No. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; *and* CAREN RABINOWITZ, *Plaintiffs*, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; *and* DAMON CIRCOSTA, *Chair of the North Carolina State Board of Elections*, *Defendants*, PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; *and* TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*, *Intervenor-Defendants*, *and* REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC; *and* NORTH CAROLINA REPUBLICAN PARTY,	From Wake County No. 20 CVS 8881

Republican Committee)
Intervenor-Defendants.)

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PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

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 petition this Court to issue a temporary stay and a writ of supersedeas. On October 2, 2020, the Wake County Superior Court, the Honorable George B. Collins, Jr. presiding, entered an order approving a proposed consent judgment between Plaintiffs and the North Carolina State Board of Elections ("NCSBE") that radically changes North Carolina election procedures ***in the midst of an election in which hundreds of thousands of citizens have already voted*** and in contradiction to duly enacted North Carolina law. Absent immediate relief, the implementation of the consent judgment will engender substantial confusion among both voters and election officials, create considerable administrative burdens, and produce disparate treatment of voters in the ongoing election—all after voting has already started, a paltry 6 days before in-person early voting begins, and a mere 25 days from election day. The consent judgment will do this in contravention of the North Carolina Constitution, the North Carolina General Statutes, and the federal

Constitution. The Superior Court entered this extraordinary, damaging, and unlawful consent judgment despite the fundamental defects and independently dispositive shortcomings that render the consent judgment likely to be reversed on appeal.

In asking the Superior Court to enter the consent judgment, the NCSBE 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, *id.* § 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. Now pursuant to their consent judgment with the NCSBE, they have radically changed North Carolina election procedures in contradiction to North Carolina law, including by vitiating the witness requirement, extending the absentee ballot receipt deadline, amending the postmark requirement for ballots 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, this Court is likely to vacate the consent judgment for at least six independent reasons. *First*, because Plaintiffs assert facial challenges to the election laws at issue, the single-judge Superior Court did not have jurisdiction to consider their claims and enter the consent judgment. *See State v. Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 553–54 (2019); N.C. GEN. STAT. §§ 1A-1, Rule 42, 1-81.1(a1), 1-267.1(a1). *Second*, 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 must be vacated. *Third*, the consent judgment is illegal because it violates the federal Constitution's Elections Clause and Equal Protection Clause. *Fourth*, the consent judgment is not "fair, adequate, and reasonable," *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999), because Plaintiffs were unlikely to succeed on the merits of their claims

and the relief contemplated by the consent judgment is vastly disproportionate to the expected harm. *Fifth*, the consent judgment is against the public interest. And *sixth*, there is a risk that the consent judgment is a product of collusion, not an arm's length agreement between Plaintiffs and the NCSBE.

Indeed, on October 3, 2020, the District Court for the Eastern District of North Carolina, recognizing that plaintiffs in a federal suit (including Legislative Defendants, individual voters, and a congressional candidate) were likely to succeed on the merits of their claims in that court that the numbered memoranda that comprise the consent judgment violate the federal Equal Protection Clause, granted a temporary restraining order enjoining the NCSBE from enforcing them. Order at 12, 19, ECF No. 47, *Moore v. Circosta*, No. 20-cv-507 (E.D.N.C. Oct. 3, 2020) (attached as Doc. Ex. 1). The temporary restraining order does not obviate the need for relief from this Court (it is set to expire October 16 and the NCSBE and Plaintiffs, who have intervened in the case, are fighting against extending it or converting it to a preliminary injunction), but the federal court's ruling underscores the unlawful nature of the NCSBE's actions.

For these and the additional reasons explained below, this Court is likely to vacate the consent judgment. And coupled with the irreparable injury that the consent judgment inflicts on North Carolina's ability to hold a safe and fair election in the midst of a worldwide pandemic, that means that a writ of supersedeas should issue staying the consent judgment and preserving the status quo it so dramatically upsets.

Because the relief that has been ordered is extraordinarily important and time-sensitive, Legislative Defendants also respectfully apply, pursuant to Rule 23(e), for **an order temporarily staying enforcement of the consent judgment until determination by this Court of whether it shall issue its writ**. A temporary stay is necessary to prevent irreparable harm while this Court determines whether it shall issue its writ of supersedeas.

Together with their opposition to Plaintiffs' and the NCSBE's joint motion for entry of the consent judgment, Legislative Defendants requested that the Superior Court, in the alternative, stay the enforcement of that judgment. A hearing was held on October 2, 2020 and the request for stay was implicitly denied when the court entered the consent judgment that same day. To confirm the Court's implicit denial, Legislative Defendants renewed their motion for a stay of enforcement of the judgment on October 7. Due to the exigent circumstances related to the upcoming election, Legislative Defendants requested a ruling on their renewed motion by 9:00 a.m. on October 8. Legislative Defendants have not been able to obtain a formal ruling from the trial court on their renewed motion. Instead, the Superior Court refused to account for the exigent circumstances presented by the upcoming election, and ruled that absent consent of the parties, which Plaintiffs and State Defendants refused to give, Legislative Defendants' renewed motion for stay will need to be scheduled for a hearing—even though the original request for stay was made on September 30 and the court declined to grant the stay after its October 2 hearing. The Superior Court has now set a hearing on the motion for a stay for **October 16**, less than three weeks

before election day and *after* the start of in-person early voting. *See* E-mail from Kellie Z. Meyers (Oct. 9, 2020, 2:43 PM) (attached as Doc. Ex. 908). This delay is intolerable. The substantial confusion among both voters and election officials, administrative burdens, and disparate treatment of voters stemming from the consent judgment so close to the general election do not allow for such a drawn-out process. Accordingly, Legislative Defendants now petition this Court for a writ of supersedeas pursuant to Rule of Appellate Procedure 23 to stay enforcement of the consent judgment pending appeal, and further move the Court to temporarily stay the consent judgment, on an emergency basis, pending its decision whether to issue a writ of supersedeas. *See* N.C. R. APP. P. 8. In support of their petition and motion, Legislative Defendants show the following:

FACTS

I. NORTH CAROLINA'S EFFORTS TO EXPAND VOTING OPPORTUNITIES IN LIGHT OF THE COVID-19 PANDEMIC

On March 26, 2020, the Executive Director of the NCSBE addressed a letter to General Assembly members and Governor Cooper requesting various changes to the State's election laws to account for the COVID-19 pandemic. *See* Karen Brinson Bell Letter (March 26, 2020) (attached as Doc. Ex. 22). The General Assembly responded by passing bipartisan legislation, HB1169, in mid-June by a total vote of 142–26, and it was signed into law by Governor Cooper on June 12. HB1169 altered North Carolina election law to cope with the pandemic in numerous ways but reflected the General Assembly's reasoned decision not to adopt all of Executive Director Bell's recommendations.

II. PROCEDURAL HISTORY

Plaintiffs filed this suit in Wake County Superior Court on August 10, 2020, nearly two months after HB1169 was signed into law, alleging that several provisions of North Carolina's election laws are unconstitutional during the COVID-19 pandemic as violations of the North Carolina Constitution. Specifically, Plaintiffs challenged

> (1) limitations on the number of days and hours of early voting that counties may offer, N.C.G.S. § 163-227.2(b); (2) the requirement that all absentee ballot envelopes must be signed by a witness, . . . [HB1169] § 1.(a)[;] (3) the State's failure to provide pre-paid postage for absentee ballots and ballot request forms during the pandemic, *id.* § 163-231(b)(1)[;] (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, . . . *id.* § 163-231(b)(2)[;] (5) the practice in some counties of rejecting absentee ballots for signature defects, or based on an official's subjective determination that the voter's signature on the absentee ballot envelope does not match the signature on file with election authorities, without providing sufficient advance notice and an opportunity to cure[;] (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239 § 1.3(a)[;] and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C.G.S. § 163-226.3(a)(5).

Am. Compl. ¶ 5 (Aug. 18, 2020).

Plaintiffs named as defendants the State of North Carolina, the NCSBE, and Damon Circosta, in his official capacity as chair of the NCSBE. On August 12, 2020, Legislative Defendants noticed their intervention as of right as agents of the State on behalf of the General Assembly under N.C. GEN. STAT. §§ 1A-1, Rule 24 and 1-72.2(b).

On August 18, 2020, Plaintiffs filed an Amended Complaint that dropped the State of North Carolina as a defendant and on the same day moved for a preliminary injunction of the various election laws and requirements at issue. Not until September 4, however, did Plaintiffs file their brief and supporting evidence—nearly a month after filing suit.

After holding a hearing on the nature of Plaintiffs' constitutional challenges, on September 24, 2020, the Superior Court determined that Plaintiffs were not raising facial challenges to the validity of acts of the General Assembly, and therefore declined to transfer the matter to a three-judge panel of the Superior Court. *See* N.C. GEN. STAT. §§ 1-267.1, 1A-1, Rule 42(b)(4).

On September 22, 2020, Plaintiffs and the NCSBE jointly moved the Superior Court for entry of a proposed consent judgment. The court heard argument on the motion on October 2, 2020, and it entered an order granting the motion the same day. In granting the motion, the court determined that Legislative Defendants were not necessary parties to the consent judgment, that the consent judgment was not "illegal, a product of collusion, or against the public interest," *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991), and that it was "fair, adequate, and reasonable," *North Carolina*, 180 F.3d at 581. The court also declined to grant Legislative Defendants' request that the court stay enforcement of the consent judgment pending appeal to this Court by entering the judgment.

Legislative Defendants then filed a petition for writ of supersedeas and motion for temporary stay with this Court. That petition was dismissed without prejudice on

October 6, 2020 for failure to comply with Rule of Appellate Procedure 23(a)(1). Rule 23(a)(1) requires either that the petitioner has first sought a stay from the trial court that has either been denied or vacated or that there are extraordinary circumstances making it impracticable to obtain a stay by application to the trial court. Not only had the Superior Court held a hearing on and implicitly denied Legislative Defendants motion for a stay, but the many arguments in Legislative Defendants' opposition brief clearly showed that the extraordinary circumstances of the upcoming general election, only 32 days away from entry of the consent judgment, necessitated this Court's immediate review.

Nevertheless, on October 7, the Legislative Defendants renewed their motion for a stay of the execution of the consent judgment in the Superior Court to secure a formal written ruling on their motion for a stay. But, given the extraordinary circumstances, the Legislative Defendants requested a ruling on their motion by 9:00 a.m. on October 8. Late in the afternoon on October 8, the parties were advised that the trial court would only rule on the motion with the consent of the parties, and that, otherwise, the motion would need to be scheduled for a hearing. Plaintiffs and the State Defendants have indicated that they do not consent to the motion. The Superior Court now has set a hearing on the motion for October 16. Accordingly, Legislative Defendants have not been able to obtain timely relief from the Superior Court.

REASONS WHY THE COURT SHOULD CONSIDER THIS PETITION

Rule 23(a)(1) explicitly provides that "[a]pplication may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or

enforcement of any judgment, order, or other determination of a trial tribunal" provided that "a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal" or "extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order." N.C. R. App. P. 23(a)(1). Legislative Defendants did so move for a stay order before the trial court and that stay was implicitly denied when the Superior Court approved the consent judgment and did not issue the stay. The Superior Court has further indicated its complete disinterest in granting the relief of a stay by its failure to provide for accelerated resolution of Legislative Defendants' renewed motion for the same. Thus, Legislative Defendants have moved for and been denied relief from the trial tribunal and this Court has jurisdiction to consider their petition. *See Zagaroli v. Pollock*, 94 N.C. App. 46, 52, 379 S.E.2d 653, 656 (1989) (explaining that the appellate courts have jurisdiction to review a trial court's implicit denial of a party's motion).[1]

Legislative Defendants also base their petition on "extraordinary circumstances" pursuant to Rule 23(a)(1). Legislative Defendants can think of no more extraordinary circumstances than the need to stay a judgment the

[1] The North Carolina Supreme Court has explained that because the North Carolina Rules of Civil Procedure are substantially similar to the federal rules, the North Carolina courts may look to federal cases for interpretive guidance. *Turner v. Duke Univ.*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989). Relevant here, the Seventh Circuit recently considered a movant's motion to stay pending appeal in the election context despite the movant not moving first in the district court. *See Libertarian Party of Ill. v. Cadigan*, 820 F. App'x 446 (7th Cir. 2020).

implementation of which will engender substantial confusion among both voters and election officials, create considerable administrative burdens, and produce disparate treatment of voters in the ongoing election—all after voting has already started, a paltry 6 days before in-person early voting begins, and a mere 25 days from election day. What is more, by scheduling the hearing on Legislative Defendant's stay motion for October 16, the Superior Court has guaranteed that a ruling will not be forthcoming until *after* early voting has started and less than three weeks before election day. Based on the extraordinary circumstances of the import of matters affecting a general election, the pressing interests of time, and the inability of Legislative Defendants to obtain a timely ruling from the trial court, Legislative Defendants respectfully request the Court to consider the merits of this petition for writ of supersedeas and motion for temporary stay. *See, e.g.*, *Populist Party v. Herschler*,746 F.2d 656, 657 (10th Cir. 1984) (holding, on October 15, 1984, that because the election "is almost upon us," "the need for relief is so immediate," and "the order of the district court shows that seeking such relief there would not be practicable," "application in the district court" for a motion to stay pending appeal was "not necessary" before the court would consider the motion).

REASONS WHY THE WRIT SHOULD ISSUE

A writ of supersedeas should issue when justice so requires, Rule 23(c), and its purpose is "to preserve the Status quo pending the exercise of appellate jurisdiction," *Craver v. Craver*, 298 N.C. 231, 238, 258 S.E.2d 357, 362 (1979). There is limited authority on the legal standard that governs the availability of a writ of supersedeas

and temporary stay pending appeal, but what precedent exists supports the application of the familiar test balancing (1) the petitioner's likelihood of success on the merits of the appeal, (2) whether irreparable injury will occur absent a stay, and (3) whether the balancing of the equities supports temporary relief preserving the status quo during the appeal. *See Abbott v. Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) (stay appropriate where "there [was] some likelihood that plaintiffs would have prevailed on appeal and thus been irreparably injured"); *Home Indem. Co. v. Hoechst Celanese Corp.*, 128 N.C. App. 113, 117–19, 493 S.E.2d 806, 809–11 (1997) (stay appropriate where failure to stay enforcement "would work a substantial injustice"); *see also N. Iredell Neighbors for Rural Life v. Iredell County*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009). Here, each of these factors favors the grant of a temporary stay and writ of supersedeas preserving the status quo pending appeal.

I. LEGISLATIVE DEFENDANTS ARE LIKELY TO SUCCEED ON THE MERITS.

Legislative Defendants are likely to succeed on the merits of their appeal for no fewer than *six* independent reasons, any of which is dispositive. *First*, because Plaintiffs assert facial challenges to the election laws at issue, the single-judge Superior Court did not have jurisdiction to consider their claims. *See Grady*, 372 N.C. at 522; N.C. GEN. STAT. §§ 1A-1, Rule 42, 1-81.1(a1), 1-267.1(a1). *Second*, 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 must be vacated. *Third*, the consent judgment is illegal because it violates

the federal Constitution's Elections Clause and Equal Protection Clause. *Fourth*, the consent judgment is not "fair, adequate, and reasonable," *North Carolina*, 180 F.3d at 581, because the Plaintiffs were unlikely to succeed on the merits of their claims and the relief contemplated by the consent judgment is vastly disproportionate to the expected harm. *Fifth*, the consent judgment is against the public interest. And *sixth*, the evidence indicates that the consent judgment is a product of collusion, not an arm's length agreement between Plaintiffs and the NCSBE.

In considering whether to enter a consent judgment, a court must examine it "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." *Colorado*, 937 F.2d at 509. Examination of a plaintiff's likelihood of success on the merits is a necessary component to consideration of whether a consent judgment should enter. In fact, the merits are "[t]he most important factor" in determining whether the consent judgment is fair, adequate, and reasonable. *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975). The Court must "consider[] the underlying facts and legal arguments" that support or undermine the proposal. *United States v. BP Amoco Oil*, 277 F.3d 1012, 1019 (8th Cir. 2002). 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*, 528 F.2d at 1173. A lower court's decision to accept or reject a consent judgment is reviewed for abuse of discretion. *See North Carolina*, 180 F.3d

at 577, 581. "However, when the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—[this Court] conduct[s] de novo review." *Da Silva v. WakeMed*, 846 S.E.2d 634, 638 (N.C. 2020). Furthermore, "an error of law is an abuse of discretion." *Id.* at 638 n.2. As explained below, because the consent judgment here cannot meet the standards necessary for its entry, the Superior Court erred as a matter of law and abused its discretion in entering it.[2]

A. The One-Judge Superior Court Did Not Have Jurisdiction To Enter The Proposed Consent Judgment Because Plaintiffs' Challenges To The Various Election Laws Are Facial.

Plaintiffs' naked attempt to use the courts to enact programmatic, substantial changes to North Carolina's election law was statutorily required to be heard before a three-judge panel of the Superior Court because Plaintiffs' claims are facial. *See* N.C. GEN. STAT. § 1-267.1(a1). In their Amended Complaint, Plaintiffs sought an order "permitting counties to expand the early voting days and hours during the pandemic," "suspending the Witness Requirement for single-person or single-adult households," "requiring the State to provide pre-paid postage on all absentee ballots and ballot request forms," "requiring election officials to count all absentee ballots mailed through USPS and put in the mail by Election Day if received by county boards up to nine days after Election Day," and allowing voters to obtain assistance

[2] 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.").

from third parties in completing and submitting their absentee ballot applications and in delivering completed ballots to election officials. Am. Compl. ¶ 7. Plaintiffs explicitly sought this relief not only for themselves but also for "all other eligible North Carolinians." *Id.* ¶ 2. To the extent these claims seek relief for parties beyond the actual Plaintiffs in this case, they are facial in nature. *See Grady*, 372 N.C. at 546–47 (citing *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 contained in the consent judgment, which is to be effectuated through the issuance of Numbered Memos to all 100 county boards of elections throughout the state. *See* Stipulation and Consent Judgment at 15–17, *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20 CVS 8881 (Wake Cnty. Super. Ct. Oct. 2, 2020) ("Consent Judgment") (attached as Doc. Ex. 29). 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 & Cross-Motion for Recommendation for Rule 2.1 Designation at 3 (Aug. 24, 2020) (attached as Doc. Ex. 69)—have disappeared in the consent judgment. Plaintiffs and the NCSBE instead have relieved *all* voters of the necessity of complying with the witness requirement and extended the receipt deadline for *all* ballots sent out for delivery by election day, whether through the USPS or a commercial carrier. *See*

Consent Judgment at 15–16. The evisceration of the one-witness requirement is particularly indicative of the facial nature of Plaintiffs' claims, as that relaxed witness requirement applies *only* to this November's election. *See* HB1169 § 1.(a).

Further demonstrating the facial nature of the consent judgment is the fact that the NCSBE's actions apparently are meant to settle not only this lawsuit but also two others that *Judge Collins himself* found to raise facial challenges—*Chambers v. State*, No. 20 CVS 500124, and *Stringer v. N.C. State Bd. of Elections*, No. 20 CVS 5615. *See* NCSBE Bench Memo at 5–7 (Sept. 15, 2020) (attached as Doc. Ex. 76). Indeed, the 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." Consent Judgment at 15.

For the foregoing reasons, a one-judge Superior Court lacked jurisdiction to enter the consent judgment, and this Court must therefore vacate it.

B. The Consent Judgment Must Be Vacated 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, Rule 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 consent judgment must be vacated.

Judge Collins concluded that N.C. GEN. STAT. § 163-22.2 gives the NCSBE authority to settle this case without Legislative Defendants' consent, but it does no such thing. That statute provides that when an election law is "held unconstitutional" the NCSBE has limited authority to make rules that "do not conflict with any provisions of this Chapter 163 of the General Statutes." N.C. GEN. STAT. § 163-22.2.

It then provides that the NCSBE "shall *also* be authorized, upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes." *Id.* (emphasis added). Read in context, there thus are at least two conditions to settlement under § 163-22.2 that are not met here: (1) a court must have held a state election law unconstitutional; and (2) the proposed settlement must not conflict with any provisions of Chapter 163. In addition, given Legislative Defendants' final decision-making authority in this litigation, the Attorney General cannot lawfully recommend a settlement without Legislative Defendants' consent.

C. The Consent Judgment Must Be Vacated Because It Is Unconstitutional.

The 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). It 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 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 consent judgment. The consent judgment is unconstitutional, therefore, because it overrules the enactments of the General Assembly to regulate the times, places, and manner of holding the upcoming federal election.

The General Assembly is the "Legislature," established by the people of North Carolina. N.C. CONST. art. II, § 1. And the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (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. N.C. CONST. art. I, § 6. 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. 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 Elections Clause thus mandates that the General Assembly is the only constitutionally empowered state entity to regulate federal elections. And as the U.S. 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 memoranda to effectuate the consent judgment that purport to adjust the rules of the election that have already been set by statute, and the Superior Court did the same by entering the consent judgment. Neither the NCSBE nor the Superior Court have freestanding power under the United States Constitution to rewrite North Carolina's election laws and to "prescribe[]" their own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. The North Carolina Constitution is fully consistent with this mandate and 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 the Superior Court are the "Legislature" empowered to adjust the rules of the federal election on their own. *See League of Women Voters of Mich. v. Benson*, No. 17-cv-14148, 2019 U.S. Dist. LEXIS 228463, at *10 (E.D. Mich. Feb. 1, 2019) (declining to enter a consent decree in a partisan gerrymandering case between the League of Women Voters and the Secretary of State because only the Michigan Legislature had authority to regulate the time, place, and manner of elections). What is more, "the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696, 249 S.E.2d 402, 410 (1978).

Because the People of North Carolina have not granted legislative power to the NCBSE or the Superior 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." *Ariz. 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*, 370 N.C. 392, 415, 809 S.E.2d 98, 112 (2018). And it made clear that whatever "interstitial" policy decisions the NCSBE can make, it cannot "make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations." *Id.* at 415 n.11. 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 418–19, *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 "where the normal schedule for the election is disrupted by . . . a natural disaster." N.C. GEN. STAT. § 163-27.1. Here, the normal schedule for the election has not been disrupted. And 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 Doc. Ex. 91). 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.* What is more, in enacting HB1169, the General Assembly already decided what adjustments to the election laws are necessary to account for the pandemic.

The consent judgment replaces 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." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). The Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. Thus, because the 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 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.

As the federal court in *Moore* held was likely the case, Order at 11–16, *Moore*, the consent judgment violates 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 consent judgment was announced[3] 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.

[3] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw.

i. The Consent Judgment Subjects Voters In The Same Election To Different Regulations.

First, the consent judgment has caused North Carolina to administer its election in an arbitrary fashion pursuant to nonuniform rules that have resulted 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 consent judgment was announced. Similarly, these provisions had governed the nearly 950,000 voters who had requested absentee ballots prior to the consent judgment.[4] The 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 consent judgment effectively nullifies the witness requirement and undermines the ballot harvesting ban, the NCSBE has also been plainly inconsistent in what each provision 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.

[4] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw.

of Elections, Original Numbered Memo 2020-19 at 2 (Aug. 21, 2020) (attached as Doc. Ex. 98). 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. at 122, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 ("*Democracy N.C.* Tr.") (M.D.N.C. July 21, 2020) (attached as Doc. Ex. 106).[5]

The NCSBE then arbitrarily changed course and issued an updated Numbered Memo 2020-19 on September 22, 2020 as part of the 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, Revised Numbered Memo 2020-19 at 2–4 (Sept. 22, 2020) (explaining that deficiencies curable by a certification from the voter include a witness or assistant failing to write their name, address, or signature) (attached as Doc. Ex. 245). This absentee "certification" will transform an entirely unwitnessed (and hence invalid) ballot into a lawful, compliant ballot. All the NCSBE's consent judgment requires is that the voter merely

[5] 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 Doc. Ex. 252) 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." Consent Judgment at 34. In addition to failing to require an actual witness signature on the absentee ballot, 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 NCSBE represented to the Eastern District of North Carolina that Numbered Memo 2020-19 was updated "in order to comply with Judge Osteen's preliminary injunction in the *Democracy N.C.* action in the Middle District," *see* Order at 9, *Moore*, which 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. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 U.S. Dist. LEXIS 138492, at *177 (M.D.N.C. Aug. 4, 2020). The same day, the NCSBE represented to the *Democracy North Carolina* court that the updated memo was merely "consistent with"—not required to comply with—"the Order entered by [the] Court on August 4, 2020." Notice of Filing at 1, ECF No. 143, *Democracy N.C.*, No. 20-cv-457 (M.D.N.C. Sept. 28, 2020). But the *Democracy North Carolina* court, which had rejected an attempt to enjoin the witness requirement, emphatically disagreed with even this relaxed interpretation of its order: "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, ECF No. 145, *Democracy N.C.*, No. 20-cv-457, (M.D.N.C. Sept. 30, 2020) (citation omitted).

The consent judgment goes further by allowing absentee ballots to be received up to *nine days* after election day. Consent Judgment at 15, 26. This is both in violation of the General Assembly's duly enacted statutes but also a further change in the rules while voting is ongoing. The 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. Consent Judgment at 36–40.

Accordingly, under the consent judgment, 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 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 Inj. Relief at 6–7, *Chambers v. State*, No. 20 CVS 500124 (N.C. Super. Ct. Sept. 3, 2020) (attached as Doc. Ex. 270); *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 Consent Judgment Will Dilute Lawfully Cast Votes.

Second, under the consent judgment 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 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* Consent Judgment at 29–34; (2) by allowing absentee ballots to be counted if received up to nine days after election day, *see id.* at 26–27; (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 36–40. 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 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 and the Fourteenth Amendment. *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). 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, under the consent judgment, the NCSBE will be violating the Equal Protection Clause in two separate ways: it will be administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast their absentee ballots before the 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; and 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.

D. The Consent Judgment Must Be Vacated Because It Is Not Fair, Adequate, And Reasonable.

The consent judgment must be vacated because it is not fair, adequate, and reasonable. Here, because Plaintiffs were unlikely to succeed on the merits of their claims, and because the relief afforded by the consent judgment is vastly disproportionate to the purported harm, the consent judgment is not fair, adequate, and reasonable, and must be vacated.

1. Plaintiffs' Claims Were Unlikely To Succeed On The Merits.

Plaintiffs' legal theories, evidence, and expert reports have significant weaknesses that rendered 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 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*, 561 U.S. at 194). 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, 814 S.E. 3d 43, 47 (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 three of the Plaintiffs—Tom Kociemba, Rosalyn Kociemba, and Rebecca Johnson—***have already voted***.[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 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 (attached as Doc. Ex. 281) (Sept. 4, 2020), 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 (a limitation on the reach of Plaintiffs' claim that has disappeared in the consent judgment). Indeed, as explained

[6] *See* Thomas John Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 340); Rosalyn Cotter Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 342); Rebecca Kay Johnson, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL (attached as Doc. Ex. 345).

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 I.D.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 in person 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 that having to purchase a single 55-cent stamp unconstitutionally burdens the right to vote of every absentee voter in the State, especially since ballots can be dropped off in person and voters can vote in person. 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—it is self-evident that those who have already voted or vote in the next several weeks will have their ballots returned on time. Only those who wait to the last minute even have a theoretical concern about an alleged slowdown in mail delivery. 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. 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. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). 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 must vacate the consent judgment, which disrupts the State's upcoming elections. *See, e.g.*, *Tex. All. for Retired Ams. v. Hughs*, No. 20-40643, 2020 WL 5816887, at *1 (5th Cir. Sept. 30, 2020) (per curiam) (attached as

Doc. Ex. 349) (staying a district court order, on *Purcell* grounds, that changed election laws eighteen days before early voting was set to begin). "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.

"Time and time again over the past several years, the Supreme Court has stayed lower court orders that change election rules on the eve of an election." *Tex. All. for Retired Ams.*, 2020 WL 5816887, at *1; *see, e.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower court order that changed election laws thirty-three days before the election); *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014) (staying a lower court order that changed election laws sixty days before the election); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (denying application to vacate court of appeals' stay of district court injunction that changed election laws on eve of election); *Purcell*, 549 U.S. 1 (staying a lower court order changing election laws twenty-nine days before the election). The reasons animating the *Purcell* principle apply with full force here. First, the consent decree conflicts with recent federal court and state court decisions to uphold the very same provisions against similar federal and state constitutional challenges. *See* Order on Inj. 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 election has already

started, election day is merely four weeks away, and "important, interim deadlines that affect Plaintiffs . . . and the State" have already passed. *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020). In particular, absentee ballots were made available to voters on September 4, *see* N.C. GEN. STAT. § 163-227.10(a), and as of October 4, 2020, over 1.1 million absentee ballots have been requested and over 356,000 voters have already cast their absentee ballots.[7] Moreover, counties have already set their one-stop early voting schedules.[8] The consent judgment, by changing the challenged provisions now—when hundreds of thousands of absentee ballots have already been sent to voters and early voting schedules have already been set and disseminated—will 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.

In short, the consent judgment is entirely impractical—indeed, affirmatively harmful—because it occurs mid-stream in the middle of an ongoing election and weeks away from election day. 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.

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[7] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 1, 2020).

[8] *See Vote Early In-Person*, N.C. STATE BD. OF ELECTIONS (Sept. 21, 2020), https://bit.ly/2Geq3ms.

"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 N. Iredell Neighbors for Rural Life v. Iredell County*, 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 omitted)). 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 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 v. N.C. State Bd. of Elections*, No. 20 CVS 5615 (Wake Cnty. Super. Ct.), case, which raises similar claims but was filed in May. 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 has put the State in an untenable position. The State will have to expend significant administrative resources informing voters of the new election procedures under the consent judgment, likely causing massive confusion. This Court should not reward Plaintiffs' delay by affirming the 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 v. Newsome*, 140 S. Ct. 1613, 1613–14 (2020) (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 v. Abbott*, 961 F.3d 389, 394 (2020). 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). The Supreme Court's conclusion that these injunctions were not justified by the pandemic undermines Plaintiffs' likelihood of success on the merits.

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, 707 S.E. 2d 199 (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).

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. Hicks*, 333 N.C. 467, 484, 428 S.E. 3d 167, 176 (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 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.

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.

[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.

App. 218, 231, 569 S.E. 2d 695, 704 (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 polls, 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, 607 S.E. 2d 638, 644 (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). 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 (Sept. 14, 2020), https://bit.ly/3hSTFDm; Expert Affidavit of Dr. M.V. Hood, III, Ph.D. ("Hood Aff.") ¶¶ 38–39 (attached as Doc. Ex. 354). 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.).

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." Kenneth Mayer Expert Deposition Transcript at 106:2–14 (attached as Doc. Ex. 407). 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 before Plaintiffs unilaterally shut down depositions 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 before 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 Doc. Ex. 553); Caren Rabinowitz Deposition Transcript ("Rabinowitz Tr.") at 32:24–25 (attached as Doc. Ex. 579); 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 Doc. Ex. 612) (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; *see also New Ga. Project v. Raffensperger*, No. 20-13360, at 2–3 (11th Cir. Oct. 2, 2020) (attached as Doc. Ex. 638) (staying district court injunction that extended Georgia's absentee ballot receipt deadline—7:00 p.m. on election day—because that deadline did not severely burden the right to vote). 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—as Plaintiff Johnson has done. 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*, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2E4ZxL7 (last accessed Oct. 4, 2020); *Judicial Voter Guide 2020* at 14, N.C. STATE BD. OF ELECTIONS, https://bit.ly/2EPP72k (last accessed Oct. 4, 2020) ("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 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

[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).

being delayed in the mail 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.

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 Doc. Ex. 670).

[11] *FAQs: Voting by Mail in North Carolina in 2020*, N.C. STATE BD. OF ELECTIONS (Sept. 1, 2020), https://bit.ly/30vgciI.

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 and is more susceptive to irregularity and fraud than other methods of voting." Affidavit of Kimberly Westbrook Strach ¶¶ 54–55 (attached as Doc. Ex. 696). 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 Doc. Ex. 735); William Dworkin Deposition Transcript ("Dworkin Tr.") at 19:23–20:5 (attached as Doc. Ex. 764). Indeed, Johnson has now successfully voted so she apparently was able to secure a witness.

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 Doc. Ex. 807). 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.*—over 1.1 million absentee ballots have been requested as of October 1, 2020, compared with merely 125,784 requests 33 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

[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.

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 v. Gwinnett Cnty. Bd. of Registration and Elections*, 446 F. Supp. 3d 1111, 1124 (2020) ("[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.").

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

[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.

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 and Ms. Johnson, 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. In other words, Plaintiffs' claims challenging this criminal ballot harvesting restriction, as pleaded, are not redressable, and thus the Court lacks jurisdiction to rule in Plaintiffs' favor.

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 Doc. Ex. 817). 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.

vii. Plaintiffs' Free Elections Clause Claim Was Unlikely To Succeed.

Plaintiffs' claim invoking North Carolina's Free Elections Clause fails as a matter of law because that clause simply has no application here, where all Plaintiffs have alleged are purportedly unconstitutional costs and burdens of participating in the political process.

The North Carolina Constitution's Free Elections Clause simply states that "[a]ll elections shall be free," N.C. CONST. art. I, § 10, a statement that clearly means that voters are free to choose how they cast their ballot without coercion, intimidation, or undue influence. The history of the provision confirms this reading. The modern version of this provision has its roots in the 1868 North Carolina Constitution. *See* N.C. CONST. art. I, § 10 (1868) ("All elections ought to be free."). Its origin, however, runs far deeper—through the 1776 North Carolina and Virginia declarations of rights and to the Eighth Clause of the English Declaration of Rights in 1689, which declared that the "election of members of parliament ought to be free." *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1797 (1972). In crafting provisions requiring elections to be "free," the drafters of both the English and Colonial declarations were responding to royal interference in the electoral process. Given this background—and the reality that there were substantial limitations on the right to vote at the time that such provisions were adopted—it comes as no surprise that the meaning of "free" in the Clause "is plain: free from

interference or intimidation." JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 56 (2d ed., 2013).

The North Carolina Supreme Court has confirmed that the Free Elections Clause requires only that voters be left free to choose how they will cast their ballot. In *Clark v. Meyland*, 261 N.C. 140, 143 (1964), the Court invalidated a state-law requirement that those voters who wished to change their party affiliation must first take an oath to support their new party's nominees both in the next election and in any and all subsequent elections in which the voters maintained their new party affiliation. What implicated the Free Elections Clause was not the burden of having to appear and take an oath, or even the fact that the oath was one of loyalty to a particular party, but rather the reality that the promise to vote only for candidates of one party imposed a "shackle" on the free choice of the voter:

> The oath to support future candidates violates the principle of freedom of conscience. It denies a free ballot—one that is cast according to the dictates of the voter's judgment. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

Id. It was the fact that the oath required the voter to vote for particular candidates that "violate[d] the constitutional provision that elections shall be free." *Id.*

Courts have identified several forms of state action that may compromise a free election, including (1) serious threats of physical violence, *see Hatfield v. Scaggs*, 133 S.E. 109, 113 (W. Va. 1926); (2) requiring a voter to disclose a secret ballot, *see Whitley v. Cranford*, 119 S.W.3d 28, 40–41 (Ark. 2003) (Imber, J., dissenting) (discussing cases); and (3) funding campaigns or initiatives with state funds, *see*

Stanson v. Mott, 551 P.2d 1, 9–10 (Cal. 1976). But we are aware of no court that has *ever* found a free-election provision violated when a voter incurs incidental costs or inconveniences to exercise the right to vote.

Plaintiffs' claim under the Free Elections Clause thus fails because they have not alleged that any of the challenged measures coerces, intimidates, or influences the free choice of North Carolina's voters in any of the ways that the courts have found would compromise a free election. Instead, they merely complain of concerns about the "risks" posed by the challenged measures, or the "increased costs and burdens" voters must undergo because of the pandemic. Am. Compl. ¶¶ 6, 141. None of these allegations suggest that any of the challenged measures somehow render voters powerless to follow the dictates of their own free will—which means that Plaintiffs have failed to allege a violation of the Free Elections Clause, and their claim fails as a matter of law.

* * *

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 consent judgment does not meaningfully analyze these state interests either. The consent judgment fails on the "most important factor"—likelihood of success on the merits—so this Court must vacate it. *Flinn*, 528 F.2d at 1172.

2. The Relief Afforded By The Consent Judgment Is Vastly Disproportionate To The Purported Harm.

The 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 consent judgment goes *beyond* the relief Plaintiffs are seeking. For example, the consent judgment vitiates the witness requirement for *all* voters, not just those who reside without another adult. *See* Am. Compl. at 39. The 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 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) (attached as Doc. Ex. 846). 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, 436 S.E. 2d 169, 173–74 (1993). Because the consent judgment violates this principle, granting Plaintiffs relief that is vastly disproportionate to the purported harm they allege, the consent judgment is not fair, adequate, and reasonable, and this Court must vacate it.

E. The Consent Judgment Must Be Vacated Because It Is Against The Public Interest.

The consent judgment disserves 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, vacating the consent judgment "is where the public interest lies." *Tex. Democratic Party*, 961 F.3d at 412 (internal quotation marks omitted). 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. This is especially true in the context of an ongoing election. *Thompson*, 959 F.3d at 813; *Respect Me. PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). And it remains true even though the NCSBE has chosen to capitulate to Plaintiffs' demands instead of defending its duly enacted election laws. Allowing the consent judgment to be enforced, therefore, would undermine the constitutional election laws.

Third, the 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.*, 140 S. Ct. at 1207 (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 1,157,606 absentee ballots and cast 356,297 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 Brief of the State Board Defendants-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

[14] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 4, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 1, 2020).

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, the consent undermines confidence in the election by eliminating safeguards that protect against ineligible and fraudulent voting and that protect vulnerable voters. *See* Strach Aff. ¶¶ 69, 72, 87. 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 the election, particularly when the NCSBE also has barred signature matching for absentee ballots. Indeed, eliminating the witness requirement will create particularly acute risks for 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 consent judgment is thus against the public interest and must be vacated.

F. The Consent Judgment Must Be Vacated 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 vacate the consent judgment. The consent judgment likely does not reflect arm's-length negotiations and gives a windfall to Plaintiffs. Consent judgments must be not only substantively sound but also procedurally fair. 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). 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).

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. In particular, "judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature." *Kasper v. Bd. of*

Election Comm'rs of Chi., 814 F.2d 332, 340 (7th Cir. 1987); *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. 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 Inj. Relief at 6–7, *Chambers*; *Democracy N.C.*, 2020 U.S. Dist. LEXIS 138492, at *103. And according to two NCSBE members who recently resigned, the NCSBE entered into the 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 Doc. Ex. 861); David Black Resignation Letter (Sept. 23, 2020) (attached as Doc. Ex. 863). 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 Doc. Ex. 866); Affidavit of David Black (attached as Doc. Ex. 892). The NCSBE provides no justification for its sudden course reversal in the face of its demonstrated successes in court.

Also concerning is the fact that Legislative Defendants were shut out of settlement negotiations. If Plaintiffs and the NCSBE truly wanted to maximize the likelihood of certainty, they likely would not have conducted their negotiations in secret and shut out representatives of the body constitutionally charged with prescribing regulations for the conduct of elections.

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."). And the shifting rationales for the amendment to Numbered Memo 2020-19—first, that it was done to comply with the *Democracy N.C.* injunction, but then only that it was consistent with the injunction—provide additional reasons for concern.

At bottom, the NCSBE is in effect aligned with Plaintiffs, and this Court should find that the consent judgment bears too many hallmarks of collusion to be appropriately entered by the Court. Accordingly, the consent judgment must be vacated.

II. THE SUPERIOR COURT'S CONSENT JUDGMENT WILL CAUSE IRREPARABLE INJURY AND IS CONTRARY TO THE BALANCE OF THE EQUITIES.

The remaining equitable factors governing the availability of the writ of supersedeas likewise favor preserving the status quo and staying the consent judgment pending appeal. The consent judgment will irreparably injure Legislative Defendants if this Court does not stay it 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 consent decree substantially alters the current election law framework that governs the ongoing election. As explained above, 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.

Consequently, a stay of the enforcement of the consent 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, (and if NCSBE and Plaintiffs are successful in federal court), 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.

MOTION TO STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, Legislative Defendants respectfully move this Court to issue a temporary stay of the trial court's 2 October 2020 Order. Legislative Defendants further incorporate and rely on the arguments presented in the foregoing petition for writ of supersedeas in support of this Motion for Temporary Stay.

CONCLUSION

Wherefore, the petitioners respectfully pray this Court to issue its writ of supersedeas to the Superior Court of Wake County of the consent judgment above specified, pending issuance of the mandate to this Court following its review and determination of the appeal; and that the petitioners have such other relief as the Court may deem proper. Petitioners also request that this Court temporarily stay enforcement of the injunction until such time as this Court can rule on Petitioners' Petition for Writ of Supersedeas.

Respectfully submitted this the 9th day of October, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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ATTORNEYS FOR LEGISLATIVE 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

VERIFICATION

The undersigned attorney for Legislative Defendants, after being duly sworn, says:

I have read the foregoing Petition for Writ of Supersedeas and Motion for Temporary Stay and pursuant to Appellate Rule 23, I hereby certify that the material allegations and contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

I also hereby certify that the documents attached to this Petition for Writ of Supersedeas and Motion for Temporary Stay are true and correct copies of the pleadings and other documents from the file in Wake County Superior Court and/or are documents of which this Court can take judicial notice.

Nicole Jo Moss

Nicole Jo Moss

Wake County, North Carolina

Sworn to and subscribed before me this 9th day of October, 2020.

Cynthia Fabian Medina

Cynthia Fabian Medina
Notary's Printed Name, Notary Public

My Commission Expires: 05/03/2022