

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:20-cv-457

DEMOCRACY NORTH CAROLINA, *et al.*, )  
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 )  
 Plaintiffs, )  
 v. )  
 )  
 THE NORTH CAROLINA STATE )  
 BOARD OF ELECTIONS; *et al.*, )  
 )  
 Defendants, )  
 )  
 and )  
 )  
 PHILIP E. BERGER, etc., *et al.*, )  
 Intervenor. )

**STATE DEFENDANTS’  
MOTION TO DISMISS**

**NOW COME** defendants—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, Jeff Carmon III, and David C. Black, in their official capacities as Members 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 (collectively “the State defendants”)—and Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure respectfully move that this Court dismiss plaintiffs’

Second Amended Complaint [D.E. 30] The motion should be granted for the reasons stated in the accompanying brief in support.

This the 30<sup>th</sup> day of July, 2020.

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Defendants,  
and  
PHILIP E. BERGER, etc., *et al.*,  
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**MEMORANDUM IN SUPPORT OF  
STATE DEFENDANTS’  
MOTION TO DISMISS**

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## **INTRODUCTION**

Plaintiffs ask the Court to enjoin enforcement of certain of North Carolina's election laws and to impose other requirement for the 2020 general elections, arguing that absent Court action, the people of North Carolina may not be able to vote safely.

The State defendants acknowledge that the COVID-19 pandemic has affected elections administration and will continue to do so in the months to come, and that certain changes must be made to both protect against threats to public health and ensure that every eligible North Carolinian can vote. The State defendants have begun to make changes to address the challenges of voting during the COVID-19 pandemic—including many changes that address specific harms alleged by plaintiffs in this case. Plaintiffs object to these changes as insufficient. But for purposes of evaluating plaintiffs' legal challenges, the relevant question is whether plaintiffs' allegations rise to the level of being constitutional infirmities in the current election framework. As explained below, they do not. As a result, plaintiffs' Second Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted.

## **NATURE OF THE CASE**

Plaintiffs challenge a number of North Carolina elections statutes on the grounds that they violate Plaintiffs' First Amendment rights, unconstitutionally burden their right to vote, violate their due-process rights, and impose an unconstitutional condition on a constitutional right by forcing them to choose between their bodily integrity and their right to vote.

## **QUESTION PRESENTED**

Whether Plaintiffs have properly stated a claim of violations of their constitutional rights.

## **FACTUAL BACKGROUND**

In North Carolina, we have only just scratched the surface on the impact that the COVID-19 pandemic has had and will continue to have on our lives. In our State alone, at least 117,850 people have had laboratory-confirmed cases of COVID-19 and at least 1,865 have died from the virus.<sup>1</sup> The COVID-19 pandemic is the greatest threat to global health in the last century.<sup>2</sup> It has affected the way we work, the way we interact with each other, and it has affected the way we vote.

Recognizing this, on 15 March 2020, Executive Director Bell issued Numbered Memo 2020-11 to the 100 county boards of elections to update them on the State Board's responses to the COVID-19 outbreak, provide recommendations that the county boards conduct meetings electronically, and adjust certain deadlines following the 3 March primary.<sup>3</sup> (DE 58-1, ¶ 6.)

On 26 March 2020, Bell issued a letter of recommendation to the North Carolina General Assembly and the Governor to address the issues raised by COVID-19.<sup>4</sup> The recommendations included allowing absentee requests to be submitted by fax or email,

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<sup>1</sup> <https://covid19.ncdhhs.gov/dashboard/cases>, accessed 30 July 2020.

<sup>2</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7175860/>, accessed 30 July 2020.

<sup>3</sup> [https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20-Memo%202020-11\\_Coronavirus%20Response.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20-Memo%202020-11_Coronavirus%20Response.pdf)

<sup>4</sup> [https://s3.amazonaws.com/dl.ncsbe.gov/sboe/SBE%20Legislative%20Recommendations\\_COVID-19.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/sboe/SBE%20Legislative%20Recommendations_COVID-19.pdf).

establishment of an online portal for absentee requests, permitting postage to be pre-paid for absentee ballots, and reducing or eliminating the witness requirement for elections conducted in 2020. *Id.* Bell also recommended temporarily modifying the prohibition on employees of hospitals, nursing homes, and other congregate living facilities to allow these individuals to assist voters and serve as witnesses in light of current visitor restrictions. *Id.* Additionally, Bell recommended that county boards of elections be allowed flexibility to determine their sites and hours for early voting to allow a tailored response to COVID-19 pandemic in each county. *Id.*

On 20 March, Bell issued an order rescheduling the Republican second primary in Congressional District 11 from 12 May to 23 June.<sup>5</sup> (DE 50-1, ¶ 8.) This order also modified some reporting deadlines and suspended certain logging requirements to allow county board offices to work while being physically closed. *Id.* Finally, the order allowed transfer of certain voters to non-adjacent precincts if the transfer was related to the COVID-19 pandemic. *Id.*

On 1 June, Bell issued Numbered Memo 2020-12, in which she provided guidance for counties administering the 23 June primary.<sup>6</sup> *Id.*, ¶ 10. In particular, Bell established policies to provide a safe experience for voters and elections officials during the COVID-19 pandemic, including requiring poll workers and other staff to wear personal protective

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<sup>5</sup> [https://s3.amazonaws.com/dl.ncsbe.gov/State\\_Board\\_Meeting\\_Docs/Orders/-Executive%20Director%20Orders/Order\\_2020-03-20%20.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/-Executive%20Director%20Orders/Order_2020-03-20%20.pdf)

<sup>6</sup> [https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%-20Memo%202020-12\\_In-Person%20COVID%20Response%20June%2023%20Election.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%-20Memo%202020-12_In-Person%20COVID%20Response%20June%2023%20Election.pdf).

equipment, including masks, face protection, and gloves and, when appropriate, to self-screen for symptoms before reporting to work. *Id.* Voters were provided with masks if they needed one, hand sanitizer, and single-use ballot-marking devices. *Id.* Bell also ordered routine cleanings and social-distancing measures, consistent with CDC guidelines. *Id.*

On 10 June, Bell directed county board staff to avoid precinct mergers wherever possible for the general election. *Id.*, ¶ 12. She also strongly encouraged staff to maintain all 17 days of early voting in polling sites leading up to the general election to spread out voters over many sites for a longer period of time, thereby reducing voter density and the risk of COVID-19 spread. *Id.*

At the same time, the North Carolina General Assembly enacted House Bill 1169, which the Governor signed into law as North Carolina Session Law 2020-17 the following day. This law made a number of changes in response to the COVID-19 pandemic. For example, it reduced the requirement of having two witnesses for absentee ballots to one witness. 2020 N.C. SESS. LAWS 17, § 1.(a). In addition, county boards of elections now have greater flexibility to allow non-resident precinct officials to serve, which will help ensure that each polling places remains open even if some current precinct officials are unable or decline to serve. 2020 N.C. SESS. LAWS 17, § 1.(b). Session Law 2020-17 also made provisions for bipartisan assistance teams to assist any voter in the state, including those in nursing homes, to fill out their ballots and requests. 2020 N.C. SESS. LAWS 17, §§ 1.(c), 2.(b). Additionally, Session Law 2020-17 also provided for absentee ballot request forms to be made online through an electronic portal that will be made

available on September 1. 2020 N.C. SESS. LAWS 17, § 7.(a). Finally, Session Law 2020-17 provided matching funds for the federal CARES Act (P.L. 116-136), allowing county boards to take advantage of federal funding to assist them in preparing for the elections in light of the COVID-19 pandemic.

Simultaneously, on 19 June, the State Board announced that it was engaging in an aggressive campaign to recruit people to serve as election officials at early voting sites and on Election Day.<sup>7</sup> This effort is part of a broader plan to recruit additional poll workers to serve in 2020.

And finally, on 17 July, Bell issued an emergency order, requiring county boards of elections to have a minimum of 10 hours of voting each of the first two weekends of early voting, to have at least one polling site open during the early-voting period for every 20,000 registered voters, and to require frequent sanitization and use of PPE in accordance with CDC guidelines.<sup>8</sup> This order was intended to ensure that there were sufficient sites and sufficient quality hours for voters to be able to exercise their right to vote safely.

### **LEGAL STANDARDS**

To survive dismissal under Rule 12(b)(6), a complaint must contain facts sufficient “to raise a right to relief above the speculative level” and to satisfy the court that the claim is “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim is plausible only “when the plaintiff pleads factual content that allows the court to

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<sup>7</sup> [https://www.ncsbe.gov/Press-Releases?udt\\_2226\\_param\\_detail=2211](https://www.ncsbe.gov/Press-Releases?udt_2226_param_detail=2211).

<sup>8</sup> [https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%-20Memo%202020-14\\_Emergency%20Order%20of%20July%2017%2C%202020.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%-20Memo%202020-14_Emergency%20Order%20of%20July%2017%2C%202020.pdf).

This emergency order can also be found at DE 101-1.



draw the reasonable inference that the defendant is liable for the misconduct alleged”—a standard that requires more than facts “that are ‘merely consistent with’ a defendant’s liability.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

## ARGUMENT

### **I. Plaintiffs Fail to State a Claim Under Rule 12(b)(6)**

Plaintiffs fail to state a claim because North Carolina’s important regulatory interests in maintaining voting integrity and consistency outweigh any asserted injury by plaintiffs under the *Anderson-Burdick* framework. Limits placed on assistance with absentee ballot request forms do not violate plaintiffs’ rights under the First Amendment to free speech and association in light of those important regulatory interests. (DE 30 at ¶¶ 96, 128). Additionally, plaintiffs’ constitutional right to “bodily integrity” is not jeopardized by the modest registration and election requirements imposed by North Carolina. Even if plaintiffs’ alleged substantive due process right to physical safety while voting were attributable to an affirmative act by the State, the substantive due process argument would still fail because the right that plaintiffs assert falls far outside the ambit of any right the Supreme Court has ever recognized. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (Supreme Court precedent requires a “careful description of the asserted fundamental liberty interest”). Plaintiffs have not cited any case that has recognized such a right that is “deeply rooted in this Nation’s history and tradition.” *Id.*

(quotation marks omitted). Because Rule 12(b)(6) requires that a Complaint contain “more than labels and conclusions” and more than a “formulaic recitation of the elements of a cause of action,” plaintiffs’ factual allegations in the instant case do not “raise a right to relief above the speculative level” to one that is “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (internal quotation marks omitted). The State defendants’ Motion to Dismiss should be granted.

## **II. The *Anderson-Burdick* Framework and its Application to Plaintiffs’ Claims**

State election regulations often “implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments.” *Pisano v. Strach*, 743 F.3d 927, 932 (4th Cir. 2014) (citation omitted). “All election laws, including perfectly valid ones, ‘inevitably affect[]—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.’” *Sarvis v. Alcorn*, 826 F.3d 708, 716 (4th Cir. 2016) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Under the well-established *Anderson-Burdick* framework, a court assessing a vote-burdening claim must “consider the character and magnitude of the asserted injury” to the right to vote. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605 (4th Cir. 2016) (quotation marks omitted). The severity of the burden imposed “dictates the level of justification” required: “Severe” burdens trigger strict scrutiny, but if the burden is only “modest,” then a state’s “important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Pisano*, 743 F.3d 927 at 933. *See also* *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995) (courts

simply ensure that “order, rather than chaos, . . . accompany the democratic process” where burden to a plaintiff’s right is modest). Even taking all of Plaintiffs’ allegations as true, all of their claims fail the *Anderson-Burdick* test.

**A. 25-Day Voter Registration Deadline**

Plaintiffs claim in their Second Amended Complaint [DE 30] that the COVID-19 pandemic renders North Carolina’s voter-registration deadline and the unavailability of online voter registration through the Department of Health and Human Services (“DHHS”) an unconstitutional burden on the right to vote. They request as relief that this Court enjoin enforcement of N.C. GEN. STAT. §§ 163-82.6(d) and 163-82.20(g),(h) imposing 25-day voter registration deadlines, and that the Court force DHHS to offer online voter registration. The State provides ample registration opportunities, and because voters “have ample time and opportunity” to register, the 25-day requirement’s burden on voters is, at most, “modest.” *Pisano*, 743 F.3d at 936. Additionally, plaintiffs have identified no legal theory that requires DHHS to offer online voter registration.

North Carolina’s compelling “interest in ensuring orderly, fair, and efficient procedures for the election of public officials,” in avoiding voter confusion, in securing sensitive voter information, and in address verification of voters justifies the 25-day deadline. *Id.* at 937 (quotation marks omitted). “This interest necessarily requires the imposition of some cutoff period to verify the validity of” the applications. *Id.* (quotation marks omitted).

Plaintiffs additionally claim that the State defendants are burdening their right to organize or vote by 1) requiring the North Carolina Department of Transportation, Division of Motor Vehicles (“DMV”) and DHHS to comply with the 25-day registration deadline; and by 2) not allowing remote voter registration at the same time the State Board allows in-person registration at a one-stop site. (DE 30 at ¶¶ 92, 95). As set forth above, the 25-day deadline is justified by compelling state interests. With regard to in-person registration after the expiration of the 25-day deadline, the Fourth Circuit has considered similar deadlines to be, at most, a modest burden because voters will have had ample time and opportunity before the election to register. *See, e.g., Pisano*, 743 F.3d at 936 (holding that filing deadlines for new political parties to nominate candidates impose only a modest burden because candidates will have had ample time and opportunity to collect the required number of signatures). Plaintiffs acknowledge that online voter registration is already available through the DMV and fail to set forth how DHHS unduly burdens the right to vote by offering paper but not online voter registration. (DE 30, at ¶ 95).

Because the burden of the voter-registration deadline is, at most, modest and there are numerous opportunities and methods to register to vote, plaintiffs have failed to state a claim upon which relief can be granted in that they have not pled that the government’s interests in maintaining these deadlines or current registration structure is unjustified. Indeed, the voter registration deadline and current voter registration framework do not present an undue burden on the right to vote.

## **B. Absentee Ballot Request Forms**

In their Complaint, plaintiffs also challenge the requirement that voters submit a completed version of the State's absentee ballot request form, and argue that the requirement will unconstitutionally burden the right to vote for those who do not have the means to print it or provide postage. (DE 30 at ¶¶ 57, 75). Importantly, however, the State Board does not require that voters print out the form themselves. Any individual may copy and distribute the official form, as long as it is blank. Therefore, the same organizational plaintiffs who wish to assist with voting can make these request forms available for voters who may not be able to print out the form themselves. In addition, for elections in 2020, voters may request by phone that an absentee ballot request form be sent to them. 2020 N.C. SESS. LAWS 17, § 5(a). Therefore, the burden on voters to access a printer and print the form for themselves has been minimized, if not eliminated altogether.

The requirement to complete the State's request form imposes no more than a modest burden when weighed against the State's legitimate interests in elections administration. In light of these minimal burdens, the government's interests in reducing voter confusion by ensuring that all absentee ballot requests comply with North Carolina law and can be processed in a timely fashion are entirely justified. *See League of Women Voters v. LaRose*, No. 2:20-cv-1638, 2020 U.S. Dist. LEXIS 91631 at \*23 (S.D. Ohio, April 3, 2020) (recognizing as adequate justification the need to properly verify a voter's identity and a voter's signature and sufficient to not allow people to request absentee ballots by phone or online). Requiring voters to complete an absentee ballot request is a

rational means of promoting the State's interest in deterring, detecting, and punishing voter fraud. Accordingly, plaintiffs have failed to state a claim upon which relief may be granted.

**C. Limits on Assistance with Absentee Ballots**

Plaintiffs also assert in their Complaint that the statutory limits placed on assistance with absentee ballots unduly burden voters by preventing them from receiving assistance to navigate the absentee ballot process. (DE 30 at ¶¶ 62-66, 96, 161, 168, 176). The restrictions on assistance with absentee ballots are a modest burden when weighed against the State's interests in preventing voter fraud.

The State's restrictions on assistance with absentee ballots limit the number of people who are permitted to assist with or mark absentee ballots and ballot requests to: (a) the voter, (b) a close relative or legal guardian, or (for 2020) (c) a member of a multipartisan assistance team ("MAT") trained and authorized by the county board of elections. N.C. GEN. STAT. §§ 163-226.3, -227.2, -230.2; 2020 N.C. SESS. LAWS 17 ("Ballot Harvesting Ban"). And for voters who need assistance due to blindness, disability, or inability to read or write and there is not a close relative or legal guardian available to assist, they may request any other person to provide assistance in requesting ballots. N.C. GEN. STAT. § 163-230.2(e1). Plaintiffs claim that these restrictions prevent voters from receiving needed assistance.

Plaintiffs fail to state a claim because the restrictions on assistance do not categorically bar assistance—they merely limit the people who may assist a voter. Moreover, these restrictions have been loosened in light of the COVID-19 pandemic. For

2020, a MAT member may assist *any* voter with requesting an absentee ballot, returning the request, marking the absentee ballot, and serving as a witness. 2020 N.C. SESS. LAWS 17. Additionally, with the passage of Session Law 2020-17, the State now allows absentee ballot requests online and by email and fax for all further 2020 elections. 2020 N.C. SESS. LAWS 17, §2(a). While plaintiffs claim that the restrictions may render voters virtually helpless, they have not provided evidence—with one exception—to suggest that a large proportion of voters who need assistance will not be able to receive that assistance from a close relative or legal guardian or a MAT member in 2020.

Plaintiffs claim that the availability of MATs is inadequate in certain counties and that, as a result, voters may be left without assistance. (DE 30 at ¶ 62). This concern, however, is speculative because county boards of elections and the State Board have anticipated the increased need for MATs this fall and are already taking steps to expand the recruitment and promotion of MATs by devoting significant additional funding provided under the CARES Act and HAVA for these efforts. 2020 N.C. SESS. LAWS 17.

In light of the measures that the State has already taken to mitigate the burden placed on absentee voters needing assistance, the restrictions are reasonable and serve the important state interests of 1) increasing confidence in elections; and 2) reducing the risk of fraud by prohibiting anyone who is not the voter, a near relative, a legal guardian, the United States Postal Service (“USPS”), or elections officials and members of a MAT trained and authorized by the county board of elections from engaging with absentee ballot requests. 2020 N.C. SESS. LAWS 17. When weighed against the State’s interests, limiting

the number of people who can assist with requesting and marking absentee ballots is reasonable and does not unduly burden voters in exercising their right to vote.

Plaintiffs also argue that the limits placed on assistance with absentee ballot request forms violate their rights under the First Amendment to free speech and association. (DE 30 at ¶¶ 96, 128). However, as set forth above, the State's legitimate interests in maintaining public confidence in elections and protecting against fraud are compelling and important interests that warrant the restrictions on who can assist with filling out absentee ballot request forms.

In their Complaint, plaintiffs also suggest a number of other laws that the North Carolina General Assembly could have passed in the alternative to address the issue of absentee voter fraud. These policy differences, however, do not create First Amendment violations. North Carolina's restrictions on assistance with absentee voting mirror independent, bipartisan recommendations, are designed to reduce the incidence of absentee voter fraud, and are viewpoint and content-neutral.

Finally, plaintiffs argue that the assistance restrictions also violate Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act because the restrictions deny some of plaintiffs their right to vote. (DE 30 at ¶¶ 145, 152, 164, 170). As discussed above, the restrictions do not deny voters assistance altogether. They merely limit the number of people who are permitted to come into contact with absentee ballots and ballot requests to reduce the chance of voter fraud. Because plaintiffs have failed to show that the ADA/RA plaintiffs are unable to request the assistance of a close relative, legal guardian, or member of a MAT, they have not shown that they have been or will be



denied the franchise, and have therefore failed to state a claim upon which relief can be granted.

**D. Witness Certification Requirement**

Plaintiffs further ask this Court for relief from the enforcement of North Carolina law requiring absentee voters to mark their ballots in the presence of one witness on the ground that it is an undue burden on the right to vote. (DE 30, *Prayer for Relief* at (c)). But they fail to state a claim that that this requirement presents a burden sufficient to outweigh the State's legitimate interests or satisfy the *Anderson-Burdick* test.

Plaintiffs note that there are more than 1.1 million single-member households in North Carolina. (DE 30 at ¶ 59). There is no evidence in the record, however, of what proportion of these single-member households would be unable to comply with the witness requirement. For example, the statistics provided by plaintiffs do not indicate whether these individuals intend to vote, whether they regularly interact with individuals outside their households, whether these individuals could obtain the required signature without violating the Center for Disease Control's social-distancing guidelines by wearing masks and gloves, remaining more than six feet apart, and being physically separated from one another by a window or open doorway.

When weighed against their failure to plead that the burden placed by a single-witness requirement is severe, plaintiffs cannot overcome the State's interest in instituting this requirement. Many states' witness requirements for absentee ballots are justified to minimize voter fraud. *See, e.g., Thomas v. Andino*, No. 3:20-cv-01552, 2020 U.S. Dist. LEXIS 90812, at \*52 (D.S.C. May 25, 2020); *League of Women Voters of Va. v. Va. State*

*Bd. of Elections*, No. 6:20-cv-00024, 2020 U.S. Dist. LEXIS 79439, at \*43 (W.D. Va. May 5, 2020); *see also Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (holding that even though there was no evidence of voter-impersonation fraud in Virginia and that the voter ID law would not prevent any voter-impersonation fraud, the voter ID law could still survive because the state’s interest in protecting against voter-impersonation fraud was a sufficiently valid interest).

Plaintiffs also argue that the witness requirement presents an unconstitutional condition on the right to vote because it “will force voters to choose between exposing themselves to severe risks to their health and exercising their constitutionally protected right to vote.” (DE 30 at ¶ 50). But because the “unconstitutional conditions” doctrine applies only if the government jeopardizes a constitutionally protected right, it does not apply here. *Reedy v. Werholtz*, 660 F.3d 1270, 1277 (10th Cir. 2011).

“The unconstitutional conditions doctrine forbids the government from denying or terminating a benefit because the beneficiary has engaged in constitutionally protected activity.” *Petrella v. Brownback*, 787 F.3d 1242, 1265 (10th Cir. 2015). It “vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. John’s River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

In this case, plaintiffs argue that the right to self-quarantine is an exercise of the constitutional right to “bodily integrity,” which is embodied in the right to be free of unauthorized and unlawful physical abuse by state intrusion. While the right to bodily integrity is undoubtedly constitutionally protected, the right to self-quarantine does not

fall within its ambit. Violations do not arise from “bad policy or inaction,” but rather only applies to “the most egregious official conduct.” *J.S. ex rel. Simpson v. Thorsen*, 766 F. Supp. 2d 695, 705 (E.D. Va. 2011) (quoting *Waybright v. Frederick Cty. Md. Dept. of Fire & Rescue Svcs.*, 528 F.3d 199, 204 (4th Cir. 2008)). As the Fourth Circuit has held, “nothing less” than intrusions that “shock the conscience” rise to violations of personal bodily integrity. *Waybright*, 528 F.3d at 205.

Enforcing the witness requirement does not violate a person’s bodily integrity. The requirement that voters who choose to vote by absentee ballot rather than to utilize in-person voting, either on Election Day or during early voting, do so in the presence of one witness is not a government intrusion that shocks the conscience. As explained above, plaintiffs have failed to prove that this requirement places a substantial burden on voters. Where there is no substantial burden to voters, the witness requirement does not violate a person’s bodily integrity. The witness requirement does not require that voters choose between two constitutional rights. Accordingly, the unconstitutional conditions doctrine is inapplicable here and the witness requirement is a rational means of promoting the State’s interest in deterring, detecting, and punishing voter fraud.

#### **E. Uniform Hours in Precincts**

Plaintiffs also ask this Court for relief from the requirements that all one-stop voting sites in a county be open during uniform hours and all sites other than the county board office be open from 8:00 A.M. to 7:30 P.M. (DE 30 at ¶ 83, *Prayer for Relief* at (h)). The requirement for all sites in a county to have uniform hours was first enacted in 2018 and has been in effect for all elections from that time. Plaintiffs have not stated a claim

that the COVID-19 pandemic renders the uniform hours requirement an undue burden requiring relief.

The State defendants acknowledge that the uniform hours requirement may reduce the flexibility of county boards of elections to respond to exigencies that may occur in light of the COVID-19 pandemic. But plaintiffs have not provided information sufficient to understand the nature of the burdens to voters resulting from the confluence of the COVID-19 pandemic and uniform one-stop hours. To the extent that the uniform hours requirement burdens the right to vote at all, that burden is modest. Moreover, the State's interests in avoiding voter confusion by promoting uniformity and promoting administrative convenience by making it easier for counties to publicize early voting hours, as well as its interest in avoiding even an appearance of partisanship in the setting of early voting hours, support this reasonable election regulation. Because plaintiffs bear the burden of showing that voters are unduly burdened sufficient to deny them their First and Fourteenth Amendment rights, their failure to do so requires that this Court grant State defendants' Motion to Dismiss for failure to state a claim.

#### **F. Residential Requirements for Pollworkers**

Plaintiffs next ask this Court for relief from the requirement that at least one precinct assistant be a registered voter of the precinct. (DE 30, *Prayer for Relief* at (b), (h)). Plaintiffs fail to show why the new requirement—that only one precinct assistant live in the precinct—places an undue burden on voters. In light of plaintiffs' failure to state a claim for relief, the State defendant's motion to dismiss should be granted.

The requirement that one precinct assistant be a registered voter of the precinct is a significant reduction, enacted by Session Law 2020-17, from the previous requirement that all precinct assistants be registered voters of the precinct. *See* 2020 N.C. SESS. LAWS 17, § 1.(b). While plaintiffs speculate that even this minimal requirement will result in the closure of polling locations in the general election, they offer nothing more than speculation to that effect. Plaintiffs' allegations do not raise their claim "above the speculative level" to a claim that is "plausible on its face." *Twombly*, 550 U.S. at 555, 570 (internal quotation marks omitted). This claim should, therefore, be dismissed.

**G. Establishment of Contactless Drop Boxes for Absentee Ballots**

Plaintiffs additionally allege that North Carolina has violated the Constitution by not providing drop boxes for voters to deliver absentee ballots. (DE 30 at ¶¶ 75, 103, *Prayer for Relief* at (k).) They make this allegation even though "there is no constitutional right to an absentee ballot," *Mays v. LaRose*, 951 F.3d 755, 792 (6th Cir. 2020).

Plaintiffs have failed to show that the lack of contactless drop boxes presents an undue burden to voters. The only factual assertion plaintiffs make in support of this claim is that individual voters will have to rely on the USPS to submit their ballots. (DE 30 at ¶¶ 73, 75, 149.) They have provided no evidence that the USPS is incapable of delivering absentee ballots to North Carolina county boards of elections in the days and weeks leading up to the general election. Nor have plaintiffs pointed to any cases that suggest that, as a legal matter, failure to provide contactless drop boxes is a per se violation of an absentee voter's constitutional rights. Instead, plaintiffs rely only on speculation that the

USPS will not be able to accommodate the volume of absentee ballots expected. This speculation does not give rise to a constitutional burden.

Plaintiffs' request that this Court intervene to short-circuit the State Board expertise and authority to exercise discretion to address the COVID-19 pandemic overlooks these legitimate state interests. Moreover, asking this Court to intervene in policy matters committed to the State Board steps on the authority and flexibility of the State's elections administration officials to respond to crises as they occur. The establishment of drop boxes is a policy consideration that falls squarely within the authority of the State's elections administration officials and this Court should not restrict the Executive Director's ability to make these decisions using her expertise in elections administration—particularly in light of the fact that plaintiffs have failed to state a claim that the lack of drop boxes significantly burdens the franchise.

#### **H. Establishment of Mechanism to Cure Absentee Ballot Requests and Absentee Ballots**

Plaintiffs additionally argue that the State unduly burdens the right to vote by not guaranteeing an opportunity for North Carolina voters to cure deficient absentee ballot requests or ballots. (DE 30 at ¶¶ 76, 103.) Like their drop boxes claim, plaintiffs have failed to show a sufficient burden on their right to vote when weighed against significant discretionary interests of the State Board to manage county boards and establish protocols.

Plaintiffs assert that in the March 2020 primary, nearly 15% of submitted absentee ballots were rejected. (DE 30 at ¶ 76.) From this statistic, plaintiffs summarily conclude that the lack of a standardized curative process is the reason these ballots were rejected.

But they provide no evidence to suggest that this is true, and they do not identify an instance where election officials rejected an absentee ballot based on some mistake that could have been cured. Plaintiffs have failed to show that the lack of a standardized curative process places an undue burden on voters' rights.

But even if plaintiffs had adequately alleged that the lack of a standardized curative process burdens the right to vote, the State's interests in maintaining flexibility to adjust to crises in real-time present sufficient justification. Like issuing contactless drop boxes, creating a standardized procedure to cure absentee ballots is under the administrative purview of the State Board. Plaintiffs' request that this Court intervene to interrupt the State Board's deliberations and limit the flexibility with which the State Board might respond to changing circumstances on the ground impinges on important State interests in elections administration. Because the absence in State law of a mandatory curative process for absentee ballots is a "reasonable and nondiscriminatory rule[]," and because the State has articulated its asserted interest with "[r]easoned, credible argument," *Sarvis v. Alcorn*, 826 F.3d at 719, its practice is constitutional. Plaintiffs have failed to state a claim upon which relief can be granted.

**I. Require Voters to Be Able to Use Federal Write-In Absentee Ballots in Lieu of Absentee Ballots**

Plaintiffs also claim that there is no fail-safe option for those voters who request but do not receive an absentee ballot, and they ask this Court to require that voters be able to use federal write-in absentee ballots ("FWABs") as "an alternative of last resort." (DE 30 at ¶¶ 101, 149, *Prayer for Relief* at (b) .) Plaintiffs speculate that voters may not receive

their absentee ballots, but offer no support for their allegation. Accordingly, they have failed to state a claim upon which relief may be granted.

Permitting civilian voters to vote by FWAB poses a number of significant administrative concerns, and requiring FWABs to be available for civilian voters would upend the important governmental interests in ensuring the accuracy of vote counts and fidelity to every voter's selections. It is simply an unworkable solution, especially given the speculative nature of plaintiffs' allegations. Plaintiffs have failed to state a claim for which relief can be granted with regard to use of FWABs.

#### **J. Monitoring Precinct Consolidation**

Plaintiffs also claim that North Carolina's residency requirements for poll workers will "exacerbate a shortage of poll workers, force precinct consolidation and relocation, and create long lines and crowds on Election Day that contravene social distancing directives needed to protect Plaintiffs' health" in violation of their constitutional right to vote, and ask this Court to put mandatory procedures in place for monitoring of precinct consolidation. (DE 30 at ¶ 106.) But plaintiffs have failed to show that the procedures currently in place are insufficient to educate voters on polling-place relocation.

The State defendants do not dispute that voters should be informed about polling-place relocation in a timely fashion. Where precincts need to be consolidated or polling places need to be relocated for the general election, county boards of elections will mail notice to all affected voters at least 30 days before the election, among other notifications. N.C. GEN. STAT. § 163-128(a). Plaintiffs have not sufficiently pled why these established methods of voter education cause such a burden as to render them constitutionally



insufficient. They have not presented evidence to suggest that voters have, in the past, not been properly informed of any changes to precincts and polling places or that changes to precincts and polling places have caused voters to not be able to vote. Accordingly, plaintiffs have failed to state a claim upon which relief can be granted, as the State defendants are already informing voters in a timely fashion of changes to precincts or polling places.

\* \* \*

Plaintiffs seek a broad array of relief that is customarily within the discretionary authority of those who are most knowledgeable about elections to administer. Indeed, plaintiffs' complaint is not that the State defendants are not properly accommodating the impacts of the COVID-19 pandemic. Rather, plaintiffs disagree with the *kind* of relief that the State defendants are providing and the manner in which they are providing it. Plaintiffs' estimations on the best policy, however, do not state a claim upon which relief can be granted. Rather, this Court should reject plaintiffs' invitation to tinker with the levers of elections administration, particularly when the State defendants are attuned and responsive to the need for action.

## CONCLUSION

For the reasons above, the State defendants respectfully requests that plaintiffs' Second Amended Complaint be dismissed with prejudice.

This the 30<sup>th</sup> day of July, 2020.

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**CERTIFICATE OF WORD COUNT**

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 5,972 words as measured by Microsoft Word.

This the 30th day of July, 2020.

/s/ Alexander McC. Peters  
Alexander McC. Peters  
Chief Deputy Attorney General