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RYAN PARK  
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October 18, 2020

Daniel M. Horne, Jr.  
Clerk of Court  
One West Morgan Street  
Raleigh, NC 27601  
(919) 831-3600

Re: *N.C. Alliance for Retired Americans v. N.C. Board of Elections*, P20-513

Dear Mr. Horne:

I write to provide relevant information on the scope of issues that are presented to this Court in the above-captioned appeal.

At the time that the State Board submitted its response to the petitions for writ of supersedeas, the Board understood the intervenors to be contesting the cure process described in Numbered Memo 2020-19. However, in their proposed reply brief submitted to this Court, the legislative intervenors clarified that their appeal does not encompass a challenge to the cure process. *See Ex. A* at 8 (stating that the “State Board Defendants are free to re-start the cure process”). The legislative intervenors made a similar clarification in a brief filed in the U.S. Court of Appeals for the Fourth Circuit, stating that their appeal to that court in a related case does not challenge the cure process. *See Ex. B* at 1-2.

In subsequent correspondence between the parties, counsel for the legislative intervenors reiterated their understanding that nothing in this appeal affects the Board’s authority to implement a cure process. They have further stated that they do not contest the Board’s authority to immediately implement the procedures set forth in Numbered Memo 2020-19 so long as: (1) those procedures comply with an order by a federal district court that the absence of a witness or assistance signature is not a curable defect, and (2) the memo does not refer to the extended absentee-ballot receipt deadline that remains a matter of dispute. *See Ex. C*.

The Board has prepared a revised Numbered Memo 2020-19 that satisfies those conditions. *See Ex. D*.

Counsel for the Republican National Committee intervenors have also expressed that they do not oppose implementation of the Numbered Memo as revised, “but reserve their rights

to challenge this cure procedure as applied if it is being used to evade the witness requirement.”  
*See Ex. E.*

Thus, the Board writes to communicate the parties’ mutual understanding that the Board may proceed with the cure process described in revised Numbered Memo 2020-19, notwithstanding the temporary administrative stay that this Court entered on Thursday, 15 October 2020. *See Ex. D.* Based on this mutual understanding, and the pressing need to enable thousands of lawful voters to cure their ballots in time to exercise their right to vote, the Board intends to proceed to implement revised Numbered Memo 2020-19 at noon tomorrow, Monday 19 October 2020. Should the Court have any questions or concerns about the Board’s intended course of action, please do not hesitate to contact me at any time.

Respectfully submitted,

/s/ Ryan Y. Park  
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cc: All counsel of record

# Exhibit A

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NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

NORTH CAROLINA ALLIANCE )  
FOR RETIRED AMERICANS; )  
BARKER FOWLER; BECKY )  
JOHNSON; JADE JUREK; )  
ROSALYN KOCIEMBA; TOM )  
KOCIEMBA; SANDRA MALONE; )  
and CAREN RABINOWITZ, )

*Plaintiffs,* )

v. )

From Wake County

THE NORTH CAROLINA STATE )  
BOARD OF ELECTIONS; and )  
DAMON CIRCOSTA, *Chair of the* )  
*North Carolina State Board of* )  
*Elections,* )

No. 20 CVS 8881

*Defendants,* )

PHILIP E. BERGER *in his official* )  
*capacity as President Pro Tempore of* )  
*the North Carolina Senate; and* )  
TIMOTHY K. MOORE *in his official* )  
*capacity as Speaker of the North* )  
*Carolina House of Representatives,* )

*Intervenor-Defendants,* )  
*and* )

REPUBLICAN NATIONAL )  
COMMITTEE; NATIONAL )  
REPUBLICAN SENATORIAL )  
COMMITTEE; NATIONAL )  
REPUBLICAN CONGRESSIONAL )  
COMMITTEE; DONALD J. TRUMP )  
FOR PRESIDENT, INC; and )  
NORTH CAROLINA REPUBLICAN )  
PARTY, )

Republican Committee )  
Intervenor-Defendants. )

\*\*\*\*\*

**MOTION FOR LEAVE TO FILE REPLY**

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TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Intervenor-Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (“Legislative Defendants”), respectfully request leave to file a very brief reply to respond to an argument raised in State Defendants’ Response in Opposition to Intervenor’s Petitions for Writ of Supersedeas. See *N. C. State Conference of NAACP v. Moore*, 817 S.E.2d 592, 593 (N.C. 2018) (mem.) (granting plaintiffs’ motion “for Leave to File Reply to Response in Opposition to Petition for Writ of Supersedeas”); cf. *Animal Prot. Soc. of Durham, Inc. v. State*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 808 (1989) (“The reply brief was intended to be a vehicle for responding to matters raised in the appellees’ brief.”).

In particular, State Defendants argue that granting Legislative Defendants’ petition will indefinitely paralyze the North Carolina State Board of Elections’ ability to help voters cure or re-vote deficient absentee ballots. In reality, as more fully explained in Legislative Defendants’ proposed Reply, an order granting our petition

would in no way deprive the voters of this State of access to a cure process. Any further delay on that score would be attributable wholly to the State Board.

Legislative Defendants' proposed reply is filed contemporaneously as an attachment to this motion.

Respectfully submitted this the 16th day of October, 2020.

COOPER & KIRK PLLC

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

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and TIMOTHY K. MOORE, in his  
official capacity as Speaker of the*

*North Carolina House of  
Representatives*

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**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 16th day of October, 2020, served a copy of the foregoing Motion for Leave to File Reply Brief by electronic mail and by first class mail on the following business day, on the following parties at the following addresses:

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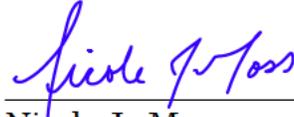
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NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA ALLIANCE )  
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and CAREN RABINOWITZ, )

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From Wake County

THE NORTH CAROLINA STATE )  
BOARD OF ELECTIONS; and )  
DAMON CIRCOSTA, *Chair of the* )  
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No. 20 CVS 8881

*Defendants,* )

PHILIP E. BERGER *in his official* )  
*capacity as President Pro Tempore of* )  
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TIMOTHY K. MOORE *in his official* )  
*capacity as Speaker of the North* )  
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FOR PRESIDENT, INC; and )  
NORTH CAROLINA REPUBLICAN )  
PARTY, )

Republican Committee )  
Intervenor-Defendants. )

\*\*\*\*\*

**PROPOSED REPLY TO STATE DEFENDANTS’ RESPONSE IN  
OPPOSITION TO INTERVENORS’ PETITION FOR WRIT OF  
SUPERSEDEAS**

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**Argument**

State Board Defendants open their response by attempting to create a specter of “administrative urgency,” State Board Response at 6, alleging that “[u]nless and until the State Board is permitted to implement the consent judgment approved by the court below, the votes of thousands of North Carolinians who have already cast their ballots by mail, but with minor technical deficiencies, will remain in administrative limbo,” *id.* at 2. But this claim is false: State Board Defendants are free to re-start the cure process they unilaterally stopped on October 4, and that is so regardless of whether this Court enters a writ of supersedeas.

The relevant background is set forth at length in the Middle District of North Carolina’s recent opinions in *Democracy N.C. v. North Carolina State Board of Elections*, 2020 WL 6058048, No. 20-cv-457 (M.D.N.C. Oct. 14, 2020) and *Moore v. Circosta*, 2020 WL 6063332, No. 20-cv-911 (M.D.N.C. Oct. 14, 2020). In short, following a preliminary injunction entered on due-process grounds in *Democracy N.C.*, the State Board on August 21, 2020, issued Numbered Memo 2020-19 to establish a uniform cure process for absentee ballots. *See Democracy N.C.*, 2020 WL

6058048, at \*2. Absentee voting began on September 4, but on September 22, 2020—before the entry of the consent judgment in this case—the State Board issued a revised Numbered Memo 2020-19 purporting to allow voters to “cure” ballots wholly devoid of witness information through a simple affidavit. *Id.* at \*3. The consent judgment in this case was entered on October 2, and its “WHEREAS” clauses expressly reference the *Democracy N.C.* preliminary injunction. *Id.* at \*4.

The State Board did not file Numbered Memo 2020-19 with the Middle District of North Carolina until September 28, 2020—despite telling the Superior Court it had done so on September 22—and the Middle District swiftly indicated that the Memo’s evisceration of the witness requirement was “not consistent with” that court’s preliminary injunction ruling, which had *upheld* the witness requirement. *See id.* at \*6; *Moore*, 2020 WL 6063332, at \*5. On October 1, the State Board put a halt to the cure process for ballots missing witness signatures, but otherwise left Numbered Memo 2020-19’s cure procedures in place. *See* Numbered Memo 2020-27, <https://bit.ly/3lWy4M2>.

On October 3, however, the federal court in *Moore* entered a temporary restraining order halting enforcement of the *revised* Numbered Memo 2020-19, but the order explicitly did “not enjoin or affect the *August* 2020-19 memo.” *Moore v. Circosta*, No. 5:20-cv-507, 2020 WL 5880129, at \*9 (Oct. 3, 2020) (emphasis added). In response, however, the State Board unilaterally put a halt to the cure process *altogether*. *See* Numbered Memo 2020-28, at <https://bit.ly/2H5O13z>. It did so despite the severability clause in the Consent Judgment anticipating that its provisions could

be rendered “unenforceable” by a ruling of another court, State Board Response App. 61, and despite the Supremacy Clause giving precedence to the federal court’s ruling, *see Gen. Atomic Co. v. Felter*, 434 U.S. 12, 15 (1977).

That is how things stood until October 14, when the Middle District of North Carolina (a) denied our motion for a preliminary injunction in *Moore*, but (b) in *Democracy North Carolina* enjoined Numbered Memo 2020-19 to the extent it allowed for an affidavit-only cure for missing witness or assistant signatures. *See Democracy North Carolina*, 2020 WL 6058048, at \*13. We have appealed the ruling in *Moore* and sought an injunction pending appeal, *but we have not sought to further enjoin implementation of Numbered Memo 2020-19 other than its incorporation of the ballot receipt extension deadline*. *See* Emergency Motion for Injunction Pending Appeal at 1, *Moore v. Circosta*, No. 20-2107 (4th Cir. Oct. 16, 2020), ECF No. 4.

In light of the foregoing, once the *Moore* temporary restraining order expires at midnight tonight the State Board will be in the same position today as it was on October 1—free to implement Numbered Memo 2020-19 and its cure process, except for the affidavit-only cure for missing witness or assistant signatures. Getting the cure process moving is therefore no basis for denying the petition here, as any delay in doing so is entirely of the State Board’s own doing. And it certainly is no basis for denying the petition *entirely*, including with respect to the ballot receipt deadline and alteration of the postmark requirement.

**Conclusion**

For these reasons and those presented in our Petition, the Court should grant a Writ of Supersedeas to stay the Superior Court's consent judgment.

Respectfully submitted this the 16th day of October, 2020.

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

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official capacity as Speaker of the  
North Carolina House of  
Representatives*

**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 16th day of October, 2020, served a copy of the foregoing Proposed Reply To State Defendants' Response In Opposition To Intervenor's Petition For Writ Of Supersedeas by electronic mail and by first class mail on the following business day, on the following parties at the following addresses:

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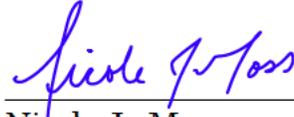
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# Exhibit B

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No. 20-2107

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

*Plaintiffs-Appellants,*

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFFERSON CARMON III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

*Defendants-Appellees,*

&

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, BARKER FOWLER, BECKY JOHNSON, JADE JUREK, ROSALYN KOCIEMBA, TOM KOCIEMBA, SANDRA MALONE, and CAREN RABINOWITZ,

*Intervenor-Appellees.*

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Appeal from the United States District Court  
for the Middle District of North Carolina

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**Plaintiffs-Appellants' Reply in Support of Emergency  
Motion for an Injunction Pending Appeal**

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October 16, 2020

(counsel listed on reverse)

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*Counsel for Plaintiffs-  
Appellants*

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Appellants respectfully submit this reply to Appellees' response and in further support of Appellants' emergency motion for an injunction pending appeal. In the interest of time and to ensure that the Court may expeditiously consider Appellants' motion, Appellants raise a few particularly pertinent points here and otherwise rely on the arguments set forth in our motion, on Judge Dever's order granting a temporary restraining order ("TRO"), Judge Osteen's orders in *Democracy North Carolina* and *Moore*, and Appellants' responses to Appellees' and Intervenor-Appellees' motions to stay the TRO in the prior appeal in this case.

### ARGUMENT

*First*, Appellees contend that the North Carolina State Board of Elections ("NCSBE") will suffer irreparable harm if the Court grants an injunction pending appeal because that injunction would bar the NCSBE from informing voters that their ballots contain "minor deficiencies, like placing a signature in the wrong place." Response to Emergency Motion for Injunction Pending Appeal at 25–26, Doc. 12-1 (Oct. 16, 2020) ("Response"). But as Appellants' motion makes clear, the *only* aspect of the revised Numbered Memo 2020-19 that Appellants are seeking to enjoin is the extension of the receipt deadline. *See* Plaintiffs-Appellants Emergency Motion for an Injunction Pending Appeal at 1, Doc. 4 (Oct. 16, 2020) ("Motion"). Appellants have explicitly not asked this Court to enjoin the entire cure process, *see id.*, so even if this Court enters an injunction pending appeal Appellees can

implement the cure process they had in place prior to the TRO, subject to Judge Osteen's injunction against allowing the curing of missing witness signatures with a voter affidavit. *See* Memorandum Opinion & Order at 40–41, Doc. 169, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. Oct. 14, 2020).

*Second*, Appellees incorrectly cite the Supreme Court's standard for issuing an injunction pending appeal. *See* Response at 4–5. The Supreme Court's authority to issue an injunction pending appeal arises from the All Writs Act. *See Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1403 (2012) (Sotomayor, J., in chambers). And though this Court has not “made a clear statement about what standard should be applied in determining whether to grant a[n] . . . injunction pending appeal,” *Ohio Valley Env't Coal., Inc. v. U.S. Army Corps of Eng'rs*, 890 F. Supp. 2d 688, 690 (S.D. W. Va. 2012), it has recognized a few factors that must be considered. One factor is “whether the petitioner has made a strong showing that he is likely to prevail on the merits of his appeal.” *Miltenberger v. Chesapeake & Ohio Ry. Co.*, 450 F.2d 971, 974 (4th Cir. 1971). Another factor is “irreparable injury.” *See Sinai Hosp. of Balt., Inc. v. Scarce*, No. 76-2259, 1976 WL 4205, at \*2 (4th Cir. Nov. 10, 1976) (Winter, C.J., in chambers). These factors are part of a common standard for granting an injunction pending appeal that many of the Courts of Appeals share. According to that standard, an injunction pending appeal will be granted if the movant establishes (1) “a substantial likelihood that it will prevail on the merits of the

appeal,” (2) “a substantial risk of irreparable injury unless the injunction is granted,” (3) “the threatened injury to the [movants] exceeds whatever damage an injunction may cause the [nonmovants],” and (4) “any injunction would not disserve the public interest.” *Eternal Word Television Network, Inc. v. Sec’y, U.S. Dep’t of Health & Human Servs.*, 756 F.3d 1339, 1344 (11th Cir. 2014) (W. Pryor, J., specially concurring) (citing *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc)); see also, e.g., *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1131 (D.C. Cir. 2017); *United States v. Alabama*, 443 F. App’x 411, 419–20 (11th Cir. 2011); *Korte v. Sebelius*, 528 F. App’x 583, 586 (7th Cir. 2012); *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988); *Fath v. Tex. Dep’t of Transp.*, 670 F. App’x 294, 295 (5th Cir. 1982). As Appellants demonstrated in their motion, these factors counsel in favor of issuing an injunction in this case.

*Third*, Appellees oppose Appellants’ Equal Protection and Elections Clause claims by contending that the NCSBE was authorized under state law to take the actions it did—in other words, to unilaterally change state election law in contravention of the General Assembly’s duly enacted laws. But as the district court found, the NCSBE lacked authority to make the extensive alterations to the election laws through the Memoranda under either N.C. GEN. STAT. § 163-22.2 or § 163-27.1. See Motion App. 146–53. Section 163-22.2 does not authorize the NCSBE to

implement rules that directly conflict with the General Assembly's duly enacted laws—like the statutory receipt deadline—and the Executive Director did not have the power to redefine the meaning of “natural disaster” under § 163-27.1 to include a pandemic to exercise her emergency powers to make the changes. What is more, § 163-27.1 is inapplicable on its face because it requires “the normal schedule for the election” to have been “disrupted,” but the normal schedule for the November 2020 election has not been altered in any way. Consequently, without the lawful authority they claim to have had, Appellees' entire opposition to Appellants' claims falls apart.

*Fourth*, Appellees' argument that Appellants' Equal Protection claim based on arbitrary and nonuniform treatment fails because “minor differences in treatment among voters simply do not support an equal-protection violation,” Response at 22–23, is meritless. Judge Osteen found that Appellants were likely to prevail on the merits of their Equal Protection claim in this respect because Appellees' actions subject Appellants Heath and Whitley to “arbitrary and disparate treatment” by “contraven[ing] the fixed rules or procedures” established by the General Assembly *before* voting started. Motion App. 120–25. Appellants will not address the particularities of the various cases that Appellees cite, but Appellees' actions are unconstitutional here because they were *arbitrary*.

*Fifth*, Appellees maintain that courts could have struck down the witness requirement, so their elimination of it via memoranda was a reasonable response to avoid protracted litigation. *See* Response at 13. But a three-judge panel of the North Carolina Superior Court and the Middle District of North Carolina have upheld North Carolina's witness requirement for this fall's election on full preliminary injunction records. *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 4484063, at \*36 (M.D.N.C. Aug. 4, 2020); Order on Injunctive Relief at 6–7, *Chambers v. State*, No. 20-CVS-500124 (N.C. Wake Cnty. Super. Ct. Sept. 3, 2020). And the Supreme Court recently for the second time stayed an injunction of a witness requirement during the pandemic. *See Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020). Furthermore, with respect to the ballot receipt deadline, several federal appellate courts have also recently stayed injunctions extending *election day* ballot receipt deadlines that are stricter than North Carolina's deadline of three days *after* the election. *See New Ga. Project v. Raffensperger*, No. 20-13360, 2020 WL 5877588 (11th Cir. Oct. 2, 2020) (staying injunction of Georgia's election day deadline); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359 (7th Cir. Oct. 8, 2020) (staying extension of Wisconsin's election day deadline); *Common Cause of Ind. v. Lawson*, No. 20-2911, 2020 WL 6042121 (7th Cir. Oct. 13, 2020) (staying extension of Indiana's election day deadline).

## CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant their motion for an injunction pending appeal.

Dated: October 16, 2020

Respectfully submitted,

/s/ David H. Thompson

David H. Thompson

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*Counsel for Plaintiffs-Appellees*

## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(a). The reply is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 1,248 words (exclusive of the parts of the document exempted by Federal Rule of Appellate Procedure 32(f)), as measured by Microsoft Word.

/s/ David H. Thompson  
David H. Thompson

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### CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Local Rule 25(b)(2), I hereby certify that on October 16, 2020, I electronically filed the foregoing reply with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties has been accomplished via ECF.

/s/ David H. Thompson  
David H. Thompson

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# Exhibit C

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## Park, Ryan

---

**From:** David Thompson <dthompson@cooperkirk.com>  
**Sent:** Friday, October 16, 2020 9:34 PM  
**To:** Peters, Alec  
**Cc:** Burton Craige; Narendra Ghosh; Paul Smith; melias@perkinscoie.com; UNkwonta@perkinscoie.com; Glickman, Ariel (Perkins Coie); Jasarasaria, Jyoti (Perkins Coie); Madduri, Lalitha (Perkins Coie); nathan.huff@phelps.com; Nicole Moss; Pete Patterson; stobin@taylorenghish.com; Burchfield, Bobby; Leland, Matthew; Park, Ryan; Steed, Terence  
**Subject:** Re: NC Court of Appeals P20-513—State Board Defendants' Response in Opposition to Intervenor's Petitions for Writs of Supersedeas

Alec,

I am writing to correct your email below.

To be clear, as of [midnight tonight](#), the state board of elections is free to implement its revised memo 2020-19 with the exception of the cure procedure for the absence of a witness signature or assistance signature (and the reference to the ballot deadline extension).

That revised memo was put into place before the consent judgment and thus is not implicated by our continued efforts to stay and enjoin the implementation of the consent judgment.

Have a good weekend.

Regards,  
David

David H. Thompson  
Cooper & Kirk, PLLC  
1523 New Hampshire Ave., NW  
Washington, DC 20036  
202-220-9659

On Oct 16, 2020, at 9:02 PM, Peters, Alec <apeters@ncdoj.gov> wrote:

Bobby,

We have received the Request for Leave to File a Reply and the proposed Reply submitted by the Legislative defendants earlier today. We understand the Legislative defendants to represent to the Court of Appeals that they are not challenging the cure provisions of the Consent Judgment, administered in conjunction with Judge Osteen's order, and that they further represent to the court that they do not believe that the stay issued by the court last night extends to the cure provisions. Can you please confirm as soon as possible whether the RNC Committees share in that position.

Thank you.

Best regards,  
Alec Peters

<image001.jpg> **Alexander McC. Peters**  
Chief Deputy Attorney General  
919.716.6400  
[apeters@ncdoj.gov](mailto:apeters@ncdoj.gov)  
114 W. Edenton St., Raleigh, NC 27603  
[ncdoj.gov](http://ncdoj.gov)

Please note messages to or from this address may be public records.

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**From:** Peters, Alec

**Sent:** Friday, October 16, 2020 12:52 PM

**To:** Burton Craige <bcraige@pathlaw.com>; Narendra Ghosh <nghosh@pathlaw.com>; Paul Smith <psmith@pathlaw.com>; melias@perkinscoie.com; UNkwonta@perkinscoie.com; Glickman, Ariel (Perkins Coie) <AGlickman@perkinscoie.com>; Jasrasaria, Jyoti (Perkins Coie) <JJasrasaria@perkinscoie.com>; Madduri, Lalitha (Perkins Coie) <LMadduri@perkinscoie.com>; nathan.huff@phelps.com; Nicole Moss <nmoss@cooperkirk.com>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; stobin@taylorenchinese.com; Burchfield, Bobby <BBurchfield@KSLAW.com>; Leland, Matthew <MLeland@KSLAW.com>

**Cc:** Park, Ryan <rpark@ncdoj.gov>; Steed, Terence <Tsteed@ncdoj.gov>

**Subject:** NC Court of Appeals P20-513—State Board Defendants' Response in Opposition to Intervenor's Petitions for Writs of Supersedeas

Counsel, attached please find the State Board Defendants' Response in Opposition to Intervenor's Petitions for Writs of Supersedeas, which has just been filed with the North Carolina Court of Appeals.

Best regards,  
Alec Peters

<image001.jpg> **Alexander McC. Peters**  
Chief Deputy Attorney General  
919.716.6400  
[apeters@ncdoj.gov](mailto:apeters@ncdoj.gov)  
114 W. Edenton St., Raleigh, NC 27603  
[ncdoj.gov](http://ncdoj.gov)

Please note messages to or from this address may be public records.

# Exhibit D

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# NORTH CAROLINA STATE BOARD OF ELECTIONS

*Mailing Address:*  
P.O. Box 27255  
Raleigh, NC 27611

(919) 814-0700 or  
(866) 522-4723

*Fax:* (919) 715-0135

## Numbered Memo 2020-19

**TO:** County Boards of Elections

**FROM:** Karen Brinson Bell, Executive Director

**RE:** Absentee Container-Return Envelope Deficiencies

**DATE:** August 21, 2020 (revised on September 22, 2020; further revised on October 17, 2020 in light of orders in *Democracy NC v. North Carolina State Bd. of Elections*, No. 20-cv-457 (M.D.N.C.) and *NC Alliance for Retired Americans v. North Carolina State Bd. of Elections*, No. 20-CVS-8881 (Wake Cty. Sup. Ct.))

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County boards of elections have already experienced an unprecedented number of voters seeking to vote absentee-by-mail in the 2020 General Election, making statewide uniformity and consistency in reviewing and processing these ballots more essential than ever. County boards of elections must ensure that the votes of all eligible voters are counted using the same standards, regardless of the county in which the voter resides.

This numbered memo directs the procedure county boards must use to address deficiencies in absentee ballots. The purpose of this numbered memo is to ensure that a voter is provided every opportunity to correct certain deficiencies, while at the same time recognizing that processes must be manageable for county boards of elections to timely complete required tasks.<sup>1</sup>

### 1. No Signature Verification

The voter's signature on the envelope shall not be compared with the voter's signature on file because this is not required by North Carolina law. County boards shall accept the voter's signature on the container-return envelope if it appears to be made by the voter, meaning the signature

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<sup>1</sup> This numbered memo is issued pursuant to the State Board of Elections' general supervisory authority over elections as set forth in G.S. § 163-22(a) and the authority of the Executive Director in G.S. § 163-26. As part of its supervisory authority, the State Board is empowered to "compel observance" by county boards of election laws and procedures. *Id.*, § 163-22(c).

on the envelope appears to be the name of the voter and not some other person. Absent clear evidence to the contrary, the county board shall presume that the voter's signature is that of the voter, even if the signature is illegible. A voter may sign their signature or make their mark.

The law does not require that the voter's signature on the envelope be compared with the voter's signature in their registration record. See also [Numbered Memo 2020-15](#), which explains that signature comparison is not permissible for absentee request forms.

## 2. Types of Deficiencies

Trained county board staff shall review each executed container-return envelope the office receives to determine if there are any deficiencies. County board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies. Review of the container-return envelope for deficiencies occurs *after* intake. The initial review is conducted by staff to expedite processing of the envelopes.

Deficiencies fall into two main categories: those that can be cured with a certification and those that cannot be cured. If a deficiency cannot be cured, the ballot must be spoiled and a new ballot must be issued, as long as the ballot is issued before Election Day. See Section 3 of this memo, Voter Notification.

### 2.1. Deficiencies Curable with a Certification (Civilian and UOCAVA)

The following deficiencies can be cured by sending the voter a certification:

- Voter did not sign the Voter Certification
- Voter signed in the wrong place
- Witness or assistant did not print name<sup>2</sup>
- Witness or assistant did not print address<sup>3</sup>

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<sup>2</sup> If the name is readable and on the correct line, even if it is written in cursive script, for example, it does not invalidate the container-return envelope.

<sup>3</sup> Failure to list a witness's ZIP code does not require a cure. G.S. § 163-231(a)(5). A witness or assistant's address does not have to be a residential address; it may be a post office box or other mailing address. Additionally, if the address is missing a city or state, but the county board of elections can determine the correct address, the failure to list that information also does not invalidate the container-return envelope. For example, if a witness lists "Raleigh 27603" you can determine the state is NC, or if a witness lists "333 North Main Street, 27701" you can determine that the city/state is Durham, NC. If both the city and ZIP code are missing, staff will need to determine whether the correct address can be identified. If the correct address cannot be identified, the envelope shall be considered deficient and the county board shall send the voter the cure

- Witness or assistant signed on the wrong line

This cure certification process applies to both civilian and UOCAVA voters.

## 2.2. Deficiencies that Require the Ballot to Be Spoiled (Civilian)

The following deficiencies cannot be cured by certification:

- Witness or assistant did not sign
- Upon arrival at the county board office, the envelope is unsealed
- The envelope indicates the voter is requesting a replacement ballot

If a county board receives a container-return envelope with one of these deficiencies, county board staff shall spoil the ballot and reissue a ballot along with a notice explaining the county board office's action, in accordance with Section 3.

## 2.3. Deficiencies that require board action

Some deficiencies cannot be resolved by staff and require action by the county board. These include situations where the deficiency is first noticed at a board meeting or if it becomes apparent during a board meeting that no ballot or more than one ballot is in the container-return envelope. If the county board disapproves a container-return envelope by majority vote in a board meeting due to a deficiency, it shall proceed according to the notification process outlined in Section 3.

# 3. Voter Notification

## 3.1. Issuance of a Cure Certification or New Ballot

If there are any deficiencies with the absentee envelope, the county board of elections shall contact the voter in writing within one business day of identifying the deficiency to inform the voter there is an issue with their absentee ballot and enclosing a cure certification or new ballot, as directed by Section 2. The written notice shall also include information on how to vote in-person during the early voting period and on Election Day.

The written notice shall be sent to the address to which the voter requested their ballot be sent.

If the deficiency can be cured and the voter has an email address on file, the county board shall also send the cure certification to the voter by email. If the county board sends a cure certification by email and by mail, the county board should encourage the voter to only return *one* of the certifications. If the voter did not provide an email address but did provide a phone number, the county

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certification in accordance with Section 3. See [Numbered Memo 2020-29](#) for additional information regarding address issues.

board shall contact the voter by phone to inform the voter that the county board has mailed the voter a cure certification.

If the deficiency cannot be cured, and the voter has an email address on file, the county board shall notify the voter by email that a new ballot has been issued to the voter. If the voter did not provide an email address but did provide a phone number, the county board shall contact the voter by phone to inform the voter that the county board has issued a new ballot by mail.

A county board shall not reissue a ballot on or after Election Day. If there is a curable deficiency, the county board shall contact voters up until the day before county canvass.

### 3.2. Receipt of a Cure Certification

The cure certification must be received by the county board of elections by the deadline for receipt of absentee ballots. The cure certification may be submitted to the county board office by fax, email, in person, or by mail or commercial carrier. If a voter appears in person at the county board office, they may also be given, and can complete, a new cure certification.

The cure certification may only be returned by the voter, the voter's near relative or legal guardian, or a bipartisan assistance team (MAT). A cure certification returned by any other person is invalid. It is not permissible for a cure certification to be submitted through a portal or form created or maintained by a third party. A cure certification may not be submitted simultaneously with the ballot. Any person who is permitted to assist a voter with their ballot may assist a voter in filling out the cure certification.

### 3.3 County Board Review of a Cure Certification

At each absentee board meeting, the county board of elections may consider deficient ballot return envelopes for which the cure certification has been returned. The county board shall consider together the executed absentee ballot envelope and the cure certification. If the cure certification contains the voter's name and signature, the county board of elections shall approve the absentee ballot. A wet ink signature is not required, but the signature used must be unique to the individual. A typed signature is not acceptable, even if it is cursive or italics such as is commonly seen with a program such as DocuSign.

## 4. Late Absentee Ballots

Voters whose ballots are not counted due to being late shall be mailed a notice stating the reason for the deficiency. A late civilian ballot is one that received after the absentee-ballot receipt deadline by (1) 5 p.m. on Election Day or (2), if postmarked on or before Election Day and received by mail by the deadline for receipt of postmarked ballots. Late absentee ballots are not curable.

If a ballot is received after county canvass the county board is not required to notify the voter.

# Exhibit E

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## Park, Ryan

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**From:** Burchfield, Bobby <BBurchfield@KSLAW.com>  
**Sent:** Saturday, October 17, 2020 10:06 PM  
**To:** Park, Ryan; Peters, Alec; David Thompson  
**Cc:** Burton Craige; Narendra Ghosh; Paul Smith; melias@perkinscoie.com; UNkwonta@perkinscoie.com; Glickman, Ariel (Perkins Coie); Jasrasaria, Jyoti (Perkins Coie); Madduri, Lalitha (Perkins Coie); nathan.huff@phelps.com; Nicole Moss; Pete Patterson; stobin@taylorenghish.com; Leland, Matthew; Steed, Terence  
**Subject:** RE: NC Court of Appeals P20-513—State Board Defendants' Response in Opposition to Intervenor's Petitions for Writs of Supersedeas

In these circumstances, my clients will not oppose the draft cure Memo you sent, Numbered Memo 2020-19 (version 3), but reserve their rights to challenge this cure procedure as applied if it is being used to evade the witness requirement.

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