

No. 20-2063

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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PATSY J. WISE; REGIS CLIFFORD; SAMUEL GRAYSON BAUM;  
DONALD J. TRUMP FOR PRESIDENT, INC.; GREGORY F. MURPHY,  
U.S. Congressman; DANIEL BISHOP, U.S. Congressman;  
REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN  
SENATORIAL COMMITTEE; NATIONAL REPUBLICAN  
CONGRESSIONAL COMMITTEE; NORTH CAROLINA REPUBLICAN  
PARTY; CAMILLE ANNETTE BAMBINI

*Plaintiff-Appellees,*

v.

DAMON CIRCOSTA, in his official capacity as Chair of the State Board  
of Elections; STELLA ANDERSON, in her official capacity as Secretary  
of the State Board of Elections; JEFF CARMON, in his official capacity  
as Member of the NC State Board of Elections; KAREN BRINSON  
BELL, in her official capacity as Executive Director of the North  
Carolina State Board of Elections

*Appellants,*

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On Appeal From the United States District Court for the  
Middle District of North Carolina  
Case No. 1:20-cv-00912-WO-JLW

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**APPELLEE'S OPPOSITION TO APPELLANTS'  
MOTION FOR TEMPORARY ADMINISTRATIVE STAY**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Patsy J. Wise, Regis Clifford, Camille Annette, Samuel Grayson Baum, U.S. Congressman Daniel Bishop, U.S. Congressman Gregory F. Murphy, Donald J. Trump for President, Inc., Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and North Carolina Republican Party hereby notify the Court that they have no parent corporation and that no publicly held corporation owns any of their stock. No other publicly held corporation has a direct financial interest in the outcome of this litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

## INTRODUCTION

The temporary restraining order in this case preserves the status quo—under which more than 330,000 North Carolinians had already voted—whereas the ever-changing Numbered Memos dramatically upset the status quo. The very first Memos were released on September 22, eighteen days after voting began on September 4, and were to become effective only upon approval by the Wake County Superior Court. That approval occurred at the close of business on October 2, but the TRO issued hours later on the morning of October 3, before the Memos could become effective. Thus, movants’ assertion that a stay is necessary to preserve the status quo is incorrect. A stay would cause a radical and disruptive change in voting procedures that have now been underway for more than a month. Just yesterday, the Supreme Court reemphasized the importance of not changing election procedures close to, much less during, an election.

Further, claims that the movants have a substantial probability of success on this appeal are vastly overstated. The Memos are in direct conflict with clear and unambiguous state statutes that the North Carolina General Assembly revised, in full consideration of the



pandemic, in June 2020, and which Appellant vigorously and successfully defended in two cases before abruptly changing its position with the Consent Judgment. The Board of Elections' disregard of those statutes in the Memos is not only an affront to the Elections Clause of the United States Constitution, it jeopardizes the ability of all citizens to vote in a fair and accurate election. The TRO was entered in recognition of these critical interests, and nothing movants say in their motion papers overcomes the burden on voters of allowing the Memos to go into effect.

### **BACKGROUND**

After careful consideration of the pandemic, the primaries conducted in other states (such as Wisconsin) in recent months, and challenges to the U.S. Postal services during those primaries, the North Carolina General Assembly passed HB 1169 in June by overwhelming bipartisan majorities in both the House and Senate. Governor Cooper signed the bill and it became law. At least seven lawsuits challenging the statute have been filed. For three months the North Carolina State Board of Elections ("BOE") vigorously defended the legislation on factual

and legal grounds, prevailing in all material respects in two cases, one in Federal court and one before a three-judge state court.<sup>1</sup>

On September 22, 2020, however—after absentee voting had been ongoing since September 4—the BOE suddenly announced a secretly-negotiated proposed “Consent Judgment” with the plaintiffs in *North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections*, No 20-CVS-8881 (Sup. Ct. Wake Cnty.). In accord with that deal, the BOE issued three “Numbered Memos.” Those Memos purported to make substantial (not minor) changes to several North Carolina election statutes, including (1) the requirement that all absentee ballot envelopes be signed by one witness (the “Witness Requirement”); (2) the requirement that absentee ballots carry a postmark no later than Election Day (the “Postmark Requirement”); (3) 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 (the “Receipt Deadline”); and (4) laws limiting the assistance

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<sup>1</sup> See *Democracy North Carolina v. N.C. State Bd. of Elections*, \_\_\_ F. Supp. 3d \_\_\_, 2020 WL 4484063, at \*64 (M.D.N.C. Aug. 4, 2020); *Chambers v. State of North Carolina*, No. 20 CVS 5001242 (Sup. Ct. Wake Cnty Sept. 3, 2020) (Lock, J., Bell J., Hinton, J.).

that voters can receive with the completion, submission, and delivery of their absentee ballots (the “Application Assistance Ban” and “Ballot Delivery Ban”). The Alliance court approved the Consent Judgment on October 2.

As relevant here, the BOE’s new “Numbered Memos” do the following:

- Revised Numbered Memo 2020-19 purports to revise Numbered Memo 2020-19 issued on August 21. Among other things, this memo would undermine the statutory requirement, *see* N.C.G.S. § 163-231(a), that another person witness an absentee ballot, by allowing 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. *See* Exhibit 1.
- Numbered Memo 2020-22 applies to “remaining elections in 2020,” and provides that absentee ballots are timely if “the ballot is postmarked on or before Election Day and received by **nine days** after the election [November 12], which is Thursday, November 12, 2020 at 5:00 p.m.” In contrast, the statute requires ballots to be received by **three days** after the election [November

6]. *See id.* § 163-231(b)(2)(b). The Memo also eliminated the Postmark Requirement by deeming a ballot “postmarked” if there is information in BallotTrax (BOE’s tracking system), or another tracking service showing that the ballot was “in the custody of USPS or the commercial carrier on or before Election.”

*Id.* *See* Exhibit 2.

- Numbered Memo 2020-23 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.” Similarly, the Memo negates 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. Compare id.* § 163-226.3 (restricting who can handle a completed ballot). *See* Exhibit 3.

Because these Memos flout North Carolina’s election statutes and are already causing chaos in the election, the Plaintiffs here filed a Complaint and Motion for Temporary Restraining Order in the U.S.

District Court for the Eastern District of North Carolina to preserve North Carolina's election regime and prevent the BOE from violating their federal constitutional rights. See Compl., *Wise* Dkt. 1; Mtn. for Temporary Restraining Order, Dkt. No. 4; see also *Moore v. Circosta*, No. 20-cv-507-D, Compl., Dkt. 1 (E.D.N.C. Sept. 26, 2020) (raising similar challenges).

On October 3, Judge James C. Dever III granted the TRO and temporarily restrained the defendants in *Wise* and *Moore* from enforcing the Numbered Memos “or any similar memoranda or policy statement that does not comply with the requirement of the Equal Protection Clause.” Dkt. No. 25 at \*19. By the time of the Order, 1,116,696 absentee ballots had been requested and 340,795 had already been returned as voted.<sup>2</sup> The order is “intended to maintain the status quo,” and remains in effect until no later than October 16, 2020. *Id.* The Order does not purport to restrain any state court proceedings. Both complaints (*Wise* and *Moore*) were transferred to the U.S. District Court for the Middle District of North Carolina (William L. Osteen, Jr.) for further

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<sup>2</sup> See <https://www.ncsbe.gov/results-data/absentee-data>.

proceedings. *Id.* Judge Osteen has scheduled a preliminary injunction hearing in this case for Thursday, October 8, 2020.

The BOE has recently issued three additional numbered memoranda, one on October 1 and two on October 4:

- Numbered Memo 2020-27 (issued October 1, 2020) purports to withdraw the revised version of Numbered Memo 2020-19 (issued on September 22). The Memo also instructs county boards of election to “take no action” on absentee ballot envelopes that have no witness, but says the remainder of Revised Memo 2020-19 “remains in effect.” *See* Exhibit 4.
- Numbered Memo 2020-28 (issued October 4, 2020) instructs that “Numbered Memos 2020-19, 2020-22, 2020-23, and 2020-27 are on hold” because of “conflicting orders” issued in the *Alliance* action, *Moore* action, and this action. This Numbered Memo also puts on hold the first version of Numbered Memo 2020-19, issued on August 21, 2020, which set forth a cure procedure as required by the Court’s ruling in *Democracy North Carolina*. In particular, Numbered Memo 2020-28 states that “[c]ounty boards that receive an executed absentee container-return envelope with a deficiency shall take no

action as to that envelope,” but must maintain deficient ballots in a secure location until further notice. *Id.* at 1–2. If a voter inquires as to the status of her ballot, the Numbered Memo instructs county boards to state: “We have received your ballot and there is an issue. Currently the cure process is being considered by the courts. We will contact you soon with more information.” *Id.* at 2. *See* Exhibit 5.

- Numbered Memo 2020-29 (issued October 4, 2020) purports to give “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.” This Numbered Memo seems inconsistent with Numbered Memo 2020-28, which was issued the same day and instructed county boards to “take no action” on envelopes that have “a deficiency.” Moreover, the Board’s instruction that county boards fill in absentee ballot information on the envelope is inconsistent with the requirement that the witness “*signed the application and certificate as a witness and printed that person’s name and address on the container-return envelope.*” HB 1169 sec 1(a)

(emphasis added). While the General Assembly has deemed failure to list zip code as not disqualifying, *see* N.C. Gen. Stat. § 163A-1310(a) (5), the failure to list street, city, or even state is not excused. *See* Exhibit 6.

With Numbered Memos 2020-27, 2020-28, and 2020-29, the BOE has now issued no less than seven memos to county boards since announcing the Consent Judgment on September 22. These Numbered Memos are not mere procedural clarifications: they represent a full-frontal assault on core aspects of North Carolina's election procedures recently upheld by two U.S. District Courts and a three judge panel of the Wake County Superior Court.

## ARGUMENT

### **I. THIS COURT LACKS JURISDICTION OVER THE APPEAL.**

“Ordinarily a TRO is not an appealable order,” *Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1029-30 (4th Cir. 1976), and this one is no exception. The district court's temporary restraining order is set to expire on October 16, and Judge Osteen has scheduled a preliminary injunction hearing for Thursday October 8. The district court's order is therefore well outside the bounds of an exceptional TRO order that would be



appealable by virtue of “effectively grant[ing] the plaintiff all of the relief which it sought.” *Id.* at 1030. The motion for a stay should be dismissed for that reason.

## II. APPELLANTS’ ONGOING CHANGES TO ELECTION PROCEDURES DISRUPT VOTING AND VIOLATE APPELLEES’ RIGHTS.

Under *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. Indeed, “[v]oters, who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Id.* at 4. The Supreme Court reaffirmed these principles only yesterday, when it stayed a district court’s injunction of South Carolina’s witness requirement for absentee ballots. *See Andino v. Middleton*, No. 20A55, 592 U.S. \_\_\_, 2020 WL 5887393 (Oct. 5, 2020). The BOE’s issuance of seven memoranda making material changes in the rules over a two week period—after voting was underway and 330,000 North Carolinians had already voted—raises the very same concern.

In *Purcell*, the plaintiffs challenged 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 this principle in election litigation involving changes courts **and** election officials sought to implement too close to an election. *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 interference 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”). And the Court has continued to recognize

that this principle applies 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”).

The Supreme Court’s order yesterday in *Andino v. Middleton*, 592 U.S. \_\_\_, 2020 WL 5887393 (2020) makes clear that a stay of the district court’s injunction is improper. *Andino* involved a challenge to a witness requirement for absentee ballots similar to the North Carolina Witness Requirement. Weeks ago, on September 18, the plaintiffs in *Andino* persuaded a District Court to preliminarily enjoin the requirement. *See Middleton v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 5591590 (D.S.C. Sept. 18, 2020). Defendants in that case appealed the decision, and although the Fourth Circuit initially issued a stay of the injunction pending appeal, No. 20-2022, 2020 WL 5739010 (4th Cir. Sept. 24, 2020), on September 25, the en banc Court, vacated the order staying the district court’s injunction, No. 20-2022, 2020 WL 5752607 (4th Cir. Sept. 25, 2020) (en banc). Yesterday, the Supreme Court stayed the district

court's injunction. No. 20A55, 2020 WL 5887393 (S. Ct. Oct. 5, 2020). In a concurring opinion, Justice Kavanaugh noted that (1) "a State legislature's decision either to keep or make changes to election rules to address COVID—19 ordinarily 'should not be subject to second-guessing by an 'unelected federal judiciary,'" and (2) that "federal courts ordinarily should not alter state election rules in the period close to an election." *Id.* at \*2 (citations omitted).

If it was improper for the District Court in *Andino* to alter the South Carolina absentee ballot witness requirement in **September** it is also improper for this Court to stay the district court's injunction and thereby allow alteration of the North Carolina absentee ballot witness requirement in **October**. Even if this Court granted relief today, October 6, there would be only 28 days until the election, which is well within the "sensitive timeframe" under *Purcell*. See *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 1,210,936<sup>3</sup> absentee ballots requested and 386,300<sup>4</sup> marked and returned.

While *Andino* involved only a witness requirement, staying the injunction in this case would affect much more fundamental changes to North Carolina election law. In addition to neutering the witness requirement for absentee ballots, a stay of the injunction would result in the following major changes to North Carolina voting law: (1) the receipt deadline for mailed-in ballots, which the Consent Judgment would extend from three to nine days after election day, *compare* N.C.G.S. § 163-231(b)(2) *with* Ex. 2, Numbered Memo 2020-22 at 1; (2) the statutory requirement for mailed ballots to be postmarked by 5:00 p.m. on election day, *compare* N.C.G.S. § 163-231(b)(2) *with* Ex. 2, Numbered Memo 2020-22 at 2; and (3) the statutory restrictions on who is permitted to assist with and deliver completed ballots, *compare* N.C.G.S. § 163-229(b); *id.* §

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<sup>3</sup> See <https://www.ncsbe.gov/> for an updated total.

<sup>4</sup> See <https://www.ncsbe.gov/results-data/absentee-data>.

163-231(a)-(b); *id.* § 163-223.6(a)(5); HB 1169 §§ 1.(a), 2.(a) *with* Ex. 3, Numbered Memo 2020-23 at 2-3.

With such a short time to go before the election and the sweeping changes to the election statutes contemplated by the currently enjoined Consent Judgment, the *Purcell* principle weighs in favor of leaving the temporary restraining order in place, which would do no more than maintain the pre-October 2 status quo until Judge Osteen considers the preliminary injunction. *See Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011) (state not harmed from injunction that prevents it from violating the Constitution). By contrast, implementation of the Numbered Memos will continue to wreak havoc on the voting process. Take the BOE’s contradictory treatment of the Witness Requirement as an example. Up to October 2, the BOE enforced the Witness Requirement and successfully defended it in this Court and before a three-judge state court panel, repeatedly touting its importance to deterring, detecting, and prosecuting fraud. *See Democracy N. Carolina*, 2020 WL 4484063, at \*36 (M.D.N.C. Aug. 4, 2020); *Chambers v. North Carolina*, Case No. 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Sept. 3, 2020). Indeed, to comply with the court’s order in *Democracy North Carolina*, on August

21 the BOE issued the original Numbered Memo 2020-19, under which county boards were required to spoil ballots that did not comply with the Witness Requirement. But then Revised Numbered Memo 2020-19, issued on September 22, allowed voters to fix deficiencies related to the Witness Requirement through a certification signed by the *voter*, with *no witness*. But the BOE back-tracked on October 1 with Numbered Memo 2020-27, which instructed county boards to “take no action” on “executed absentee container-return envelope[s] with a missing witness signature.” That Numbered Memo left the remainder of Revised Numbered Memo 2020-19 in place, but only three days later the BOE suspended Revised Numbered Memo 2020-19 *in its entirety*. And if those Numbered Memos were not confusing enough, for good measure the Board issued another memo that same day which purported to provide “clarification” on handling ballot return envelopes with missing address, zip code, or city information.

This saga of Numbered Memos affecting the Witness Requirement is perhaps the most glaring example of the confusion that the BOE has created over the last two weeks, but it is not the only one. To use an obvious example, the BOE tells voters they cannot use drop boxes to

submit ballots, but then instructs county boards that they must count all ballots placed in drop boxes. 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, in addition to blatantly undermining a statute duly enacted by the General Assembly, 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. *Cf. Common Cause v. Thomsen*, 2020 WL 5665475, at \*2 (W.D. Wisc. Sept. 23, 2020) (noting this risk). If these changes are allowed, the voter confusion feared in *Purcell* is a certainty.

Finally, the aggregate impact of the Consent Judgment on election administrators would be material, who must spend additional time learning these new procedures while keeping up with absentee ballot requests and returns. 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. Further, the new Memos contain numerous ambiguities. 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. Finally, all of this confusion, together with the enormous increase in absentee ballots expected in the 2020 election, means that county boards will have an ample challenge to complete their canvass in the days between the final day for receipt of absentee ballots and the canvass on November 13. Yet, the BOE is trying to reduce the time between last receipt of absentee ballots from six days before the canvas (November 6 as required by statute), to one day before the canvass (November 12 according to Numbered Memo 2020-22). All this mixed together is a recipe for chaos.

Any argument from the BOE that this lawsuit has created confusion is a non-starter. This is a mess entirely of the BOE’s own creation. After successfully defending North Carolina’s election code for five months in *Democracy North Carolina*, in *Chambers*, and numerous other cases, it secretly negotiated and entered a backroom deal with the *Alliance* plaintiffs, producing the Consent Judgment and Numbered Memos. The BOE could have avoided all of this trouble simply by adhering to its own limited role under North Carolina’s Constitution as

the administrator of state elections, not the drafter or reviser of the election code. Once the BOE decided to change the election code through administrative fiat, Plaintiffs were forced to act in order to protect their federal constitutional rights, as Judge Dever recognized. *See generally Wise* Dkt. No. 25. By entering the TRO hours after the Consent Judgment was approved—and before the challenged Numbered Memos could take effect—it was Judge Dever who maintained the status quo as set forth in HB 1169. Vacating the TRO now would unleash the confusion that only the TRO is forestalling.

### **III. GRANTING A STAY WOULD BE INCONSISTENT WITH DECISIONS FROM MULTIPLE FEDERAL AND STATE COURTS.**

Granting Appellants' requested stay would be inconsistent with the decisions of multiple federal and state courts, which have (1) upheld the constitutionality of the very statutory requirements that the Numbered Memos would eliminate, and (2) questioned the legality of the State Board of Elections' attempts to unilaterally nullify those same requirements. *See Chambers v. North Carolina*, Case No. 20-CVS-500124, Order (Sup. Ct. Wake Cnty. Sept. 3, 2020) (Lock, J., Bell, J., Hinton, J.); *Democracy North Carolina v. N.C. State Bd. of Elections*, No.

1:20-cv-457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) (Osteen, J.); *Wise v. N.C. State Bd. of Elections*, No. 5:20-cv-505-D (E.D.N.C.) (Dever, J.).

Both a federal and state court have upheld the constitutionality of multiple statutory requirements that the State Board's Numbered Memos would nullify, including the Witness Requirement, Receipt Deadline, Postage Requirement, Assistance Ban, and Ballot Delivery Ban. In a comprehensive 188-page decision issued on August 4 in *Democracy North Carolina*, the Middle District of North Carolina granted limited relief but otherwise ruled against a set of plaintiffs who alleged that numerous provisions of North Carolina's election code violated federal constitutional and statutory law. *Democracy North Carolina*, 2020 WL 4484063, at \*5–10. The *Democracy North Carolina* plaintiffs lost on the claims that are relevant here: namely, their constitutional challenges to the Witness Requirement, Receipt Deadline, Postage Requirement, Assistance Ban, and Ballot Delivery Ban. *See id.* at \*1, 64. The court determined that plaintiffs were unlikely to succeed in striking down the Witness Requirement, because the health risk from fulfilling the requirement was minimal even for elderly, high-risk voters, while the benefit to State from fraud deterrence was significant. *Id.* at

\*24–33. Furthermore, the other challenged provisions, including the Ballot Assistance and Delivery Bans, served the purposes of “combating election fraud” and enabling the State to administer orderly elections, making them likely to survive plaintiffs’ constitutional challenges. *Id.* at \*38, 51–52.

The federal court’s decision to uphold the constitutionality of the Witness Requirement foreshadowed a subsequent decision in North Carolina state court. On September 3, the day before absentee voting began, a three-judge panel of the Wake County Superior Court denied a motion to enjoin the Witness Requirement, determining that there was not a substantial likelihood that the plaintiffs would prevail on the merits. *See Chambers*, Case No. 20-CVS-500124, at 6. The panel further recognized that “the equities do not weigh in [plaintiffs’] favor” due to the proximity of the election, the tremendous costs that the injunction would impose on the State, and the confusion such a decision would create for voters. *Id.* at 7. Granting plaintiffs’ requested relief at such a late stage “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 added).

Now that absentee voting has been well underway for over a month, with over 1,210,936<sup>5</sup> absentee ballots requested and 386,300<sup>6</sup> returned, the risk of voter confusion from granting an injunction against the Witness Requirement and other statutory voting provisions has only increased—making it ever more paramount to ensure that the State Board’s Numbered Memos do not go into effect and throw the process into chaos based on an agency action that rests on dubious statutory and constitutional footing.

Two federal district court judges have expressed such concerns about the legality and risks associated with the State Board’s decision to issue the Numbered Memos that are challenged in this lawsuit. After the State Board filed a copy of Revised Numbered Memo 2020-19 in the Middle District of North Carolina, that court ordered a status conference at the “earliest possible date and time,” stating it “d[id] not find [Revised Numbered Memo 2020-19] consistent with [its] previous order” because

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<sup>5</sup> See <https://www.ncsbe.gov/> for an updated total.

<sup>6</sup> See <https://www.ncsbe.gov/results-data/absentee-data>.

“it appear[ed] to th[e] court that Memo 2020-19 . . . may be reasonably interpreted to eliminate the one-witness requirement under the guise of compliance with th[e] court’s order.” *Democracy North Carolina*, No. 20-cv-00457, Order at \*12 (M.D.N.C. Sept. 30, 2020). In a subsequent order, the court clarified that, “[c]ontrary to the [BOE Defendants’] suggestion,” it did “not intend to instruct state officials on how to conform their conduct to state law.” *Democracy North Carolina*, No. 20-cv-00457, Order, Dkt. 152, at \*5 (M.D.N.C. Oct. 2, 2020). And it continued to express concern that its “preliminary injunction was used to obtain relief [(i.e. elimination of the Witness Requirement) that the] court denied in the first instance.” *Id.*

The Eastern District of North Carolina came to a similar set of determinations in its review of Appellees’ motion for a temporary restraining order. After the BOE asked the Superior Court to enter the secretly-negotiated Consent Judgment, the Republican Committees and certain other individuals filed suit in the United States District Court for the Eastern District of North Carolina challenging the Consent Judgment based on four violations of the U.S. Constitution. *Wise v. North Carolina State Board of Elections*, No. 5:20-cv-505-D, Complaint, Dkt. 1

(E.D.N.C. Sept. 26, 2020). The Eastern District of North Carolina granted the temporary restraining order, determining that “plaintiffs’ argument concerning the Equal Protection Clause [is] persuasive,” and the irreparable harm, balance of the equities, and public interest factors each weighed in favor of that relief. Leland Decl, Ex. X, Moore, No. 20-CV-507, Order at \*12, 19 (E.D.N.C. Oct. 3, 2020). The court reiterated the concerns that have motivated other federal and state courts to refrain from altering North Carolina’s absentee voting provisions: the “Numbered Memos would “materially chang[e] the electoral process in the middle of an election after over 300,000 people have voted.” *Id.* at \*15. Granting the temporary restraining order was necessary to “restor[e] the status quo for absentee voting in North Carolina.” *Id.* This Court should not hold differently.

#### **IV. THE REPUBLICAN PLAINTIFFS’ REQUEST FOR A TEMPORARY RESTRAINING ORDER IS PROPER.**

Appellants raise three procedural arguments against the Court’s order, none of which divests this court or the U.S. District Court of jurisdiction.

First, the Republican Plaintiffs have standing for their claims. In granting Plaintiffs’ emergency motion for a temporary restraining order,

Judge Dever recognized that Plaintiffs satisfy the requirements for standing—his order notes that (1) Plaintiffs complain of a “constitutional harm” (2) brought about by the Board of Elections’ actions that “materially chang[ed] the electoral process in the middle of an election,” and (3) that harm is “irreparable” absent some action by the court in their favor. *See* Dkt. No. 25 at 15. There can be no serious dispute that the Plaintiff voters and candidates, as the primary participants in elections, are impacted by the ever-changing rules at issue here. The Alliance plaintiffs claim standing on the same basis. Further, the Plaintiff political committees have spent considerable time and money educating citizens about the voting process while relying on the Board of Elections’ former memoranda. These organizations suffer when abrupt changes are made as they must then divert additional resources to new efforts in response.

Second, abstention is inappropriate here because that doctrine applies only “when the need to decide a federal constitutional question might be avoided if state courts are given the opportunity to construe ambiguous state law.” *Martin v. Stewart*, 499 F.3d at 363 (4th Cir. 2007) (citation omitted). As passed by the General Assembly, the pertinent



voting statutes are clear and unambiguous, and the Board does not contend otherwise. The questions presented here do not turn on unresolved questions of state law, but on the important federal constitutional issues raised by the Board's attempt to supersede necessary and appropriate legislation passed by a bipartisan majority of the General Assembly. Nor, unlike *Younger v. Harris*, have the Plaintiffs asked the Court to interfere in any way with a pending state court action. Rather, Plaintiffs seek to enjoin the BOE from implementing the Numbered Memos in violation of the federal Constitution.

Third, issue preclusion also does not bar the Plaintiffs' Equal Protection Claim. The *Alliance* case ended with a consent judgment between the *Alliance* plaintiffs and the BOE. But a negotiated settlement between parties like the Consent Judgment does not constitute a final judgment for issue preclusion. *See Arizona v. California*, 530 U.S. 392, 414, supplemented, 531 U.S. 1, (2000) ("consent judgments do not support issue preclusion"). The claims settled in *Alliance* were claims seeking to invalidate the election statutes; the Plaintiffs' claims are efforts to *defend and uphold* those statutes. Further, the Republican Committees' objected to the *Alliance* Consent

Judgment and were not parties to that agreement. Finally, the individual voters and Members of Congress were not parties to the *Alliance* action, have separate interests, and are in no way bound by that ruling.

**V. THE U.S. DISTRICT COURT SHOULD BE PERMITTED TO DECIDE THESE ISSUES AT ITS OCTOBER 8 HEARING.**

The BOE and *Alliance* plaintiffs argue that the district court did not meaningfully address the BOE's argument that the district court lacked authority to address these claims. BOE Mot. at 10. As discussed above, that is not correct, but in any event, this matter is scheduled for a preliminary injunction hearing on Thursday, October 8, at which the court will fully consider all the arguments being made here. *Wise v. N.C. State Board of Elections*, 20-cv-912, Order (M.D.N.C. Oct. 5, 2020).

**CONCLUSION**

For the foregoing reasons, the Republican Plaintiffs urge the Court to deny Appellants request for an administrative stay.

Dated: October 6, 2020

Respectfully submitted,

/s/ Bobby R. Burchfield

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE  
REQUIREMENTS**

1. This brief with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5177 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. (32)(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in fourteen-point Century Schoolbook.

Dated: October 6, 2020

Respectfully submitted,

/s/ Bobby R. Burchfield

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*Counsel for Appellees*

## CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2020, I caused the foregoing Motion to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record, effecting service on them. *See* 4th Cir. R. 25(a).

/s/ Bobby R. Burchfield

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# Exhibit 1



# NORTH CAROLINA

---

## STATE BOARD OF ELECTIONS

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### 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)

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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.<sup>1</sup>

#### 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.

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<sup>1</sup> 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<sup>2</sup>
- Witness or assistant did not print address<sup>3</sup>
- Witness or assistant did not sign
- Witness or assistant signed on the wrong line

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<sup>2</sup> 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.

<sup>3</sup> 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 bipartisan 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.

# Exhibit 2



# NORTH CAROLINA

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## STATE BOARD OF ELECTIONS

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P.O. Box 27255  
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### 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

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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.<sup>1</sup>**

#### 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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<sup>1</sup> 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 3



# NORTH CAROLINA

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### 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

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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.<sup>1</sup> A bipartisan 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

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<sup>1</sup> 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.<sup>2</sup> **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.<sup>3</sup> A county board shall not disapprove an absentee ballot solely because it was delivered by someone who was not authorized

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<sup>2</sup> 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.

<sup>3</sup> *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.<sup>4</sup>

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.

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<sup>4</sup> *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.

# Exhibit 4



# NORTH CAROLINA

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## STATE BOARD OF ELECTIONS

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### Numbered Memo 2020-27

**TO:** County Boards of Elections  
**FROM:** Karen Brinson Bell, Executive Director  
**RE:** Court Order Regarding Witness Signature Deficiency  
**DATE:** October 1, 2020

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On September 30, 2020, the U.S. District Court for the Middle District of North Carolina issued an order requiring the parties to attend a status conference to discuss Numbered Memo 2020-19. *Democracy NC v. State Board*, 1:20CV457, Order on Status Conference (M.D.N.C. Sept. 30, 2020). In the [order](#), the court states it does 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 be cured with a certification after the ballot has been returned.” *Id.* at 3-4. In order to avoid confusion while related matters are pending in a number of courts, this memo is issued effective immediately and is in place until further numbered memo from the State Board.

**County boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope.** This includes any container-return envelopes that contain multiple deficiencies that include a missing witness signature. County boards shall not send a cure certification or reissue the ballot if they receive an executed container-return envelope without a witness signature. Absentee envelopes with a missing witness signature shall be kept in a secure location and shall not be considered by the county board until further notice. Once the State Board receives further direction from a court, we will issue guidance to county boards on what actions they should take regarding container-return envelopes with a missing witness signature. Guidance will also address how to handle ballots with a missing witness signature that were previously acted upon by the county board if a cure certification has been returned.

**In all other respects, [Numbered Memo 2020-19](#), as revised on September 22, 2020, remains in effect.** This means that county boards shall continue to issue cure certifications for all other deficiencies identified in Section 2.1 of Numbered Memo 2020-19 and shall follow the processes outlined in the memo for all deficiencies except a missing witness signature.

# Exhibit 5



# NORTH CAROLINA

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## 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 2020-28

**TO:** County Boards of Elections  
**FROM:** Karen Brinson Bell, Executive Director  
**RE:** Court Orders Regarding Numbered Memos  
**DATE:** October 4, 2020

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To avoid confusion while related matters are pending in a number of courts, this memo is issued effective immediately and is in place until further numbered memo(s) is issued by the State Board.

For the reasons set forth in this memo, Numbered Memos 2020-19 (both versions), 2020-22, 2020-23 and 2020-27 are on hold until further notice from the State Board. On October 2, 2020, the Wake County Superior Court in *NC Alliance v. State Board* entered a consent judgment ordering that, to settle all of plaintiffs' claims, Numbered Memo 2020-19 (Absentee Container-Return Envelope Deficiencies), Numbered Memo 2020-22 (Return Deadline for Mailed Civilian Absentee Ballots in 2020), and Numbered Memo 2020-23 (In-Person Return of Absentee Ballots) shall be issued.

However, on October 3, 2020, the U.S. District Court for the Eastern District of North Carolina temporarily blocked the State Board from enforcing the same numbered memos. The court also transferred the cases to the U.S. District Court for the Middle District of North Carolina that has jurisdiction over the *Democracy NC* case. *Moore v. Circosta*, 5:20-CV-507-D, (E.D.N.C. Oct. 3, 2020); *Wise v. State Board*, 5:20-CV-507-D, (E.D.N.C. Oct. 3, 2020). The State Board's attorneys are reviewing these competing orders and will provide guidance as soon as possible on how to move forward.

**At this time, because of these conflicting orders, Numbered Memos 2020-19, 2020-22, 2020-23 and 2020-27 are on hold.**

**County boards that receive an executed absentee container-return envelope with a deficiency shall take no action as to that envelope.** County boards shall not send a cure certification or reissue the ballot if they receive an executed container-return envelope with any deficiency. County boards also may not accept or reject any ballots if the container-return envelope has any

deficiencies. Envelopes with deficiencies shall be kept in a secure location and shall not be considered by the county board until further notice. Once the State Board receives further direction from a court, we will issue guidance to county boards on what actions they should take regarding container-return envelopes with deficiencies. If a county board has previously reissued a ballot, and the second envelope is returned without any deficiencies, the county board may approve the second ballot.

County boards that receive deficient envelopes shall not check them into SEIMS. We recommend that, if a voter calls your office and wants to know about the status of their deficient ballot, your staff state: “We have received your ballot and there is an issue. *Currently the cure process is being considered by the courts.* We will contact you soon with more information.” If the ballot has a deficiency, do not issue a cure certification or spoil the ballot even upon a voter’s request.



# Exhibit 6



# NORTH CAROLINA

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*Fax:* (919) 715-0135

### Numbered Memo 2020-29

**TO:** County Boards of Elections  
**FROM:** Karen Brinson Bell, Executive Director  
**RE:** Witness or Assistant Address Issues on the Absentee Container-Return Envelope  
**DATE:** October 4, 2020

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This memo is issued to provide 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.

#### If No Address

If a witness or assistant does not print their address, the envelope is deficient.

#### Missing ZIP Code or City

As previously explained in Footnote 3 of Numbered Memo 2020-19, 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 City and ZIP Code Missing

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 is deficient. If one of the following criteria are met, you can determine the address and the envelope is not deficient:

- The witness or assistant's address is the same as the voter's address – either because the witness or assistant wrote "same as above" or something similar on the address line or because the partial address provided matches the address of the voter – or it is on the same street as the voter's address;
- The witness's or assistant's name and partial address match that of a registered voter in your county in SEIMS; or

- The street address is a valid address in your county. You may confirm this using a county GIS website<sup>1</sup> or office, or a similar tool. Do not use an online directions tool such as Google Maps, which does not identify whether an address is valid.

If there is only a street address and none of the above criteria are met, the county board cannot determine the address and the envelope is deficient. If a P.O. box is listed but the address provided does not include a city or ZIP code, it is not possible to determine the address and the envelope is deficient.

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<sup>1</sup> <https://www.lib.ncsu.edu/gis/counties.html>