

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

DEMOCRACY NORTH CAROLINA, THE LEAGUE
OF WOMEN VOTERS OF NORTH CAROLINA,
DONNA PERMAR, JOHN P. CLARK, MARGARET
B. CATES, LELIA BENTLEY, REGINA
WHITNEY EDWARDS, ROBERT K. PRIDDY
II, WALTER HUTCHINS, AND SUSAN
SCHAFFER,

Plaintiffs,

vs.

THE NORTH CAROLINA STATE BOARD OF
ELECTIONS; DAMON CIRCOSTA, in his
official capacity as CHAIR OF THE
STATE BOARD OF ELECTIONS; STELLA
ANDERSON, in her official capacity as
SECRETARY OF THE STATE BOARD OF
ELECTIONS; KEN RAYMOND, in his
official capacity as MEMBER OF THE
STATE BOARD OF ELECTIONS; JEFF CARMON
III, in his official capacity as
MEMBER OF THE STATE BOARD OF
ELECTIONS; DAVID C. BLACK, in his
official capacity as MEMBER OF THE
STATE BOARD OF ELECTIONS; KAREN
BRINSON BELL, in her official
capacity as EXECUTIVE DIRECTOR OF THE
STATE BOARD OF ELECTIONS; THE NORTH
CAROLINA DEPARTMENT OF
TRANSPORTATION; J. ERIC BOYETTE, in
his official capacity as
TRANSPORTATION SECRETARY; THE NORTH
CAROLINA DEPARTMENT OF HEALTH AND
HUMAN SERVICES; MANDY COHEN, in her
official capacity as SECRETARY OF
HEALTH AND HUMAN SERVICES,

Defendants.

Civil Action

No. 20-cv-457

**PLAINTIFFS'
MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR
PRELIMINARY
INJUNCTION AND
REQUEST TO EXPEDITE***

* This memorandum exceeds the page limits set forth in Local Rule 7.3. The parties have filed a motion to expand the page limits for this memorandum. ECF No. 7.

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INTRODUCTION

The COVID-19 pandemic has upended the normal functioning of our democracy. State officials nationwide have attempted to ensure that voters can cast their ballots safely. Some states have postponed their elections, while others have shifted to mail-in voting only. In states that have maintained in-person voting in the face of the pandemic, thousands of elderly poll workers have withdrawn from service, drastically reducing the number of operational polling sites. The experience of states that have already conducted their primaries has shown that the pandemic has deterred voters, strained election administrators' finite resources, and ultimately disenfranchised countless citizens.

In North Carolina, Defendant the North Carolina State Board of Elections ("SBE") anticipates an unprecedented, ten-fold increase in the use of mail-in absentee ballots relative to the 2016 general election as voters seek to maintain physical distancing and limit their exposure to the novel coronavirus that causes COVID-19. Yet Defendants remain unprepared to manage that level of absentee mail-in voting or to adapt in-person voting to ensure both safety and equal access. North Carolina's election code was not enacted with

a global pandemic in mind, let alone one of this ferocity. And in the context of a pandemic caused by a highly contagious and lethal virus, a number of statutory provisions pose a grave threat to voters' health and therefore severely burden the most fundamental right of U.S. citizenship, no matter how voters exercise it. Absent relief from this Court, voters will needlessly face great hardship and disenfranchisement.

First, the 25-day deadline to register to vote must be lifted to ensure adequate opportunities for voters to safely complete the registration process. In a typical presidential election year, voters register in robust and increasing numbers. This year, however, registration rates have cratered as in-person registration drives have been cancelled and other in-person opportunities for registration have disappeared. Normally, this fallout would be mitigated by the opportunity to register at an early voting site within the 25-day window, but this option risks exposing voters and their families to infection.

Second, in light of the pandemic, voting by mail should theoretically be a safer option for many North Carolina voters, but the absentee ballot laws require voters to take unreasonable risks with their health. North Carolina's

restrictions on requesting, completing, and submitting a mail-in absentee ballot—including the requirement that voters complete their ballot in the presence of two witnesses—have already caused at-risk and quarantined voters to conclude that they will not be able to participate in the November election.

Third, restrictions on the administration of in-person voting must be relaxed to safeguard voters' rights, as well as their health. For example, requiring that a majority of poll workers reside in the precinct where they serve will result in inadequate staffing; the risk of exposure to COVID-19 is already causing dire shortfalls in poll worker recruitment. The additional requirement under North Carolina law that counties maintain uniform hours for early voting sites will further reduce early voting capacity. Both of these provisions will lead to long lines and large crowds, forcing voters to violate social distancing directives to exercise the right to vote.

Plaintiffs Donna Permar, John P. Clark, Margaret B. Cates, Lelia Bentley, Regina Whitney Edwards, Robert K. Priddy II, and Walter Hutchins, similar to many others in North Carolina, live with underlying health conditions and/or

disabilities that heighten their risks of severe complications and death from COVID-19. If this Court does not relax the state's unconstitutionally burdensome registration and voting requirements for mail-in absentee and in-person voting—relief that Plaintiffs request solely for the November 2020 general election—Plaintiffs and countless North Carolina voters will not be able to vote in that election, or will have to choose between forgoing this right and risking their health and the health of their family members.

The time to act is *now*. Epidemiologists and infectious disease specialists predict that COVID-19 infections will surge in the fall. Election administration procedures follow an inexorable timeline, and the necessary steps—to procure equipment such as personal protective equipment (“PPE”), designate polling places, print mail-in ballots with instructions, educate the electorate about voting procedures, and recruit and train poll workers—must begin well in advance of Election Day. Absent timely intervention by this Court, Plaintiffs will suffer irreparable injury.

Plaintiffs Democracy North Carolina (DemNC) and the League of Women Voters of North Carolina (“LWVNC” and, together with DemNC, the “Organizational Plaintiffs”), as

well as Donna Permar, John P. Clark, Margaret B. Cates, Lelia Bentley, Regina Whitney Edwards, Robert K. Priddy II, Walter Hutchins, and Susan Schaffer ("Individual Plaintiffs") (collectively, "Plaintiffs"), bring this civil rights action under the First and Fourteenth Amendments, Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12131 *et seq.*, and Section 504 of the Rehabilitation Act (the "RA"), 29 U.S.C. § 794, as enforced by 42 U.S.C. § 1983, for preliminary declaratory and injunctive relief against Defendants SBE; Damon Circosta, in his official capacity as Chair of SBE; Stella Anderson, in her official capacity as Secretary of SBE; Ken Raymond, Jeff Carmon III, and David C. Black, all in their official capacities as Members of SBE; Karen Brinson Bell, in her official capacity as Executive Director of the State Board of Elections (collectively "SBE Defendants"); Defendants the North Carolina Department of Transportation ("DOT") and J. Eric Boyette, in his official capacity as Secretary of the Department of Transportation (the "DOT Defendants"); and Defendants the North Carolina Department of Health and Human Services ("DHHS") and Dr. Mandy Cohen, in her official capacity as Secretary of Health and Human Services ("DHHS Defendants"). Plaintiffs seek an

injunction against the voting laws that will most interfere with conducting a free and fair election in the fall, and respectfully request that the Court expedite the briefing and consideration of this issue.

STATEMENT OF FACTS

I. The COVID-19 Pandemic

A. COVID-19

"SARS-CoV-2 is a newly identified coronavirus that is the causative agent involved in Coronavirus Disease 2019 (Covid-19)." Murray Decl. ¶ 6. The World Health Organization ("WHO") designated COVID-19 to be a Public Health Emergency of International Concern on January 30, 2020, then declared less than two months later that COVID-19 had become a pandemic. Riggs Decl. ¶ 6.

The coronavirus continues to spread at an unprecedented pace. As of June 4, 2020, there were 1,842,101 confirmed cases and 107,029 deaths in the United States.¹ This virus spreads through respiratory droplets that are attached to the surfaces of objects or are suspended in air and transmitted

¹Coronavirus Disease 2019 (COVID-19), *Cases in the U.S.*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last updated June 4, 2020).

via inhalation and “emitted during coughs, sneezes or even talking.” Murray Decl. ¶¶ 8-9. Since it can be transmitted by symptomatic and asymptomatic people alike, individuals can spread the disease before realizing they are infected and self-quarantining. *Id.* ¶ 9.

Though COVID-19 typically begins with “a flu-like illness that starts out with fever, cough, sore throat and shortness of breath,” some people “develop much more serious illness, characterized by respiratory compromise due to pneumonia that can be gradual or sudden.” Murray Decl. ¶¶ 14-15. The major complication in patients with severe disease is acute respiratory distress syndrome (“ARDS”), which commonly requires patients to be put on a ventilator. *Id.* ¶ 16. People who develop severe complications and require mechanical ventilation to survive ARDS “are likely to develop lung scarring that may permanently impair their pulmonary function” or, in the case of stroke, “long term neurological deficits from these events.” *Id.* ¶ 19. In critical cases, COVID-19 can be fatal. *Id.* ¶ 16. Even young individuals, including children, are at risk of severe complications and death from COVID-19. *Id.* ¶¶ 16, 20.

According to the CDC, individuals are at higher risk of severe complications and death from COVID-19 if they are 65 years of age or older, are immunocompromised, or have underlying health conditions and diseases, including chronic lung disease such as chronic obstructive pulmonary disease ("COPD"), asthma, serious heart conditions, diabetes, and severe obesity. Riggs Decl. ¶ 7; Murray Decl. ¶¶ 20-21.

The COVID-19 pandemic is expected to produce steady or increased transmission in the United States through the fall, as voters seek to cast their ballots on or before Election Day. Dr. Megan Murray notes in her declaration that within the range of different possible scenarios for COVID-19 epidemic trajectories, "all scenarios are similar in that they predict that it is highly likely that Covid-19 will continue to circulate at its current level or at an even higher level than currently in October and November of 2020." *Id.* ¶ 33. Likewise, Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, has said a second wave of infections in the United States is "inevitable," and CDC Director Robert Redfield has said that wave may "be even more difficult than the one we just went through." Riggs Decl. ¶ 8.

Due to the relaxation of social distancing measures, the corresponding increase in social contacts, and seasonal changes, "it is reasonable to expect that, like other beta-coronaviruses, [COVID-19] may transmit somewhat more efficiently in fall and winter than summer." Murray Decl. ¶¶ 37-39. The projected persistent or increased risk of transmission in the fall and winter is, in part, due to seasonal factors, including "differences in the ways people congregate," as "people tend to spend more time indoors with less ventilation and less personal space than they do in the summer." *Id.* ¶ 39. Based on studies of previous influenza epidemics, Dr. Murray notes that the "most likely scenario" is that "the current first wave of Covid-19 will be followed by a larger wave in the fall or winter of 2020 and one or more smaller subsequent waves in 2021," and that "most epidemiologists expect that incidence will increase in the fall/winter months of 2020-2021." *Id.* ¶¶ 41-42. "In the period prior to the widespread use of an effective vaccine, this spread will continue to lead to serious disease and death in at-risk groups." *Id.* ¶ 44. Finally, progress towards herd immunity and vaccine development and production are unlikely

to advance sufficiently quickly to significantly alter the trajectory of the COVID-19 outbreak. *Id.* ¶¶ 51.

B. North Carolina's Response to COVID-19

As of June 4, 2020, the North Carolina Department of Health and Human Services ("DHHS") had confirmed 31,966 positive cases and 960 deaths in North Carolina, with 1,189 new cases reported in North Carolina on June 4, 2020 alone.²

Governor Cooper has announced a three-phase plan for easing restrictions in North Carolina, and the timeline for implementing the plan will depend on whether North Carolina has successfully met key metrics regarding infection in the state. Since May 20, 2020, North Carolina has been in "Phase 2," which "very strongly encourage[s]" individuals at high risk of severe illness, including those 65 years or older and/or with underlying medical conditions, to stay home and travel only for "absolutely essential purposes." *Id.* It maintains the prior guidance that individuals maintain at least six feet of social distancing, and requires businesses to limit occupancy and take other measures promoting social

² COVID-19 Response, *COVID-19 North Carolina Dashboard*, NCDHHS (last updated June 4, 2020).

distancing. *Id.* It also encourages individuals to wear face coverings. *Id.* Mass gatherings of more than 10 people indoors and 25 people outdoors remain prohibited. *Id.*³ Given the trend of increasing transmission, similar measures will likely be required for the remainder of 2020, and Governor Cooper has stated that any spike in infections may require tightening restrictions again. Riggs Decl. ¶ 10.

COVID-19 will have an unprecedented impact on the upcoming general election on November 3, 2020. State and county election officials have recently drawn attention to the inadequacies of North Carolina's election laws to facilitate safe, free, and fair voting during a pandemic. On March 26, 2020, Defendant Karen Brinson Bell wrote to Governor Cooper and the General Assembly's leadership requesting statutory changes to address the anticipated impact of the COVID-19 pandemic on the upcoming elections. Riggs Decl. ¶ 3. In a follow-up letter, Defendant Bell emphasized that changes were required immediately during the April 28 legislative

³ The DHHS Defendants similarly recommend that individuals "put distance between yourself and other people" and advise, "[t]he very best evidence on reducing the spread is to maintain social distance and stay at home." Riggs Decl. ¶ 22

session in order to be effective for North Carolina's upcoming general election. Riggs Decl. ¶ 4.

On April 27, 2020, dozens of county board of elections officials from eleven counties in North Carolina's 11th Congressional District similarly issued an "urgent request" of legislators to protect upcoming elections. Riggs Decl. ¶ 5. They warned that regular poll workers were "reluctant to serve" because a large percentage of them are elderly and at higher risk of severe complications and death from COVID-19. *Id.* These county officials requested that the legislators eliminate the requirement that a majority of poll workers reside in the precinct in which they serve and instead permit officials to recruit poll workers from anywhere in the county.

C. Election Administration Timing

In her letter to Governor Cooper, Defendant Bell stated the urgency of certain requested changes, particularly to absentee voting by mail, noting that "[b]ecause of deadlines associated with the 2020 General Election . . . there is an immediate need to prepare for a coronavirus response." Riggs Decl. ¶ 4. She advised that expanding the options for absentee requests needed to be made "as soon as possible as voters may already request absentee ballots for the June 23 and November

3 elections," that an online portal would need to be established "immediately," and that reducing or eliminating the witness requirement needed to happen "now in order to update the absentee instructions and return envelope, since these will need to be redesigned by June and printed in early July to ensure the counties can meet the start of absentee-by-mail voting on September 4, 2020." *Id.* She also noted that modifying the uniform hours requirement would need to be made "as soon as possible to allow time for county boards to locate and procure appropriate sites, a process that has already begun for the November 3 election." *Id.*

Consistent with this, election expert Dr. Paul Gronke states that "The experiences of Wisconsin, Pennsylvania, and other states provide evidence that North Carolina will want to prepare as soon as possible" for the November election. Gronke Decl. ¶ 50; see also ¶¶ 39-49, 63-64. Former Executive Director of the North Carolina State Board of Elections likewise concurs with Defendant Bell's assessment that immediate action is required to prepare for the November election. Bartlett Decl. ¶ 29.

QUESTIONS PRESENTED

- A. Whether N.C. Gen. Stat. §§ 163-82.6(d), 163-82.20(g), (h), 163-230.2(a), (c), (e), (e1), 163-231(a), 163-227.6(c), and 163-42(b) imposing restrictions on voter registration, mail-in voting, and in-person voting, and the Defendants' failures to expand voter registration via online portals available through DHHS services, establish contactless drop boxes for absentee ballots, establish mechanisms for requesting absentee ballots by phone, email, and online, establish mechanisms to cure deficient absentee ballot requests and absentee ballots, allow for submission of Federal Write-in Absentee Ballots ("FWAB"), provide personal protective equipment ("PPE") to county boards of election for use during in-person voting, and establish a more accessible, centralized way in which voters and advocates can monitor precinct consolidation, in the context of the pandemic violate the First and Fourteenth Amendments, Title II of the Americans with Disability Act, and Section 504 of the Rehabilitation Act.
- B. Whether Plaintiffs are entitled to preliminary injunctive relief.

LEGAL STANDARD

To prevail on a motion for a preliminary injunction, plaintiffs must demonstrate that (1) they are “likely to succeed on the merits”; (2) they “will likely suffer irreparable harm absent an injunction”; (3) “the balance of hardships weighs in their favor”; and (4) “the injunction is in the public interest.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). “In each case, courts ‘must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.’” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). Plaintiffs readily meet these requirements.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits of their claims.

A. Undue Burdens on the Right to Vote

Under the First and Fourteenth Amendments to the U.S. Constitution, any burden on the right to vote must be balanced against a state’s legitimate interest in that requirement. The Fourth Circuit has distilled governing Supreme Court precedent into the following test:

When facing any constitutional challenge to a state's election laws, a court must first determine whether protected rights are severely burdened. If so, strict scrutiny applies. If not, the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests in ensuring that 'order, rather than chaos, is to accompany the democratic processes.'

Fusaro v. Cogan, 930 F.3d 241, 257–58 (4th Cir. 2019) (quoting *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995)). To survive strict scrutiny, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Even in the absence of a severe burden, the court must still evaluate "the legitimacy and strength of each of [the state's] interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). While states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent "concrete evidence" that "those interests make it necessary to burden the plaintiff's rights." *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020) (internal quotation marks omitted).

Each of the laws challenged and other modifications requested in this action, taken individually and as a collective scheme, unduly burden Plaintiffs' right to register and vote. In the midst of this ongoing public health crisis, the burdens on Plaintiffs' right to vote imposed by the challenged provisions and any refusal to provide the requested modifications are neither justified by nor narrowly drawn to advance a compelling state interest. Unless Plaintiffs are granted the relief requested, thousands of North Carolinians' voting rights will be severely burdened, or even denied completely, in the November general election.

i. Voter registration

In North Carolina, voters who register by mail, through state agencies, or online through the Department of Motor Vehicles ("DMV") (a division of Defendant DOT), must do so at least 25 days before the election in which the voter wishes to cast a ballot. See N.C. Gen. Stat. §§ 163-82.6(d), 163-82.20(g), (h); *Registering to Vote in North Carolina*, N.C. State Bd. of Elections, <https://www.ncsbe.gov/Voters/Registering-to-Vote> (last visited June 3, 2020); see also N.C. Gen. Stat. § 163-82.6(c) (voter registration via original form); *id.* §§ 163-82.20-

82.23 (agency registration); *id.* § 163-82.19 (DMV registration). Online registration, moreover, is available only to DMV customers, and until recently required voters to complete a DMV transaction, such as a license renewal, at the same time. See Riggs Decl. ¶ 21. The only alternative for voters to register within 25 days of an election is same-day registration during early in-person voting, which is available until the last Saturday before the election. See N.C. Gen. Stat. § 163-227.2(b).

In light of the COVID-19 pandemic North Carolina's 25-day registration deadline and failure to provide broader online voter registration severely burden the right to vote. The COVID-19 pandemic has limited voter registration opportunities. Like other voter registration organizations, LWVNC has reduced or canceled its in-person voter registration initiatives, Nicholas Decl. ¶ 8, 13; Lopez Decl. ¶ 20-21, and the DMV and state agencies have closed or limited in-person access. Riggs Decl. ¶ 11. These conditions have prevented voters from registering for the November 2020 election, as indicated by the dramatic drop in voter registration rates compared to the last presidential election year. January 2020 started with a 162% increase in

registrations in comparison to 2016, but comparative rates have fallen to -10% for February, -14% for March, and -50% for April. Ketchie Decl. ¶ 4.

Plaintiff LWVNC anticipates that many voters will “seek[] to register closer to the election because of limitations on in-person voter registration efforts.” Nicholas Decl. ¶ 8. If enforced, the 25-day registration deadline will seriously hinder LWVNC’s purpose to promote voter registration, especially given that the fail-safe option of registering during early voting is no longer viable for voters at high risk from COVID-19. Nicholas Decl. ¶ 8. Voters who could register online through the DMV are generally unaware that they no longer need to complete a “transaction,” and thus the 25-day deadline for DMV registration similarly hinders the efforts of LWVNC to educate and help voters register leading up to the election. Nicholas Decl. ¶ 9. DemNC also traditionally receives many calls to its hotline during the early voting period about voter registration, and traditionally recommends same-day registration to voters, which is not an option for many voters during the pandemic. Lopez Decl. ¶ 21. Additionally, Defendants’ failure to provide online registration through other agencies beyond the

DMV, such as agencies administered by Defendant DHHS, likewise hinders LWVNC's efforts to promote registration online (in lieu of its in-person events) and renders DemNC's advising efforts more difficult. Nicholas Decl. ¶ 10; Lopez Decl. ¶ 20.

The burdens discussed above are not justified by a legitimate or important state interest while COVID-19 persists. North Carolina already allows for same-day registration at one-stop early voting sites up until the Saturday before Election Day, and if needed, supplemental poll books can be printed for Election Day. Despite once having online voter registration systems "ready to test and roll out," North Carolina still fails to offer broader online registration—with no justification. Bartlett Decl. ¶ 15a. And any purported state interest would pale in comparison to the extremity of the situation, as demonstrated by the unprecedented decline in registration numbers. Accordingly, the voter registration deadline must be extended until the Saturday before the election, and Defendants must offer broader online registration through DHHS. These measures will ensure that voters have adequate opportunities to

register this year and will reduce the demand for in-person registration during early voting.

ii. Absentee Ballot Requirements

COVID-19 has caused Defendant SBE to anticipate a dramatic increase in mail-in absentee voting in 2020. Riggs Decl. ¶ 3. But North Carolina's election laws contain restrictions on absentee voting that will impermissibly force voters to choose between voting and protecting their health. The State also lacks crucial mechanisms for guaranteeing that the mail-in absentee ballots of eligible voters will be counted.

Burdens on Requesting and Submitting Absentee Ballots

North Carolina's election code and administration presents numerous burdens on mail-in absentee voting. These include: (i) requiring voters to submit a completed State Absentee Ballot Request Form to their county board of elections in order to receive an absentee ballot, pursuant to N.C. Gen. Stat. § 163-230.2(a), (e)(1), without allowing for voters to request absentee ballots by phone, email, or online (the "Form Requirement"); (ii) allowing only a "voter's near relative or verifiable legal guardian" or multi-partisan assistance teams to help voters complete and deliver an

absentee ballot request form, pursuant to N.C. Gen. Stat. § 163-230.2 (e) (2) (the "Organizational Assistance Ban");⁴ (iii) requiring individuals voting an absentee ballot to do so either "[i]n the presence of two persons who are at least 18 years of age" (among other requirements),⁵ or in the presence of a notary public, pursuant to N.C. Gen. Stat. § 163-231(a) (the "Two Witness Requirement"); and (iv) failing to provide for contactless drop boxes for voters to deliver absentee ballots.

In light of the COVID-19 pandemic, these requirements each impose a severe, unjustified burden on Plaintiffs' right to vote because complying with these provisions would require voters to risk their health by violating social-distancing directives and self-quarantines. Specifically, the Form

⁴ Voters requiring assistance to complete the absentee ballot request form due to blindness, disability, or inability to read or write may request another person if "there is not a near relative or legal guardian available to assist that voter." N.C. Gen. Stat. § 163-230.2(e)1. However, there is no exception for those who require assistance with *returning* the request form by reason of their blindness, disability, or inability to read or write. See *id.* § 163-230.2 (e) (4).

⁵ Other restrictions include prohibiting owners, managers, directors, employees of any hospital, clinic, nursing home, or rest home from witnessing for a voter who is a patient or resident. See N.C. Gen. Stat. §§ 163-226.3(a) (4) and 163-237(b) (1).

Requirement means that voters like Plaintiff Peggy Cates, who lacks means to print the request form, will be unable to request an absentee ballot while social distancing; they will have to seek help from others, whereas they could make such a request by alternative means if the form were not required. Cates Decl. ¶ 8. Plaintiff LWVNC has already received similar reports from members and others who have no way to download and print the request form. Nicholas Decl. ¶ 14.

The Organizational Assistance Ban augments these challenges, preventing organizations like LWVNC from helping voters to correctly complete and deliver request forms. This process can be “particularly difficult for those who are self-quarantining and do not have access to envelopes, postage, or secure USPS mail pick-up.” Nicholas Decl. ¶ 14. Recent national polls indicate that a substantial number of voters are not confident that they understand the process of voting by mail. Gronke Decl. ¶ 53. Plaintiffs Clark, Cates, Edwards, Priddy, and Bentley, who all intend to vote by mail-in absentee ballot, will be restricted in terms of whom they can receive assistance from. Clark Decl. ¶ 10; Cates Decl. ¶ 9-10; Edwards Decl. ¶ 10; Priddy Decl. ¶ 5, 8; Bentley Decl. ¶ 7. The Organizational Assistance Ban thus prevents voters

from receiving needed assistance to navigate the ballot request process even though this assistance is crucial at this time.

The Organizational Assistance Ban also severely hinders the work of LWVNC and similar organizations to help those wishing to vote by mail, a population that will dramatically increase this year with an influx of voters who have never voted by mail. Nicholas Decl. ¶¶ 13-14; see also Lopez Decl. ¶ 24. The Ban impedes LWVNC's educational mission and message of participation in voting, its ability to build relationships and associate with voters, and most importantly, its mission of promoting voter participation and civic engagement. Nicholas Decl. ¶ 14. Additionally, the multi-partisan assistance teams cannot remedy these barriers in certain North Carolina counties, where their availability has been inadequate under the best of circumstances. See Riggs Decl. ¶ 12. For similar reasons, Susan Schaffer and others who (separate from LWVNC) have previously assisted voters in requesting and completing absentee ballots will be prevented from doing so. Declaration of Susan Schaffer ("Schaffer Decl.") ¶¶ 4-7.

The Two Witness Requirement also presents an insurmountable barrier to voting by mail for many voters in North Carolina. Plaintiffs Clark, Cates, Edwards, Priddy, Bentley, and Hutchins are all eligible North Carolina voters who are at high risk of developing severe complications from COVID-19 and therefore need to vote by mail to safeguard their lives and the health and well-being of their family members or co-habitants. Clark Decl. ¶¶ 2, 4-6; Cates Decl. ¶¶ 2, 4; Edwards Decl. ¶¶ 5-6; Priddy Decl. ¶¶ 4-5; Bentley Decl. ¶¶ 2, 4-7; Hutchins ¶ 6. Following advice from medical professionals or the CDC, these Plaintiffs have quarantined themselves in their homes, either alone, Cates Decl. ¶¶ 6, 9-10; Bentley Decl. ¶¶ 1, 4, or with one other individual, Clark Decl. ¶¶ 6-7; Edwards Decl. ¶¶ 1, 6; Priddy Decl. ¶¶ 1, 5. Plaintiff Hutchins is under quarantine in a nursing home due to the pandemic and the residents' vulnerability to COVID-19. Hutchins Decl. ¶ 6. These Plaintiffs have no way to safely comply with the two-witness requirement. As a result, they will be forced to choose between exercising their right to vote and risking their health by interacting with a witness. Putting Plaintiffs to this choice constitutes a severe burden on their right to vote.

These Plaintiffs are just a few among many in North Carolina. According to the U.S. Census, there are 1,113,548 single-member households in North Carolina, 37% of which are occupied by someone 65 or older, in addition to 1,388,442 two-person households (who would similarly be unable to meet the Two Witness Requirement without contact with an adult outside of their household).⁶ In addition to bringing the voter in close proximity to others, the Two Witness exposes them to the risks of surface contamination and transmission of COVID-19 via the dispersion of respiratory droplets and aerosolization. Murray Decl. ¶¶ 8, 24. The alternative of obtaining a notary public's signature does not alleviate this issue since the recent remote-notarization provisions in North Carolina's COVID-19 response bill specifically exempted absentee ballots. Riggs Decl. ¶ 13. For higher-risk voters, this burden is especially severe and must be justified by and narrowly drawn to a compelling interest and the law.

Finally, the SBE Defendants' failure to provide contactless drop boxes for absentee ballots creates an

⁶ Table S2501, *Occupancy Characteristics, American Community Survey 2014-2018*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=S2501&g=0400000US37&tid=ACSSST5Y2018.S2501>.

additional burden on voters. Drop boxes would allow voters without access to postage and USPS pick-up to securely deposit their ballots without breaking social distancing guidelines, and would further reduce the strain on North Carolina's mail infrastructure. The latter is not a merely theoretical concern: mail-in ballots must be postmarked on or before Election Day and delivered no later than 5:00 pm on Election Day, or returned to the county board of elections (not a polling location) no later than 5:00 pm on Election Day. Voters such as Plaintiffs Clark, Cates, Edwards, Priddy, Bentley, and Hutchins who intend to vote by mail will have to rely on USPS to safely submit their ballots. North Carolina's failure to provide drop boxes will likewise strain Plaintiff DemNC's resources to "assist voters (in a legal way) to find a way to return their ballots if they lack stamps or financial resources." Lopez Decl. ¶ 26. The anticipated influx of mail-in ballots means that the USPS will have to handle an unprecedented volume of absentee ballots unless contactless drop boxes are provided. Furthermore, other states, including Oregon, have successfully used drop boxes and North Carolina can easily implement a similar program. Bartlett Decl. ¶ 24.

These Burdens Are Not Justified By The State's Interest In
Fraud Prevention

In the midst of this public health crisis, no legitimate or important state interest justifies the burdens placed on Plaintiffs' right to vote. To the extent the SBE Defendants invoke an interest in election security and fraud prevention, the challenged restrictions are neither justified by that interest nor narrowly drawn to advance it.

The state's lawyers will likely attempt to defend some or all of these restrictions by citing the 2018 absentee ballot fraud conspiracy in 9th Congressional District (the "Dowless Scheme"). While states have an interest in ensuring the legitimacy of their elections, see *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008), the *Anderson-Burdick* inquiry calls for a balancing of burdens against interests, not merely the naming of a legitimate one. See, e.g., *Norman v. Reed*, 502 U.S. 279, 289 (1992). The regulation must be proportionate to the problem.

The COVID-19 pandemic has caused these provisions to burden voters to an unprecedented degree, both in terms of risk (given the severe impact COVID-19 can present to all individuals and particularly those with underlying health

issues) and in scale (given the expected increase in infection rates throughout the fall). The Form Requirement, failure to provide alternative means to request absentee ballots by phone, email, or online, and failure to provide contactless drop boxes have no clear connection to preventing voter fraud yet will significantly impair certain voters' ability to vote by mail during an election when more voters than ever before will seek to do just that.

The Organizational Assistance Ban was passed in the wake of the Dowless Scheme and therefore has some connection to preventing voter fraud. See An Act to Amend the Laws Governing Mail-In Absentee Ballots ("SB 683"), S.L. 2019-239, § 1 (Nov. 6, 2019). However, its restrictions are not narrowly drawn nor necessary because the state still can—and already *does*—achieve its anti-fraud goals in other, less burdensome ways by: (i) requiring voters to submit one of their North Carolina driver's license or state ID number or the last four digits of their Social Security Number to request an absentee ballot, see N.C. Gen. Stat. § 163-230.2(a)(4), (f), (which could still be required for requests made by phone, email, or online); (ii) requiring the same as well as a certification under penalty of perjury by the voter on the absentee ballot itself,

see, e.g., Riggs Decl. ¶ 14; (iii) making the identities of absentee ballot requestors confidential until Election Day, see N.C. Gen. Stat. § 163-228(c); and (iv) enhancing the penalties for certain absentee-ballot-law violations and criminalizing any receipt of payment, failure to deliver, or copying of information from an absentee ballot request or application. See N.C. Gen. Stat. § 163-237.

In particular, making absentee ballot requests confidential (item (iii) above) prevents those trying to commit fraud, such as Dowless, from targeting individuals who have requested absentee ballots. As Mr. Tutor explains,

Mr. Dowless' illegal mail-in absentee ballot fraud enterprise was almost totally dependent on his daily access to the names and addresses of those who requested absentee ballots from the Bladen County Board of Elections. Mr. Dowless was known to have had a very long and cordial relationship with the staff at the Bladen County Board of Elections. He would either call the county board staff or come by on a daily basis to get the list of absentee ballot requests. At that time, the names and addresses of those requesting a mail-in absentee ballot were public record.

Now that the law has been changed so that the identities of voters requesting mail-in absentee ballots is not a public record until Election Day, I do not believe anyone can fraudulently manipulate the system as Mr. Dowless did.

Tutor Decl. ¶¶ 6-7.

Although the Supreme Court has recognized fraud prevention as a legitimate goal, it has twice struck down voting requirements because oath requirements and other anti-fraud measures already fulfilled the same purpose. In *Dunn v. Blumstein*, the Court noted that Tennessee could prevent non-residents from fraudulently voting in its elections by imposing an oath requirement and implementing cross-checks. 405 U.S. 330, 346, 348 (1972). See also *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 267-68 (1974) (holding that state agencies managed to prevent fraud without using durational residency requirements); *Harman v. Forssenius*, 380 U.S. 528, 543 (1965) (rejecting Virginia's argument that requiring either a poll tax or a certificate of residence promoted administrative efficiency in voting, in part because 46 other states were able to verify voters' addresses without these requirements).

The Organizational Ban also imposes greater restrictions on completing and submitting absentee ballot *applications* than exist for returned, completed absentee ballots, for which a voter may obtain assistance from a third party who is not a near relative or legal guardian. See N.C. Gen. Stat. §§ 163-226.3(a), 163-229(b)(4), 163-231(a). It is difficult

to ascertain how restrictions on application assistance could be justified where restrictions on ballot assistance are not necessary.

Similarly, the Two Witness Requirement does little to prevent fraud while creating mass disenfranchisement. The U.S. District Court for the District of South Carolina recently considered a similar *Anderson-Burdick* undue burden challenge to a *single-witness* requirement for mail-in voting and concluded that plaintiffs were:

likely to prevail on their constitutional challenge to the Witness Requirement under the *Anderson-Burdick* balancing test because the character and magnitude of the burdens imposed on [plaintiffs] in having to place their health at risk during the COVID-19 pandemic likely outweigh[s] the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity.

Thomas v. Andino, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *21 (D.S.C. May 25, 2020). The court placed particular emphasis on South Carolina Election Commission Executive Director Marci Andino's candid statement that "the witness signature offers no benefit to election officials as they have no ability to verify the witness signature." *Id.* at *19-20; see also *League of Women Voters of Okla. v. Ziriaux*, No. 118765, 2020 WL 2111348, at *1 (Okla. May 4, 2020) (enjoining absentee ballot notary requirement); *Libertarian Party of*

Ill. v. Pritzker, No. 20-CV-2112, 2020 WL 1951687, at *4 (N.D. Ill. Apr. 23, 2020) (enjoining portions of signature requirement for potential candidate ballot eligibility because they presented “insurmountable hurdle” during pandemic).

Any purported reliance by Defendants on the Dowless Scheme to justify the Two Witness Requirement is unavailing: the Two Witness Requirement was enacted in 2013, see 2013 N.C. HB 589 § 4.4 (enacted Aug. 12, 2013), years before the Dowless Scheme and thus failed to prevent it. Former Lead Investigator for Defendant SBE Marshall Tutor explains in his declaration that the two-witness signature requirement is not a particularly effective anti-fraud measure:

I do not believe a two-witness signature requirement in any way prevents potential fraud such as that conducted by Mr. Dowless’ illegal ballot fraud activities. In my 15 years’ experience as an investigator with the State Board of Elections, I cannot think of a time or situation in which two absentee ballot witness signatures would have prevented absentee ballot fraud.

Declaration of Marshall Tutor (“Tutor Decl.”) ¶ 8. Former Executive Director of the N.C. State Board of Elections similarly explains:

Other measures, such as fining violators, suspending voting rights and electioneering for a period of time, or incarcerating violators, would be much more

effective in deterring voter fraud than imposing a blanket two-witness requirement that will be an unnecessary barrier to many eligible voters.

Bartlett Decl. ¶ 28. Similarly, DemNC is aware through its research and advocacy that election fraud is “quite rare, and that the issues raised by the 2018 case have to do with enforcement of laws that were already in place prior to 2018, and with enforcement, surveillance and monitoring of election irregularities can suss out and address these issues.” Lopez Decl. ¶ 30.

Even if it did advance an interest in preventing fraud, the two-witness requirement is not narrowly tailored, especially in light of the other anti-fraud measures in place and listed above. As the court in *League of Women Voters of Virginia v. Virginia State Board of Elections* recently explained when considering a single witness requirement:

In ordinary times, Virginia’s witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times. In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden is substantial for a substantial and discrete class of Virginia’s electorate. During this pandemic, the witness requirement has become both too restrictive and not restrictive enough to effectively prevent voter fraud.

On the one hand, the measure is too restrictive in that it will force a large class of Virginians to face the choice between adhering to guidance that is meant to

protect not only their own health, but the health of those around them, and undertaking their fundamental right-and, indeed, their civic duty-to vote in an election. The Constitution does not permit a state to force such a choice on its electorate.

No. 6:20-CV-000024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) (internal quotation marks and citations omitted).

Finally, the witness certifications themselves do not call for the printed name of the witnesses, a glaring omission that further undermines the certification's use as an anti-fraud tool. Accordingly, witness certifications function as placebos. They have a psychological benefit, but recent history has shown that they are not particularly effective fraud deterrence, prevention, detection, or prosecution tools. Accordingly, the Two Witness Requirement should be suspended for the November election.⁷

⁷ Should the Court seek to craft a remedy tailored to voters facing the most serious risks of severe illness, Plaintiffs offer two alternatives to the Two Witness Requirement: (i) permitting voters to submit a certification with their absentee ballot affirming their inability to safely obtain a witness requirement following reasonable efforts, and/or (ii) permitting individuals to remotely witness absentee ballots remotely (e.g., via videoconference), and requiring only that voters record the name and address of the witness without requiring the witness's wet-ink signatures. See *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Nos. 20-1538 & 20-1546, at *4 (7th Cir. Apr. 3, 2020), *stayed in part*, No. 19A1016, 2020 WL 1672702 (U.S. Apr. 6, 2020). At

Additional Burdens To Absentee Voting

The failure by Defendants to ensure voters have an opportunity to cure deficient absentee ballot requests or ballots, or to submit a FWAB as an alternative of last resort to cast their votes should they fail to receive absentee ballots in time, present additional burdens to the right to vote in North Carolina. In the March 2020 North Carolina primary, almost 15 percent of submitted absentee mail-in ballots were rejected. Ketchie Decl. ¶ 5. Plaintiffs Clark, Cates, Edwards, Priddy, Bentley, and Hutchins all intend to vote by mail-in absentee ballot, some for the first time, see *e.g.*, Cates Decl. ¶ 8, and may well make errors on their absentee ballot request forms or absentee ballots and/or their certificate envelopes. There is no guarantee they will be notified or given the opportunity to cure these errors. Plaintiff LWVNC will have to redirect its limited resources toward ensuring that the voters it assists are following all procedures precisely, all while navigating the Organizational Assistance Ban. Nicholas Decl. ¶ 18. Plaintiff DemNC works in

bare minimum, Plaintiffs respectfully request the Court enjoin the requirement for a second witness, thereby requiring voters to only obtain one witness.

many of North Carolina's 100 counties and, without a uniform procedure for county boards to assist voters with curing their absentee ballots or request forms, will require them to spend more time helping individual voters from varying counties to successfully vote by mail. Lopez Decl. ¶ 27. In light of the anticipated dramatic increase in the use of absentee ballots and the Organizational Assistance Ban, there is a heightened risk that voters new to mail-in absentee voting will fail to follow the proper procedures. By lacking a procedure for voters to cure deficiencies, North Carolina's election code risks disenfranchising vast numbers of absentee voters.

Similarly, the importance of providing the FWAB as a back-up is underscored by the recent evidence out of Wisconsin, Ohio, and Pennsylvania, where state and local election officials, as well as the USPS, failed to timely deliver thousands of absentee ballots to voters in the mail during a spring election with significantly lower-turnout elections than the November presidential election will be. Gronke Decl. ¶¶ 55, 60. Given the anticipated ten-fold increase in use of absentee mail-in ballots, it is likely that many North Carolina voters will likewise receive their ballots too late to cast them. Those voters who timely request

an absentee ballot, such as Plaintiffs Clark, Cates, Edwards, Priddy, Bentley, and Hutchins who all intend to vote by mail-in absentee ballot, but do not receive their ballots in time to vote and drop them off or mail them by Election Day will be disenfranchised unless they are permitted to use the FWAB as an alternative of last resort to cast their votes. Plaintiff DemNC also anticipates a significant diversion of resources to help voters get last-minute absentee request submitted without the availability of the FWAB failsafe measure. Lopez Decl. ¶ 27.

There are no legitimate state interests for Defendants' failure to remedy these restrictions to absentee voting during the ongoing health crisis. It's not clear what, if any, interest would be served in requiring counties to provide voters with an opportunity to cure absentee ballots and requests forms. As for FWABs, these are already available to military and overseas citizens pursuant to the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301 *et seq.* This law provides that military and overseas voters must be permitted to cast FWABs as an "Official Backup Ballot," Riggs Decl. ¶ 15, or "back-up measure," to vote in federal races if they do not receive their regular absentee

ballot. 52 U.S.C. §§ 20302(a)(3), 20303(a)(1). FWABs are then “submitted and processed in the manner provided by law for absentee ballots in the State involved.” 52 U.S.C. § 20303(b). Even if these burdens to voting did serve a legitimate state interest, the need for these failsafe options during the COVID-19 pandemic would far outweigh any such interest where voting by mail is of paramount importance.

iii. In-Person Voting Restrictions

While use of mail-in absentee voting is projected to increase ten-fold, a majority of voters are projected to still rely on in-person voting options in the November election. North Carolina’s electorate has expressed a clear preference for in-person voting, with just 4 percent of voters casting mail-in absentee ballots in the 2016 general election. Ketchie Decl. ¶ 6; Gronke Rep. ¶ 15. As a result, North Carolina has not built the infrastructure to accommodate such a dramatic increase in voter demand for absentee mail-in ballots without overloading current systems and causing mass disenfranchisement. Gronke Decl. ¶¶ 15, 18. Accordingly, in-person voting must be preserved as a safe alternative to mail-in ballots.

The CDC has issued guidance recommending election officials to “reduce crowd size at polling stations” and take other action to ensure safe in-person voting options in light of COVID-19. Riggs Decl. ¶ 16. Contrary to this guidance, North Carolina’s election code has two provisions that have already hindered—and will continue to hinder—county boards in providing safe, free, and fair in-person voting options: (i) the requirement pursuant to N.C. Gen. Stat. § 163-42(b) that a majority of poll workers reside in the precinct where they serve on Election Day under (the “Majority Precinct Requirement”); and (ii) the requirement pursuant to N.C. Gen. Stat. § 163-227.6(c) that all early voting sites must be open during uniform hours and all sites other than the county board office must be open 8:00 a.m. to 7:30 p.m. (the “Uniform Hours Requirement”).

The burden of these provisions on the right to vote is already apparent. As of May 14, 2020, eight county boards have moved to eliminate 64 precincts for the upcoming Congressional District 11 Second Republican Primary, with several citing a lack of poll workers as the reason for consolidation. Riggs Decl. ¶ 20. In a letter to General Assembly leadership, county board members from Congressional

District 11 conveyed that eliminating the Majority Precinct Requirement “would significantly help us staff polling places in these challenging times.” Riggs Decl. ¶ 5. Eliminating the Majority Precinct requirement is likewise required to prevent the closure of polling locations in the November election in light of the anticipated persistence of COVID-19 this fall and the advanced age of poll workers. In the 2014 general election, over 60 percent of North Carolina poll workers were 61 years of age or older and, as a result, a significant portion of poll workers are in the 65-years-old-plus CDC risk category. Riggs Decl. ¶ 17. Similarly, the Uniform Hours Requirement has already proven to cause polling locations to close. After North Carolina imposed this requirement in June 2018, the costs of implementing this measure caused 43 counties to reduce the number of early voting sites in the 2018 general election compared to 2014 and over two-thirds of counties to reduce weekend hours. Lopez Decl. ¶ 7; Riggs Decl. ¶ 18–19.

The precinct consolidation that will result from enforcement of the Majority Precinct and Uniform Hours Requirements will cause a severe burden on the right to vote in North Carolina. Gronke Decl. ¶ 28. Voters who need to vote

in person, like Plaintiff Permar, will be confronted with confusion as to their voting location, increased travel time to get there, as well as long lines and crowds that will put them at greater risk of contracting COVID-19. Permar Decl. ¶ 7-10. Closures of polling places accessible by public transportation will also jeopardize the ability of those who rely on public transportation to reach polling locations, like Plaintiff Permar. *Id.* at ¶ 7. Additionally, Plaintiff LWVNC will have to divert its limited resources toward recruiting poll workers from within precincts and to alerting its members and those in their communities about precinct closures, Nicholas Decl. ¶¶ 20-21, and Plaintiff DemNC will have to spend more time advocating for early voting site sand days if the Uniform Hours Restriction is enforced. Lopez Decl. ¶ 28.

These anticipated barriers to voting are not speculative. The reductions in polling place locations in the recent Wisconsin primary caused voters to wait two to three hours to cast a ballot in some locations. Gronke Decl. ¶ 46. In North Carolina, there are over 200 precincts with over 5,000 voters, Ketchie Decl. ¶ 7, and this number only stands to increase with precinct closures. These precincts especially will

experience long lines. Bartlett Decl. ¶ 27. These factors—inconvenient polling places, long lines, and less accessible voting locations that require voters to travel longer distances—already present obstacles to voting under ordinary circumstances. Gronke ¶ 25; Lopez ¶ 14; Bartlett Decl. ¶ 17. These obstacles will only be exacerbated during the current pandemic, when social distancing is required for safe election administration. Consistent with the anticipated impact of these provisions, Defendant Bell requested a change in state law to allow county boards to recruit and train poll workers county-wide and to allow count boards of election “flexibility to determine hours because they are affected differently by, and respond differently to, the COVID-19 pandemic.” Riggs. Decl. ¶ 3.

Individuals accustomed to early voting may very well be deterred by crowding and the inherent heightened risk of infection; they will thus be forced to choose between risking their health to cast a ballot or foregoing their right to vote. Accordingly, these provisions present a severe burden to these Plaintiffs and the rights of voters who rely on in-person voting. *See Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969) (finding that the defendant’s failure to provide

adequate voting facilities despite their foreknowledge of precinct consolidations deprived voters of their constitutional rights); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 478 (6th Cir. 2008) (finding long lines and inadequate voting machines severely burdened Ohio voters' right to vote).

It is unclear what legitimate, let alone important, state interest could be furthered by the Majority Precinct and Uniform Hours Requirements, particularly when the shortage is already dire. In the midst of this ongoing public health crisis, there is no state interest in enforcing this requirement that justifies these burdens placed on Plaintiffs' constitutional right to vote.

In addition to the above restrictions, the SBE Defendants has imposed further burdens on the right to vote by failing to provide an accessible, centralized way for voters and advocates to monitor precinct consolidations, and failing to require counties to provide poll workers and voters with PPE for use during in-person voting for the 2020 general election. These failures add cumulatively to the panoply of restrictions on eligible voters wishing to cast a ballot in person. See *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005)

("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition.") (O'Connor, J., concurring).

As for precinct consolidation, each county board must give notice at least 45 days before the election when altering or consolidating precincts by posting notice in a generally circulated newspaper and on the door of the county courthouse and county board, and mailed to the chairmen of every political party in the county. See N.C. Gen. Stat. § 163-128(a). However, voters only need to be notified of changes in their particular precinct 30 days before an election. *Id.* Accordingly, North Carolina's failure to provide an accessible, centralized way in which voters and advocates can monitor precinct consolidation is a severe burden on the right to vote in light of the expected volume of changes. Limited access to this information will impede and confuse voters trying to determine where and how best to vote in-person, including voters like Plaintiff Permar, who must vote in person and must ensure she is able to vote at a time that is in line with her work schedule. Permar Decl. ¶¶ 1, 9. As a central hub for voter information, Plaintiff DemNC will need

to redistribute resources in order to adequately and timely inform voters about precinct consolidations absent a centralized access to this information. Lopez Decl. ¶ 14-15.

In addition, the SBE Defendants must require counties to provide PPE to ensure the safety of voters and poll workers. Such PPE should include protective masks and gloves for poll workers and/or voters, separation shields, antiseptic wipes for equipment, and single-use pens, all of which will help prevent voters such as Plaintiff Donna Permar, who must vote in person, Permar Decl. ¶ 10, and poll workers from infection. In conducting its Election Protection hotline and poll-monitoring program, DemNC volunteers will almost certainly be asked about PPE, who has it, and how to secure it if is not provided. Lopez Decl. ¶ 24. In addition to presenting a risk to voters' health, the failure in the recent Wisconsin primary to provide supplies to protect election workers caused poll worker shortages and, as a result, localities to severely limit or close early voting locations. Gronke Decl. ¶ 43. The reductions in polling place locations also caused voters to wait two to three hours to cast a ballot in some locations, thus compounding issues of crowding and risks of infection. *Id.* ¶ 46. Finally, the need for a requirement that counties

provide PPE can hardly be in dispute where Defendant Bell stated that she intended already to order PPE for counties holding the second Republican primary election. Riggs Decl. ¶ 23. The same measures should be taken for the November election.

In the midst of this ongoing public health crisis and the rapid changes to election plans it is forcing, there is no state interest in denying easy access to precinct consolidation information or failing to require counties to provide PPE that justifies the burden placed on Plaintiffs' constitutional right to vote.

As set forth above, Plaintiffs are likely to succeed on the merits of proving that these various restrictions on voter registration, absentee by-mail voting, and in-person voting, present severe burdens to the right to vote in violation of the First and Fourteenth Amendments that are not justified by any state interests, compelling or otherwise, in light of COVID-19. Even if purported to serve legitimate state interests, such as preventing voter fraud, these measures are not narrowly tailored in light of COVID-19. Although true even when taken individually, even if these restrictions were individually defensible they present a "panoply of

regulations” with the “combined effect of severely restricting participation and competition.” *Clingman*, 544 U.S. at 607-08 (O’Connor, J., concurring).

B. Unconstitutional Condition on the Right to Vote

North Carolina’s election laws and procedures are not designed to facilitate safe, fair, and free elections during such a public health crisis, and the legislature has failed to take action to remedy this situation. Given the rapidly spreading infection, North Carolina’s current election laws will force voters to choose between exposing themselves to severe risks to their health and exercising their constitutionally-protected right to vote. This forced choice unlawfully compels North Carolina voters to forfeit their constitutionally-protected right to bodily integrity in order to exercise another constitutional right.

As the U.S. Constitution forbids undue burdens on the right to vote, so does it prohibit states from forcing individuals to choose between their rights. Defendants’ enforcement of restrictions on mail-in absentee voting outlined in the sections above force mail-in absentee voters to relinquish their Fourteenth Amendment right to bodily integrity in order to exercise their First and Fourteenth

Amendment-protected right to vote. Forcing voters to forfeit their right to bodily integrity violates the Fourteenth Amendment.

Under the unconstitutional conditions doctrine, the government may not require an individual to forfeit one constitutional right in order to exercise another. See *Simmons v. United States*, 390 U.S. 377, 394 (1968) (“[I]t [is] intolerable that one constitutional right should have to be surrendered in order to assert another.”). The doctrine has also been invoked to prohibit the imposition of conditions on First Amendment-protected activities that require the forfeiture of other rights. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977) (finding New York law unconstitutionally required political party leaders to provide unimmunized testimony before a grand jury, forcing leaders to choose between First Amendment right of association and Fifth Amendment right against self-incrimination); *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) (“This case presents an especially malignant unconstitutional condition because citizens are being required to surrender a constitutional right—freedom from unreasonable searches and seizures—not merely to receive a

discretionary benefit but to exercise two other fundamental rights—freedom of speech and assembly.”).

Most relevant here, the Supreme Court has invalidated voting requirements or conditions that require the forfeiture of another fundamental right. In *Dunn v. Blumstein*, the Court held that a one-year durational residency requirement for voter registration placed an unconstitutional condition on the fundamental right to interstate travel. 405 U.S. 330 (1972). The Court explained that “such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote.” *Id.* at 342. Notably, when First Amendment-protected rights such as the right to vote are at stake, it is irrelevant whether the government intended to coerce the voter into forfeiting a constitutional right. See *Bourgeois*, 387 F.3d at 1324–25 (“[T]he very purpose of the unconstitutional conditions doctrine is to prevent the Government from subtly pressuring citizens, *whether purposely or inadvertently*, into surrendering their rights.” (emphasis added)).

Courts evaluate these claims by looking to the constitutional standard for the right that Plaintiffs are coerced to surrender. “[W]hen a condition on a government

benefit burdens a constitutional right, it generally triggers the same scrutiny as a direct penalty would." *McCabe v. Sharrett*, 12 F.3d 1558, 1562 (11th Cir. 1994). In *Dunn*, the durational residency requirement for voter registration was subjected to strict scrutiny because fundamental voting and interstate travel rights were implicated: "In the present case, whether we look to the benefit withheld by the classification (the opportunity to vote) or the basis for the classification (recent interstate travel) we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements." 405 U.S. at 335; see also *Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969) ("Since the classification [for welfare eligibility] here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest.").

This case implicates Plaintiffs' rights to bodily integrity, which is guaranteed by the Fourteenth Amendment's Due Process Clause. Government actions that threaten the right to bodily integrity are subject to strict scrutiny. See *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998). In *Guertin v. Michigan*, which concerned the Flint water

crisis, the court recognized that the Sixth Circuit articulated the following standard: "Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value . . . is a classic example of invading the core of the bodily integrity protection." 912 F.3d 907, 919, 921-22 (6th Cir. 1998); *cf. id.* at 921 ("[A] government actor violates individuals' right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent, especially when such substances have zero therapeutic benefit.").⁸

The Two-Witness Requirement forces voters who are at high risk of developing severe complications from COVID-19, such as Plaintiffs Cates, Clark, Edwards, Priddy, and Bentley, to choose between their right to vote and the right to bodily integrity. These voters, who have quarantined themselves in their homes to protect their health, wish to vote by mail

⁸ Typically, these bodily integrity cases are about prior misconduct in an action for damages, *not*, as here, an action for prospective injunctive relief based upon the argument that a law or policy will, in the future, violate plaintiffs' bodily integrity. But if anything, the right to bodily integrity should be even more robust when the harm to bodily integrity arises from the face of a law—it is a small analytical hop to analogize from the cases about past official misconduct.

because they cannot vote in person—but to do so, they must risk their health by engaging two witnesses to observe their completion of the ballot. Cates Decl. ¶¶ 10-11; Clark Decl. ¶¶ 9-11; Edwards Decl. ¶¶ 10-12; Priddy Decl. ¶¶ 8-10; Bentley Decl. ¶¶ 7-10.

Further, voting in person is not a viable alternative to mail-in voting for these at-risk Plaintiffs. See *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *17 n.20 (D.S.C. May 25, 2020) (holding that, in light of the COVID-19 pandemic, restrictions on absentee voting effectively impair and deny the right to vote because “it is relatively difficult to vote in person without risking the possibility of infection, especially for those who are more susceptible to the ravaging harms of COVID-19” and “absentee voting is the safest tool through [sic] which voters can use to effectuate their fundamental right to vote”).

As discussed above, the Two Witness Requirement does not clearly advance the state’s interest in preventing fraud, and existing anti-fraud measures more than adequately protect mail-in absentee voting, including requirements that voters submit identifying information, that they and their witnesses certify the ballot under penalty of perjury, and enhancing

the penalties for certain absentee-ballot-law violations. See *supra* Section I.A.ii at pp. 1528-367; see also *Dunn*, 405 U.S. at 346, 348 (striking down voting requirements after finding Tennessee could prevent non-residents from fraudulently voting in its elections by imposing an oath requirement and implementing cross-checks); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 267-68 (1974) (holding that state agencies managed to prevent fraud without using durational residency requirements); *Harman v. Forssenius*, 380 U.S. 528, 543 (1965) (rejecting Virginia's argument that requiring either a poll tax or a certificate of residence promoted administrative efficiency in voting, in part because 46 other states were able to verify voters' addresses without these requirements).

Accordingly, Defendants' enforcement of the challenged restrictions on mail-in absentee voting forces Plaintiffs and the Organizational Plaintiffs' members to forfeit their right to bodily integrity in order to exercise their right to vote in violation of the Fourteenth Amendment.

C. Violation of the Organizational Plaintiffs' and Plaintiff Schaffer's First Amendment Rights to Free Speech and Association

Voter assistance is critical to Organizational Plaintiffs' speech, associational group activity and

organizational mission. SB 683's restrictions on the organization assisting its members and other voters with completing and submitting absentee ballot request forms thus impermissibly interferes with the Organizational Plaintiffs' First Amendment rights to promote civic engagement and associate with their members and other voters. SB 683's restrictions also interfere with Plaintiff Schaffer's rights to free speech and association because she is no longer able to assist many voters who desperately need it. Schaffer Decl. ¶¶ 8-9.

There is no "doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (internal quotation omitted). The restrictions on who can assist voters with completing and returning mail-in absentee ballot request forms stymie the Organizational Plaintiffs and their members' core political speech and expressive conduct to engage potential voters and encourage them to vote by assisting voters with requesting and submitting absentee ballot requests. See Nicholas Decl. ¶ 6, 8, 12-14; Lopez Decl. ¶ 22.

The Supreme Court has recognized that petition-gathering activity is “the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 422–23 (1988). Whether a voter should apply for a ballot and ultimately participate in an election is a “matter of societal concern that [Plaintiffs] have a right to discuss publicly without risking criminal sanctions.” *Meyer v. Grant*, 486 U.S. 414 at 421; see also *Buckley v. Am. Constitutional Law Found*, 525 U.S. 182, 186–87 (1999) (quoting *Meyer*, 486 U.S. at 422). In *Meyer*, plaintiffs were engaged in direct outreach to fellow citizens to engage them in the political process by gathering petition signatures for inclusion of a ballot question. State law burdened their signature-gathering activity by banning payment of petition circulators. Applying “exacting scrutiny,” the Supreme Court struck down this law as “restrict[ing] political expression.” *Meyer*, 486 U.S. at 420–22.

As in *Meyer*, providing assistance to voters who need to vote by mail to mitigate their risk of contracting COVID-19 and who are requesting a mail-in ballot for the first time since SB 683’s enactment goes to the heart of Organizational

Plaintiffs' core associational rights and missions to increase civic participation and engagement, as well as Plaintiff Schaffer's individual free speech and associational rights. Nicholas Decl. ¶¶ 6, 12-14; Lopez Decl. ¶¶ 2, 5, 10-11; Schaffer Decl. ¶¶ 6, 9. Particularly in the pandemic context, assisting voters with filling out request forms and helping voters submit them, rather than simply pointing to blank forms, would be an important part of the LWVNC's educational mission and the effectiveness of their message of participation. Nicholas Decl. ¶¶ 13-14. Where the LWVNC directly helps voters, this assistance has educational and communicative value, and helps it build relationships with members and other voters. *Id.* Voters who work with the LWVNC to submit applications, many for the first time, would be more likely to complete the process independently in the future, and more likely to vote in the following election. *Id.* ¶ 13. When voters cannot get needed assistance, DemNC must expend more resources explaining the process to them, including how to get a ballot. Lopez Decl ¶¶ 16, 22-24.

The restrictions on assisting voters with applying for mail ballots prevent Organizational Plaintiffs from associating with their members and other voters, limiting

Organizational Plaintiffs' political expression, and diminishing their ability to convey their message and further it by engaging more individuals in the political process. See Nicholas Decl. ¶¶ 12-13; Lopez Decl. ¶ 22. The speech in question is "at the core of our electoral process and of the First Amendment freedoms." *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). And because the restrictions interfere with core political speech, they are "accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)).

By imposing a blanket ban on organizations like the Organizational Plaintiffs and Plaintiff Schaffer, which prevent them from assisting their members and/or voters with completing and requesting absentee ballots, N.C. Gen. Stat. § 163-23.2 is not narrowly-tailored to serve a compelling state interest. "[W]hen it comes to core First Amendment speech...the government may not use a hatchet where a scalpel will suffice." *Cross v. Mokwa*, 547 F.3d 890, 903

(8th Cir. 2008) (Bye, J., concurring in part) (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982)). Examples of more targeted provisions include the prohibition on falsification of papers with respect to fraudulent voter qualification, and on false representations to blind or illiterate voters regarding their ballots. N.C. Gen. Stat. §§ 163-274, 163-275. Accordingly, Organizational Plaintiffs and Plaintiff Schaffer are likely to succeed on their First Amendment speech and association claim.⁹

D. Procedural Due Process

"Where the government seeks to deprive someone of a liberty interest protected by due process, due process demands that certain procedural safeguards be provided." *United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995). A liberty interest that is governed by due process can be created by the U.S. Constitution or "may arise from an

⁹ Even if the Court were to review this restriction on Plaintiffs' associational rights under the *Anderson-Burdick* framework for regulations of the election process, there is little difference between the exacting scrutiny of *Meyer* and the close scrutiny applied under *Anderson-Burdick* when considering regulations on core political speech, which are necessarily severe. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 208 (1999) (Thomas, J., concurring); see *id.* at 192 n.12. See *infra* Section 1.A.

expectation or interest created by state laws or policies.” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

“[P]rocedural due process requires fair notice of impending state action and an opportunity to be heard.” *Snider Int’l Corp. v. Town of Forest Heights*, 739 F.3d 140, 146 (4th Cir. 2014) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Absent exigent circumstances, due process requires pre-deprivation procedures. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The *Mathews* test “set forth the familiar three-step inquiry for determining the adequacy of the opportunity to be heard,” *Snider Int’l*, 739 F.3d at 146, but here state and county election officials afford no process whatsoever.

Courts have held that the failure to provide voters adequate notice and an opportunity to cure amounts to a violation of voters’ procedural due process rights. *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217–22 (D.N.H. 2018) (applying *Mathews* and concluding that the state’s scheme “fails to guarantee basic fairness”). North Carolina law gives all registered North Carolina voters statutory rights to request and cast a mail-in absentee ballot that will be processed and counted, thereby vesting them with liberty

interests. N.C. Gen. Stat. § 163-226(a). Eligible, registered voters enjoy an "individual and personal" right to vote under North Carolina law. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). "The right to vote by absentee ballot is not, in and of itself, a fundamental right. But once the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot." *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *5 (N.D. Ill. Mar. 13, 2006).

As enforced by Defendants, the state's election laws do not afford mail-in absentee voters any notice of or opportunities to cure material defects in their absentee ballot request form or the absentee ballots themselves. Such material defects will result in the rejection of their request forms or absentee ballots, thereby depriving Individual Plaintiffs and the Organizational Plaintiffs' members of their right to vote by mail. Furthermore, the lack of any uniform mechanism to cure will require LWVNC and DemNC to devote additional resources towards identifying which counties are voluntarily providing some sort of process to cure absentee ballot request forms and absentee ballots,

educating voters on those processes, and assisting them. Nicholas Decl. ¶ 18; Lopez Decl. ¶¶ 23, 27.

Plaintiffs Clark, Cates, Edwards, Priddy, Bentley, and Hutchins all intend to vote by mail-in absentee ballot, some for the first time, see *e.g.*, Cates Decl. ¶ 8, and may well make errors on their absentee ballot request forms or absentee ballots and/or the certificate envelopes. Procedural due process requires a cure procedure for these defects. Defendants have deprived Plaintiffs of their protected interest in casting an absentee ballot by failing to provide notice and an opportunity to cure deficiencies in the request forms and ballots.

E. Violation of Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131 et seq.) and § 504 of the Rehabilitation Act (29 U.S.C. § 794)

Title II of the ADA provides that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity” such as voting. 42 U.S.C. § 12132. Similarly, section 504 of the RA requires that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in,

be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). The ADA and RA protect individuals with disabilities from being excluded from voting on the basis of their disabilities. See *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 510 (4th Cir. 2016). Accordingly, Defendants are obligated to provide Plaintiffs Clark, Edwards, and Priddy with the reasonable modifications so they are afforded the same opportunity to vote as other individuals who do not have disabilities.

The SBE, which received federal funding to conduct elections, must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability. See 29 U.S.C. § 794(a). By failing to waive the two-witness requirement for absentee ballots for voters whose disabilities limit their ability to have contact with others during this pandemic, the SBE Defendants are violating the ADA and RA. Without action by this Court, vulnerable voters like Plaintiffs Clark, Edwards, Priddy, and Hutchins (the “ADA/RA Plaintiffs”) will not be able to vote this November.

To prove a violation of Title II of the ADA and Section 504 of the RA,¹⁰ plaintiffs must show

(1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability.

Lamone, 813 F.3d at 503. First, there is no question that the ADA/RA Plaintiffs have disabilities under the ADA and RA. An individual is considered disabled if he can show "(1) that he has a physical or mental impairment, (2) that this impairment implicates at least one major life activity, and (3) that the limitation is substantial." *Heiko v. Colombo Sav. Bank, F.S.B.*, 434 F.3d 249, 254 (4th Cir. 2006).

ADA/RA Plaintiffs' preexisting conditions qualify as physical impairments. Physical impairments include lung disease and diabetes, see 28 C.F.R. § 35.108(b)(2); 10 C.F.R. § 4.101, and both conditions impose a greater risk of severe illness from COVID-19. Courts around the country have also routinely held that conditions like COPD, diabetes,

¹⁰ The Fourth Circuit analyzes the ADA and RA together because "the analysis is substantially the same." *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty*, 673 F.3d 333, 336 n.1 (4th Cir. 2012) (internal quotation marks omitted).

blindness, and immunodeficiency can qualify as disabilities under the ADA and RA. See, e.g., *Davis v. Nat'l R.R. Passenger Corp.*, 733 F. Supp. 2d 474, 494 (D. Del. 2010) (COPD); *Myers v. Hose*, 50 F.3d 278, 282 (4th Cir. 1995) (diabetes); *Lamone*, 813 F.3d 494 (blindness); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (HIV). Moreover, the CDC has deemed that individuals who have impairments such as COPD, diabetes, and organ transplants (requiring immunosuppressant medication), or are of advanced age (65 or older), such as the ADA/RA Plaintiffs, are "at higher risk for severe illness from COVID-19." Riggs Decl. ¶ 7.

These physical impairments, in combination with the pandemic, also substantially affect ADA/RA Plaintiffs by restricting their enjoyment of at least one major life activity. Major life activities include breathing, standing, sleeping, reading, writing, walking, as well as the operation of a major bodily function, such as "function of the immune system" and respiratory and endocrine systems. 28 C.F.R. § 36.105(c)(1). Plaintiff Clark suffers from severe COPD, which interferes with several major life activities, including breathing. Clark Decl. ¶ 5. Plaintiff Edwards possesses type 1 Diabetes, a physical impairment that substantially affects

her major bodily function through her endocrine system. Edwards Decl. ¶ 5. Plaintiff Priddy's pre-existing conditions are physical impairments that substantially influences his major life activities because the function of his immune system is directly affected. Priddy Decl. ¶ 4. Plaintiff Hutchin's blindness is a physical impairment that substantially influences many major life activities, such as reading, writing, and walking. Hutchins Decl. ¶¶ 4, 12. Accordingly, the ADA/RA Plaintiffs have disabilities as defined by the ADA and RA.

Second, the ADA/RA Plaintiffs are otherwise qualified to receive the benefits of a public service, program, or activity—namely, voting. Each ADA/RA Plaintiff is registered to vote this November. Clark Decl. ¶ 3; Priddy Decl. ¶ 2; Edwards Decl. ¶ 2; Hutchins Decl. ¶ 3. However, whether the ADA/RA Plaintiffs can vote in light of this pandemic will depend on whether this Court grants relief and suspends the two-witness requirement.

Third, the ADA/RA Plaintiffs are excluded from participation in and denied the benefits of voting, or are otherwise discriminated against, on the basis of their disability. Due to their conditions, the Plaintiffs Clark,

Edwards, and Priddy cannot vote safely in person and must vote by mail. However, they are unable to safely obtain two witness signatures without ignoring the CDC's guidance and putting themselves at unreasonable risk of contracting COVID-19 and suffering serious health consequences, including death. Furthermore, Plaintiff Hutchins would like to vote by mail because his age puts him at risk of serious illness or death from COVID-19. Hutchins Decl. ¶ 6. Due to his disability, he cannot fill out and return his absentee ballot himself and needs assistance. His nursing home is closed to visitors in light of the COVID-19 pandemic and he is not able to receive assistance from his wife. Thus, he would like his nursing home staff to help him. *Id.* ¶¶ 10-12. However, under North Carolina law, the nursing home staff and nurses are not allowed to assist him with returning an absentee ballot request form, marking and completing an absentee ballot, and submitting an absentee ballot. See N.C. Gen. State. §§ 163-226.3(a)(4)-(6), 163-230.2(e)(4); 163-231(b)(1); see also *Lamone*, 813 F.3d at 504 (because Maryland allowed no-excuse absentee voting, defendants violated the ADA by failing to make reasonable accommodations to allow individuals who were blind to vote by mail).

Thus, unless this Court grants relief, by omitting the Two Witnesses Requirement and by allowing nursing home staff to assist voters fill out and submit absentee ballots, voters like the ADA/RA Plaintiffs will confront a dilemma that they should never have to face: vote and risk exposure to a highly-contagious and deadly disease, or forego voting. Indeed, it was out of concern for the pandemic that Defendant Director Bell recommended that the witness requirement be reduced or eliminated “[i]n light of social distancing requirements to prevent the spread of COVID-19.” Even if Defendants are not intentionally discriminating against individuals with disabilities, Defendants are nevertheless violating the ADA and RA because reasonable modification or accommodation claims do not require discriminatory intent. See *Lamone*, 813 F.3d at 510 (Maryland violated ADA for “failure to make reasonable accommodations” for visually-impaired voters even though “the record is devoid of any evidence that the defendants acted with discriminatory animus”). Furthermore, no discriminatory intent is necessary because Defendants’ policies have a disparate impact on vulnerable voters like the ADA/RA Plaintiffs. See *A Helping Hand, LLC v. Baltimore Cty.*, 515 F.3d 356, 362 (4th Cir. 2008).

Finally, Defendants will not succeed in arguing that eliminating the two-witness requirement or the prohibition on nursing staff assistance pose an undue burden. Under ADA regulations, a public entity is not required to take any action "that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. Defendants bear the burden of proving this undue burden. See *id.* ("[A] public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens"). Eliminating the two-witness requirement is clearly not burdensome, as it merely requires Defendants to cease disqualifying absentee ballots lacking two witness signatures, make minor modifications to the ballots, and include instructions regarding the rule change. See *Lamone*, 813 F.3d at 508 (proposed online ballot marking tool for absentee voting for visually impaired did not pose undue burden). There can be no serious argument that eliminating the two-witness "results in a fundamental alteration in the nature" of voting. Furthermore, allowing nursing home staff to assist voters complete and submit absentee ballots cannot pose burdens on the Defendants.

Accordingly, the ADA/RA Plaintiffs are likely to prevail on their ADA and RA claims. Defendants' failure to accommodate these voters constitutes a condition on access to the ballot box that has the effect of screening out individuals from participating in the November general election because of their disabilities, in violations of Title II of the ADA and Section 504 of the RA.

F. Violation of Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508)

Under Section 208, a voter who needs assistance for reason of blindness, disability, or inability to read or write ("208-covered voter") possesses the right to choose any person other than their employer/union representative—regardless of whether the person is a near relative, legal guardian, or nursing home staff—to assist them with the voting process, including the steps necessary to obtain, cast, and submit an absentee ballot. 52 U.S.C. § 10508; *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017). Defendants are violating Section 208 of the VRA by preventing 208-covered voters from selecting their assistor of choice who is not their employer or union representative to assist them with submitting their absentee ballot request form (N.C. Gen. Stat. § 163-230.2(e)(4)), or with marking, completing

and submitting their absentee ballot (N.C. Gen. Stat. §§ 163-226.3, 163-231(b)(1)). States cannot “deny the assistance at some stages of the voting process during which assistance [is] needed.” S. Rep. 97-417. For Plaintiff Hutchins, applying for a mail ballot is a prerequisite to safely voting, and he requires assistance with submitting his request for a ballot, marking and completing the ballot, and delivering it. Hutchins Decl. ¶¶ 4-12. Defendants provide an exception to 208-covered voters only for completing the request form. N.C. Gen. Stat. § 163-230.2(e1). Plaintiff Hutchins is entitled to any assistor of choice other than an employer/union representative at all stages of the absentee voting process. See *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017).

II. Absent injunctive relief, Plaintiffs will suffer irreparable harm in the November general election.

Absent an injunction suspending or modifying the challenged restrictions, voters will suffer irreparable injuries in the November general election. “[O]nce [an] election occurs, there can be no do-over and no redress.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). For that reason, “[c]ourts routinely

deem restrictions on fundamental voting rights irreparable injury." *Id.* (collecting cases).

To demonstrate irreparable harm, a party must establish that (1) the harm is "certain and great, actual and not theoretical, and so imminen[t] that there is a clear and present need for equitable relief"; and (2) that, once incurred, the threatened harm would be "beyond remediation." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (internal quotation marks omitted) (alteration in original). Dr. Murray's report demonstrates that this fall the pandemic's transmission dynamics and the corresponding risk to voters are highly likely to be equal to or worse than the current situation. Murray Decl. ¶¶ 33, 42, 44. Absent relief from this Court, in-person and mail-in absentee voters alike will face severe risks and severe burdens in casting their ballots in person or by mail. Some may overcome these obstacles; many others will not. But these unconstitutional hardships will remain without an injunction.

Further, denial or abridgment of the right to vote in a particular election is the archetypal irreparable injury. See *N.C. State Conf. of NAACP v. Cooper*, 430 F. Supp. 3d 15, 51 (M.D.N.C. 2019) ("By their very nature, laws impacting the

right to vote create the potential for irreparable harm"). Once the burdens cause a denial or undue burdening of the right to vote, this injury cannot be undone. Once the results are certified, it is nearly impossible to set aside the results of an election, and voters deprived of their voice cannot be made whole. An injury is typically deemed irreparable if monetary damages are inadequate or difficult to ascertain and, typically, there are no damages in voting rights cases. See *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551 (4th Cir. 1994), abrogated on other grounds by *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

Just as individual voters face irreparable harm in November, so do organizations engaged in voter engagement like LWVNC and DemNC, as Defendants' "actions 'perceptibly impair[]' the organization's programs, making it more difficult to carry out its mission." *Action NC v. Strach*, 216 F. Supp. 3d 597, 642 (M.D.N.C. 2016) (quoting *Lane v. Holder*, 703 F.3d 668, 674-75 (4th Cir. 2012)); *Newby*, 838 F.3d at 9 (holding that plaintiffs suffered an irreparable harm when newly enacted barriers to registering voters "ma[de] it more

difficult for [them] to accomplish their primary mission of registering voters”).

A voter engagement and advocacy organization is also irreparably harmed when its members’ constitutional and statutory rights related to voting are unlawfully burdened and otherwise infringed. See *Common Cause Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1295 (N.D. Ga. 2018) (holding that harm organizational plaintiff suffered was “coterminous” with harm its members would suffer if voting was made more difficult); *Common Cause Ind. v. Lawson*, 327 F. Supp. 3d 1139, 1154 (S.D. Ind. 2018) (holding that organizational plaintiff would suffer irreparable harm if voters were wrongfully disenfranchised), *aff’d*, 937 F.3d 944 (7th Cir. 2019).

III. Given the dire circumstances of this deadly global pandemic, the balance of hardships tips heavily in Plaintiffs’ favor.

Many of the challenged laws in this case are quite burdensome even in normal times. As voters are now facing a virus that transmits extremely easily from person to person and can cause severe complications, lasting physical injury, and death in a wide range of people, the harm to voters far outweighs any harm to the state from the requested injunction. The injunctive relief requested seeks to strike a balance,

and Plaintiffs have herein proposed alternative solutions that safeguard election integrity while advancing voter participation and safety. For example, Plaintiffs seek the invalidation of the double-witness requirement but have suggested no fewer than three alternative remedies that would mitigate, if not eliminate, the constitutional harm. Further, Plaintiffs also do not seek invalidation or noncompliance with other requirements of the absentee ballot envelope; rather, they seek only an option for voters to cure deficiencies. In light of the pandemic's severe disruption to the normal course of voting and the threat it poses to every manner of voting, Plaintiffs have demonstrated why it is necessary to enjoin or modify the targeted restrictions, and how this will facilitate safe and equal participation and can be achieved without undermining the general election's integrity.

IV. The public interest strongly favors granting Plaintiffs' requested relief to facilitate participation in the general election.

Entering a preliminary injunction would serve the public interest as well, as non-parties to this action will stand to benefit from the requested injunction. Election integrity is not only served by *effective* anti-fraud measures but equally,

if not more so, by ensuring that all eligible, registered voters can make their voices heard. Indeed, courts have often said that the public interest "favors permitting as many qualified voters to vote as possible." *League of Women Voters of N.C.*, 769 F.3d at 247 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). As this Court recently put it, "electoral integrity is enhanced, not diminished, when all eligible voters are allowed to exercise their right to vote free from interference and burden unnecessarily imposed by others." *N.C. State Conf. of NAACP*, 430 F. Supp. 3d at 53. The public interest is also served by "upholding constitutional rights." *Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

REQUEST FOR EXPEDITED CONSIDERATION

Plaintiffs respectfully request expedited briefing and consideration of this motion. As discussed *supra* p. 12 (Election Administration Timing), any changes to election administration must be made immediately to avoid irreparable harm, and specifically to allow for ordering and printing of election-related materials, recruitment of poll workers, and voter education regarding voting processes and election-day location information and other logistics. As Director Bell

stated in her April 22, 2020 letter, “[b]ecause of deadlines associated with the 2020 General Election . . . there is an immediate need to prepare for a coronavirus response.” Riggs Decl. ¶ 4. Accordingly, there is good cause to expedite briefing and consideration here, and Plaintiffs respectfully request that the Court shorten the requirements of Local Civil Rule 7.3(f) to require Defendants’ response within 14 days of service of this Motion and Plaintiffs’ reply within 7 days of service of the response, and thereafter that the Court provide expedited consideration of a hearing date and decision on Plaintiffs’ motion.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant their Motion for a Preliminary Injunction.

Dated: June 5, 2020.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d) (1), the undersigned counsel hereby certified that the foregoing Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction and to Expedite contains 14973 words (including headings and footnotes) as measured by Microsoft Word.

/s/ Allison J. Riggs
Allison J. Riggs

CERTIFICATE OF SERVICE

I certify that on the 5th day of June, 2020, the foregoing Memorandum in Support for Plaintiffs' Motion for Preliminary Injunction and Request to Expedite, and all Declarations and Exhibits thereto, was served by electronic mail to Defendants' Counsel, Alec McC. Peters, Chief Deputy Attorney General, at the address apeters@ncdoj.gov, with consent of counsel to accept service in this manner.

/s/ Allison J. Riggs
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