphasis added). By contrast, spoliation of a ballot occurs prior to or on Election Day. *See, e.g.*, 8 N.C. Admin. Code 10B.0104(b) ("If a voter *spoils* or damages a ballot, the voter may obtain another upon returning the spoiled or damaged ballot to the chief judge or other designated official. A voter shall not be given a replacement ballot until the voter has returned the spoiled or damaged ballot."). Spoliation, therefore, results in the issuance of a new ballot to the voter and another opportunity to cast a ballot that will be counted. In the context of the cure procedure ordered by this Court and implemented by the NCSBOE, spoliation means that the ballot was defective in a way that could not be cured. For

example, the ballot may have been opened in the course of its return to the county board office, so the voter was issued a new ballot and the original, defective ballot was destroyed. *See generally* Declaration of Talia Ray (describing reasons behind spoliation of various ballots).

As of this filing, 405,855 absentee voter ballots have been returned to county boards. Cerpa Decl. ¶6. Of those, some 2,918 ballots have been "spoiled." *Id.* ¶ 11. The state's data does not provide a breakdown of the reasons for spoliation. As of this filing, only 1,139 cured ballots have been counted to date, and only a fraction of the ballots pending cure will be affected by any cure procedures issued by the SBE Defendants in order to provide the required due process for material curable defects. *Id.* ¶¶7, 10.

This Court need not decide this *Bush v. Gore* claim if it grants relief to Proposed Intervenor-Defendants in the *Democracy N.C.* litigation and retains jurisdiction to ensure compliance and uniform administration. *See* 20-cv-457, ECF 156. Such relief would moot this claim. But even if this Court were to conclude that Plaintiffs have standing and prospective injunctive relief is warranted to cure a prospective equal protection violation in the curing of absentee ballots, the

U.S. Supreme Court, just two days ago in its decision in *Andino v. Middleton*, 592 U. S. ___ , No. 20A55, 2020 WL 5887393, (Oct. 5, 2020), made clear that, for voters who have already cast their ballots, their due process rights and interests in relying on election officials' representations of voting rules are paramount and override a court's subsequent assessment of the merits of a law or injunction upon which election officials and voters alike relied. In *Andino*, the Court stayed the district court's injunction against South Carolina's witness requirement, but expressly did not upset the settled expectations of voters who cast their ballots in reliance on that injunction: "The order is stayed except to the extent that any ballots cast before this stay issues and received within two days of this order may not be rejected for failing to comply with the witness requirement." *Id.* at *1. Plaintiffs omit this crucial exception-- even if this Court grants the PI Motion as to this claim, no retrospective relief is warranted under *Andino*. ECF 43 at 5. Additionally, *Andino*, which was decided 29 days before Election Day, makes clear that it is not too late under *Purcell* to change election rules to ensure

compliance with the law.[4]

Today, 27 days in advance of Election Day, no North Carolina voter's ballot has been unfairly rejected while a similarly- or identically-situated ballot was counted. Accordingly, this Court has time to clarify which material defects can be cured, and rule that previously-cured ballots cannot be disturbed, given voters' due process interests.

**4. The requested relief is overbroad, and this Court lacks subject matter jurisdiction to order it.**

Plaintiffs seek a full reversion to Numbered Memorandum 2020-19 as issued on August 21, 2020. This requested relief is overbroad and improper. SBE Defendants are allowed to do anything lawful to comply with this Court's PI order in *Democracy N.C.* Indeed, any provisions in the September 22, 2020 version of the Numbered Memorandum on the cure procedure that are consistent with federal and state law, including federal and state judicial rulings, must not be enjoined. Forcing a rollback to the August version of the Numbered Memo would exceed the scope of the constitutional claims in this case and, therefore, exceed this Court's subject matter jurisdiction.

[4] Nevertheless, the NCSBOE has utterly failed to implement a clear cure procedure consistent with this Court's PI Order, and that is why Proposed Intervenor-Defendants have moved for affirmative relief in the related *Democracy N.C.* litigation.

Enjoining the September version of Numbered Memo 2020-19 in its entirety is unnecessary to remedy the constitutional violations that Plaintiffs allege, even if such allegations were legally correct, and such overbroad relief would cause mass chaos in the processing of absentee ballots by county boards of elections, which started applying the cure process in its original form on September 4, 2020 and to date have processed more than 393,683 ballots and allowed more than 1,142 voters to cure their absentee ballots pursuant to this cure process. Cerpa Decl. ¶7.[5] *See* N.C. State Board of Elections Data File, "absentee_20201103.zip" (last updated 10/6/2020, 9:37:42 AM).[6] Plaintiffs identify specific alleged constitutional defects in revised Numbered Memo 2020-19, but never argue that the entire Memo is unlawful. In their brief , Plaintiffs argue that four requirements for mail-in absentee voting in North Carolina's election statutes are violated by

[5] On October 1, 2020, Executive Director Bell issued Numbered Memo 2020-27 directing county boards to take "no action" as to absentee ballot envelopes with a missing witness signature. Executive Director Karen Brinson Bell, Numbered Memo 2020-27 (Oct. 1, 2020), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-27_Court%20Order%20re%20Witness%20Signature%20Deficiencies.pdf

[6] *Available at* https://dl.ncsbe.gov/?prefix=ENRS/2020_11_03/.

the Numbered Memos: (1) the witness certification requirement; (2) the postmarked-by-Election-Day requirement; (3) the receipt deadline; and (4) the restriction on ballot collection for delivery purposes. ECF 43 at 6-7. These are the only statutory requirements that Plaintiffs seek to vindicate: N.C. Gen. Stat. § 163-231, as amended by Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a), N.C. Gen. Stat. § 163-231(b)(2)(b), and N.C. Gen. Stat. § 163-226.3(a)(5). For purposes of Plaintiffs' constitutional challenge, the only "relevant" provision of Numbered Memorandum 2020-19 is that "[Revised Numbered Memo 2020-19] would allow a voter to cure the omission of a witness to the absentee ballot by submitting a cure affidavit executed by the voter, but without fulfilling the witness requirement." ECF 43 at 7 (emphasis added).

Additionally, they write that "[f]rom September 4 until October 2, over 150,000 North Carolinians—including Plaintiff Wise—cast their votes under a regime in which the BOE enforced the Witness Requirement, Postage Requirement, Postmark Requirement, Receipt Deadline, Application Assistance Ban, and Ballot Delivery Ban." ECF 43 at 11; *see also id.* at 6-7, 11 ("Revised Numbered Memo 2020-19 would allow the voter to cure a failure to comply with the Witness Requirement by submitting

his or her own certification—without a witness."), 18 (same). Plaintiffs do not assert that any other election statutes, rules, or regulations have been violated by Memorandum 2020-19.

The proper remedy for these alleged constitutional violations is to enjoin the parts of revised Memorandum 2020-19 that are allegedly unconstitutional, not the whole, for the same reason a court never enjoins an entire statute or an entire regulation, when enjoining a specific provision will suffice. Well-settled precedent dictates that injunctive relief may reach no farther than is necessary to redress a legal violation: "It is well established that 'injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.'" *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 436 (4th Cir. 2003) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *Roe v. Dep't of Def.*, 947 F.3d 207, 231 (4th Cir. 2020), *as amended* (Jan. 14, 2020) (same in regards to preliminary injunctions). The Fourth Circuit has further explained that "[a]n injunction should be carefully addressed to the circumstances of the case." *Va. Soc'y for Human Life v. FEC*, 263 F.3d 379, 393 (4th Cir.2001) (citing *Hayes v. N. State*

*Law Enf't Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993) ("Although injunctive relief should be designed to grant the full relief needed to remedy the injury to the prevailing party, *it should not go beyond the extent of the established violation*") (emphasis added)).

Even if this Court should find that Plaintiffs prevail on the merits of their constitutional claims, Plaintiffs have overplayed their hand in requesting such overbroad relief. In the event of such a ruling, this Court can easily grant relief that is targeted to the specific constitutional violations without enjoining Numbered Memo 2020-19 in full. If this Court were to grant the PI motion, it could order the SBE Defendants to immediately rewrite the specific provisions in Numbered Memo 2020-19 that are in conflict with N.C. Gen. Stat. § 163-231 as amended by Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 § 1.(a), and N.C. Gen. Stat. § 163-231(b)(2)(b), so that those specific provisions conform to the Court's ruling on the constitutional merits. If the Court ruled in Plaintiffs' favor, a simple line-item edit to excise or modify the offending provisions would be in order, nothing more.

It bears emphasizing that Proposed Intervenor-Defendants did not seek or request the disputed changes in Numbered Memo

2020-19 that were incorporated pursuant to the state court's consent judgment. Proposed Intervenor-Defendants were not parties to that state court action; instead, almost two months ago, they secured a preliminary injunction that enforces the Due Process Clause for absentee voting. Plaintiffs, many of whom intervened as defendants in the state court action, did not seek to appeal the consent judgment. Instead, they shopped for a different forum in the hope that the Eastern District Court of North Carolina would issue a favorable ruling, setting up a conflict between this action and *Democracy N.C.*

The details of Numbered Memo 2020-19, as revised in September, demonstrate why a full rollback of all changes would be excessive and overbroad. The revised version of Numbered Memo 2020-19 issued in September contains numerous provisions that (1) are consistent with this Court's PI Order in *Democracy N.C.*; (2) pose no equal protection concerns; and (3) do not run afoul of *Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Court should therefore, at a minimum, deny Plaintiffs' motion for a preliminary injunction as to these aspects of Numbered Memo 2020-19.

First, Numbered Memo 2020-19 provides that "[c]ounty 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." Redline of Numbered Memo 2020-19 at 3 ("Redline"), ECF 39-4]. This Court's PI Order requires regular, timely review of mail-in absentee ballots for deficiencies, but these internal procedures do not directly affect the casting of mail-in absentee ballots. Again, this provision is consistent with this Court's PI Order in *Democracy N.C.*; poses no equal protection concerns; and could not possibly result in voter confusion or a "consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. If this Court were to order faster turn-around for the cure procedure prospectively as requested in Proposed Intervenor-Defendants' motion for affirmative relief, there would be no need to order any retrospective relief to ensure equal protection. This ameliorative change would not result in conflicting dispositions of similarly-situated ballots.

Second, several provisions address the nature of the notice that must be afforded to voters. Numbered Memo 2020-19 as revised requires notification of curable defects by physical mail "to the address to which the voter requested their ballot be sent," *and* "by email" if "the voter has an email address on

file." Redline at 6. The previous version of Numbered Memo 2020-19 obligated county boards to provide notice either by physical mail *or* email. *Id.* Next, under the revised Numbered Memo, county boards must "contact the voter by phone" if "the voter did not provide an email address but did provide a phone number." *Id.* Finally, "[i]f 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." *Id.* These expanded notice provisions effectuate the objective of and are therefore consistent with this Court's PI Order in *Democracy N.C.* They could not possibly pose any equal protection concerns, as no voter's ballot will be weighted any differently than any other; nor would there be any conflicting dispositions of similarly-situated ballots. And of course these notice provisions also will not result in voter confusion or a "consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. Improved notice means less voter confusion.

Third, consistent with the PI Order, revised Numbered Memo 2020-19 clarified that certain omissions by a witness are not defects that require a cure: (1) the witness's failure to "list [his or her] ZIP code does not require a cure"; (2) the

witness's listing of a non-residential address, such as a "post office box or other mailing address"; (3) the witness's omission of certain address information where the county board is able to "determine the correct address"; and (4) the witness "signed on the wrong line." Redline at 4. Even if there were evidence that a small number of previously-cast ballots were spoiled for these reasons (there is none), those voters still have a chance to vote a newly-issued ballot prospectively. Their votes are not finally rejected such that there is arbitrary and disparate dispositions of similarly-situated ballots. *Bush v. Gore* is not violated by this clarification.

Each of the provisions listed above are required to fully effectuate the PI Order in Democracy N.C. and do not implicate the equal protection concerns Plaintiffs have identified. Further, allowing them to take effect poses no risk of voter confusion. Voters typically never learn of cure procedures; only a relatively small minority will ever need to avail themselves of these procedures. Accordingly, a change in the cure procedure at this time will not cause voter confusion and will eliminate county board staff members' confusion.

As a result, the Court should deny Plaintiffs' motion for a preliminary injunction as to these aspects of Numbered Memo

2020-19.[7]

**CONCLUSION**

Accordingly, this Court should deny Plaintiffs' Motion for a Preliminary Injunction. Even if the Motion is granted as a whole or in part, this Court should order an immediate revision of revised Numbered Memo's 2020-19 few disputed provisions and not enjoin revised Numbered Memo 2020-19 in full.

Respectfully submitted this, the 7th day of October, 2020,


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[7] Intervenor-Defendants take no position on whether the other provisions of Numbered Memo 2020-19 addressing the witness certification are required by the PI Order in *Democracy N.C.*

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**WORD CERTIFICATION**

Pursuant to Local Rule 7.3(f)(3), the undersigned certifies that the word count for PROPOSED DEFENDANT-INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION is 5483 words. The word count excludes the case caption, signature lines, cover page, and required certificates of counsel. In making this certification, the undersigned has relied upon the word count of Microsoft Word, which was used to prepare the brief.

*/s/ George P. Varghese*
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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that, on October 7, 2020, PROPOSED DEFENDANT-INTERVENORS' PROPOSED RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION was served on all counsel of record by electronic filing via the CM/ECF system.

*/s/ George P. Varghese*
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