STATE OF NORTH CAROLINA COUNTY OF WAKE	)	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
	)	
	)	CASE NO. 20 CVS 8881
NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; AND CAREN RABINOWITZ, PLAINTIFFS, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAMON CIRCOSTA, *Chair of the North Carolina State Board of Elections*, DEFENDANTS, *and* PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; *and* TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*, INTERVENOR-DEFENDANTS, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; AND NORTH CAROLINA REPUBLICAN PARTY; REPUBLICAN COMMITTEE INTERVENOR-DEFENDANTS. _____	)	**LEGISLATIVE DEFENDANTS' OPPOSITION TO PLAINTIFFS' AND EXECUTIVE DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT JUDGMENT**

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

I. Introduction

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

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

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

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

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

II. Standard

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

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

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

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

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

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

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

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

III. Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The proposed consent judgment undermines North Carolina's election statutes and effectively nullifies statutes enacted by the General Assembly while depriving the State of its ability to "enforce its duly enacted" laws. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). The proposed consent judgment violates two provisions of the federal Constitution that protect North Carolina's elections and the right to vote: the Elections Clause and the Equal Protection Clause.

1. The Proposed Consent Judgment Violates the Elections Clause

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Neither the NCSBE nor this Court have the authority to override the General Assembly's exercise of this authority through the proposed consent judgment. If entered, therefore, the consent judgment would be unconstitutional because it would overrule the enactments of the General Assembly to regulate the times, places, and manner of holding the upcoming federal election.[1]

The General Assembly is the "Legislature," established by the people of North Carolina. N.C. CONST. art. II, § 1. And the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme

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

judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). With this grant of exclusive legislative power, the General Assembly is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the State. *Id.* Concurrently, this exclusive grant of legislative power means the U.S. Constitution has assigned the role of regulating federal elections in North Carolina to the General Assembly.

The word "Legislature" in the Elections Clause was "not . . . of uncertain meaning when incorporated into the Constitution." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). And "the Legislature" means now what it meant then, "the representative body which ma[kes] the laws of the people." *Id.*; *see, e.g.*, THE FEDERALIST NO. 27, at 174–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (defining "the State legislatures" as "select bodies of men"); NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "Legislature" as "the body of men in a state or kingdom, invested with power to make and repeal laws"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (defining "Legislature" as "[t]he power that makes laws"). By choosing to use the word "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch, *Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814, and in North Carolina that is the General Assembly.

The Framers had a number of reasons to delegate (subject to Congress's supervisory power) the task of regulating federal elections to state Legislatures like the General Assembly. Specifically, the Framers understood the regulation of federal elections to be an inherently legislative act. After all, regulating elections "involves lawmaking in its essential features and most important aspect." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *cf. Ariz. Indep. Redistricting*

Comm'n, 576 U.S. at 808 (observing that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking"). And so, as one participant in the Massachusetts debate on the ratification of the Constitution explained, "[t]he power . . . to regulate the elections of our federal representatives must be lodged somewhere," and there were "but two bodies wherein it can be lodged—the legislatures of the several states, and the general Congress." 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co., 1881).

Further, the Framers were aware of the possibility that regulations governing federal elections could be ill-designed. James Madison, for instance, acknowledged that those with power to regulate federal elections could "take care so to mould their regulations as to favor the candidates they wished to succeed." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911), *available at* https://bit.ly/3kPvZRu. But as with so many other problems the Framers confronted, their solution was structural and democratic. To ensure appropriate regulation of federal elections, the Elections Clause gives responsibility to the most democratic branch of state government—the Legislature—so that the people may check any abuses at the ballot box. And as a further check, the Elections Clause gives supervisory authority to the most democratic branch of the federal government—the U.S. Congress.

The text and history of the Elections Clause thus confirm that the General Assembly is the only constitutionally empowered state entity to regulate federal elections. And as the Supreme Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—the state legislatures' power to prescribe regulations for federal

elections "cannot be taken." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And courts have long recognized this limitation on the power of states to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

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

Because the People of North Carolina have not granted legislative power to the NCBSE or the Court, this case is far afield from *Arizona Independent Redistricting Commission*. In that case,

the Supreme Court dealt with a provision of the Arizona Constitution—adopted through popular initiative—that vested an independent state commission with authority over drawing federal congressional districts. The state legislature claimed that the federal Elections Clause rendered that allocation of authority invalid, but the Supreme Court disagreed, concluding that the independent state commission simply acted as "a coordinate source of legislation on equal footing with the representative legislative body." *Arizona Indep. Redistricting Comm'n*, 576 U.S. at 795. But here neither the NCSBE nor this Court have legislative power and are not on equal footing with the General Assembly. Indeed, the North Carolina Supreme Court expressly held that a prior version of the NCSBE "clearly performs primarily executive, rather than legislative or judicial, functions." *Cooper v. Berger*, 809 S.E.2d 98, 112 (N.C. 2018). It therefore struck down provisions limiting the Governor's control over the NCSBE. The current version of the statute does not change the nature of the NCSBE's activities but rather addresses the constitutional infirmities recognized by *Cooper*. *Compare id.* at 114, *with* N.C. GEN. STAT. § 163-19.

Even if it were possible in some circumstances for an executive agency like the NCSBE to exercise the authority to prescribe regulations governing the times, places, and manner of federal elections that the Elections Clause assigns exclusively to the legislature (and it is not), the NCSBE would lack authority to do so here. The NCSBE is a creature of statute. *See* N.C. GEN. STAT. § 163-19(a) ("There is established the State Board of Elections . . . ."). And consistent with being a creature of statute, the NCSBE is limited by the statute that created it. "The State Board of Elections shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations . . . as it may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See id.* § 163-22(a) (emphasis added). Thus, the General Assembly has not granted the NCSBE any power to overrule the duly enacted

statutes governing elections or given it any form of legislative power. Quite the contrary, the NCSBE is not allowed to issue any rules or regulations that "conflict" with provisions enacted by the General Assembly.

To be sure, Executive Director Bell has limited statutory authority to make necessary changes to election procedures in response to "a natural disaster." N.C. GEN. STAT. § 163-27.1. But the current pandemic is not a "natural disaster" under the statute and its implementing regulations "describing the emergency powers and the situations in which the emergency powers will be exercised," *id.*; *see* 8 N.C. ADMIN. CODE 1.0106, and the North Carolina Rules Review Commission unanimously rejected an earlier attempt by Executive Director Bell to extend her emergency powers to the pandemic, *see* Rules Review Commission Meeting Minutes at 4 (May 21, 2020), https://bit.ly/3kLAY5y (attached as Ex. 6 to Moss Aff.). In declining to approve the changes to the Rule, the Rules Review Commission explained that the NCSBE "does not have the authority to expand the definition of 'natural disaster' as proposed" in the amendments. *Id.*

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

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

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

The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. Thus, because the proposed consent judgment purports to alter the time, place, and manner for holding the upcoming federal election in a manner that contravenes the General Assembly's duly enacted statutes, its entry would violate the Elections Clause.

2. The Proposed Consent Judgment Violates the Equal Protection Clause

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S.

533, 554 (1964). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941). But the right to vote includes the right to have one's ballot counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted).

To ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court's] decisions."). "[T]reating voters different" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001).

At a minimum then, the Equal Protection Clause requires the "nonarbitrary treatment of voters" and forbids voting practices that are "standardless," without "specific rules designed to ensure uniform treatment." *Bush*, 531 U.S. at 103, 105–06; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). Consequently, the "formulation of uniform rules" is "necessary" because the "want of" such rules may lead to "unequal evaluation of ballots." *Bush*, 531 U.S. at 106.

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

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

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

First, if the proposed consent judgment is entered, North Carolina will be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. As discussed above, North Carolina law requires all absentee ballots to be witnessed by one qualifying adult. *See* HB1169 § 1.(a). North Carolina prohibits any person other than a voter's "near relative" or "verifiable legal guardian" from delivering a completed absentee ballot to a county board of elections. N.C. GEN. STAT. § 163-226.3(a)(5). And North Carolina also requires absentee ballots to be received, at the latest, by 5:00 p.m. three days after election day. These provisions governed the absentee ballot submission process for the 153,664 voters who had already cast their absentee ballots before the proposed consent judgment was announced. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the proposed consent judgment.[3] The proposed consent judgment is thus a sudden about-face on the rules governing the ongoing election that upends the careful bipartisan framework that has structured voting so far.

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

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

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

requires. On August 21, 2020, the NCSBE explained in Numbered Memo 2020-19 that a failure to comply with the witness requirement was a deficiency that *could not* be cured by a post-submission affidavit. *See* N.C. State Bd. of Elections, Numbered Memo 2020-19 ("Original Numbered Memo 2020-19") at 2 (Aug. 21, 2020) (attached as Ex. 7 to Moss Aff.). Instead, the relevant county board of elections was required to spoil the ballot and reissue a new ballot along with an explanatory notice to the voter. *Id.* The lack of a witness was a problem that no affidavit could cure. *Id.* Notably, in federal litigation challenging the witness requirement, Executive Director Bell testified under oath that an absentee ballot with "no witness signature" could not be cured and therefore elections officials would have to "spoil that particular ballot" and require the voter to vote a new one. Evidentiary Hearing Tr. ("*Democracy N.C.* Tr.") at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. July 21, 2020) (attached as Ex. 8 to Moss Aff.).[4]

The NCSBE then arbitrarily changed course and issued an updated Numbered Memo 2020-19 on September 22, 2020 as part of the proposed consent judgment. The new memo explains that an absentee ballot entirely devoid of witness information may be cured with a certification from the voter. *See* N.C. State Bd. of Elections, Numbered Memo 2020-19 at 2–4 (Sept. 22, 2020), https://bit.ly/3666pTV (explaining that deficiencies curable by a certification from the voter include a witness or assistant failing to write their name, address, or signature). This absentee "certification" will transmogrify an entirely unwitnessed (and hence invalid) ballot into a lawful, compliant ballot. All the NCSBE's proposed consent judgment requires is that the voter merely

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

affirm that the voter "voted and returned [her] absentee ballot for the November 3, 2020 general election and that [she] ha[s] not voted and will not vote more than one ballot in this election." Proposed Consent Judgment at 37. The certification does not require voters to affirm that they had their ballots witnessed in the first place or even attempted to follow this important aspect of the law.

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

The *Democracy N.C.* order enjoined the NCSBE "from the disallowance or rejection, or permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *177 (M.D.N.C. Aug. 4, 2020). The evidence in the case made clear that ballots lacking a witness signature are not subject to remediation. As explained above, Executive Director Bell testified under oath that an absentee ballot with "no witness signature" could not be cured and therefore elections officials would have to "spoil that particular ballot" and require the voter to vote a new one. *Democracy N.C.* Tr. at 122. Thus, since failing to procure a witness is not "subject to remediation," any cure for a voter's failure to comply with the witness requirement is *outside the scope* of the remedy ordered by the Middle District of North Carolina.

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

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

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

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

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

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

of the General Assembly's duly enacted statutes but also a further change in the rules while voting is ongoing. The proposed consent judgment also provides a standardless approach by allowing even the anonymous delivery of ballots—facilitating violations of N.C. GEN. STAT. § 163-226.3's prohibition on the delivery of ballots by all but a select few—to unmanned boxes at polling sites. Proposed Consent Judgment at 38–42.

Accordingly, if the proposed consent judgment is entered, North Carolina will necessarily be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. *See Bush*, 531 U.S. at 106. Over 150,000 voters cast their ballots before the proposed consent judgment was unveiled, and therefore worked to comply with the witness requirements and lawful delivery requirements. There is no justification for subjecting North Carolina's electorate to this arbitrary and disparate treatment, especially given that both a North Carolina state court and a North Carolina federal court have rejected motions to preliminarily enjoin the witness requirement, finding that plaintiffs in those cases had not shown a likelihood of success on the merits. *See* Order on Injunctive Relief at 6–7, *Chambers*; *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103. For the NCSBE to suddenly reverse course and capitulate to Plaintiffs' demands despite this demonstrated success in court raises questions as to the rationale underlying a sudden change in policy in the midst of an ongoing election.

ii. The Proposed Consent Judgment Will Dilute Lawfully Cast Votes

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

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

The proposed consent judgment is a denial of the one-person, one-vote principle affixed in the Supreme Court's jurisprudence. Dilution of lawful votes, to any degree, by the casting of unlawful votes violates the right to vote. *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). Moreover, those practices, such as the NCSBE's that promote fraud and dilute the effectiveness of individual votes by allowing illegal votes, violate the Fourteenth Amendment too. *Reynolds*, 377 U.S. at 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."). Thus, when the NCSBE purposely accepts even a single ballot without the required witness, accepts otherwise late ballots beyond the deadline set by the General Assembly, or facilitates the delivery of ballots by unlawful parties, the NCSBE has accepted votes that dilute the weight of lawful North Carolina votes.

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Plaintiffs' Challenges Violate the *Purcell* Principle

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Postage Expenses

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

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

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

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

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

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

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

b. Ballot Receipt Deadline

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

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

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

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

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

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

c. Witness Requirement

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

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

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

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

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

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

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

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

d. Early Voting

Plaintiffs contend that "limitations on the number of days and hours of early voting that counties may offer burdens in-person voting." Pls.' Mem. at 36. They assert that the "pandemic will force counties to offer fewer total early voting locations than they would under normal circumstances, and the resulting fewer cumulative early voting hours will lead to larger crowds and long lines for those who attempt to vote in person." *Id.* These "crowded polling places" will force Plaintiffs to "risk[] their health in order to cast their votes." *Id.*

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

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

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

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

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

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

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

e. Ballot Harvesting Ban

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

Second, although Ms. Johnson, Ms. Rabinowitz, and Rosalyn and Tom Kociemba assert that they are injured by the restrictions on who can deliver completed ballots, Pls.' Mem. at 35–36, they are unlikely to succeed on their challenge to the ballot harvesting ban. Rosalyn and Tom Kociemba, of course, have already voted, so this Court can provide them with no relief. With respect to the others, North Carolina law criminally prohibits anyone other than the voter, the voter's near relative, or the voter's verifiable legal guardian from "return[ing] to a county board of

elections the absentee ballot of any voter." N.C. GEN. STAT. § 163-226.3(a)(5). But given that no criminal prosecutors are defendants in this case, the Court cannot provide relief from this criminal statute as regardless of what this Court does prosecutors will remain free to prosecute violations.

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

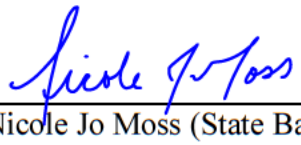
Furthermore, if the Court is inclined to deny Legislative Defendants' request for a stay, then they will seek the same relief from the appellate courts in the form of a motion for temporary stay and petition for writ of supersedeas. *See* N.C. R. App. P. 8(a) ("After a stay order or entry has been denied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

V. Conclusion

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

Dated: September 30, 2020

Respectfully Submitted,



Nicole Jo Moss (State Bar No. 31958)
David Thompson*
Peter Patterson*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, DC 20036
Telephone: (202) 220-9600
Facsimile: (202) 220-9601

Nathan Huff
PHELPS DUNBAR LLP
North Carolina Bar #40626
4140 ParkLake Avenue, Suite 100
Raleigh, North Carolina 27612
Telephone: (919)789 5300
Facsimile: (919)789-5301
Attorneys for Intervenor-Defendants

**Motions to Appear Pro Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

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

For the Plaintiffs:

Marc E. Elias
Uzoma N. Nkwonta
Lalitha D. Madduri
Jyoti Jasrasaria
PERKINS COIE LLP
700 Thirteenth St., NW, Suite 600
Washington, DC 20005-3960
melias@perkinscoie.com
unkwonta@perkinscoie.com
LMadduri@perkinscoie.com
AGlickman@perkinscoie.com
JJasrasaria@perkinscoie.com

Burton Craige, State Bar No. 9180
Narenda K. Ghosh, State Bar No. 37649
Paul E. Smith, State Bar No. 45014
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

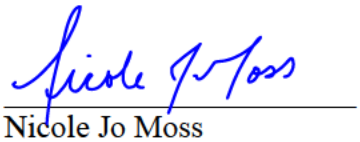
For the State Defendants:

Alec McC. Peters
Terrence Steed
NORTH CAROLINA DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
Tsteed@ncdoj.gov

For Intervenor-Republican Committee Defendants:

R. Scott Tobin, N.C. Bar No. 34317
Taylor English Duma LLP
4208 Six Forks Road, Suite 1000
Raleigh, North Carolina 27609
stobin@taylorenglish.com

Bobby R. Burchfield
Matthew M. Leland
King & Spaulding LLP
1700 Pennsylvania Avenue NW, Suite 200
Washington DC, 20006
bburchfield@kslaw.com
mleland@kslaw.com



Nicole Jo Moss
Cooper & Kirk, PLLC
1523 New Hampshire Ave. NW
Washington, DC 20036