

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

ADRAIN ARNETT, in his individual
capacity, and in his capacity as Chairman of
the Duplin County Republican Party, and
NORTH CAROLINA REPUBLICAN
PARTY,

Plaintiffs,

v.

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; JEFF CARMON III, 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; WAKE
COUNTY BOARD OF ELECTIONS;
BUNCOMBE COUNTY BOARD OF
ELECTIONS; DUPLIN COUNTY BOARD
OF ELECTIONS,

Defendants,

and

NORTH CAROLINA DEMOCRATIC
PARTY,

Intervenor-Defendant

FIRST AMENDED COMPLAINT

Plaintiffs Adrain Arnett ("Arnett") and the North Carolina Republican Party ("NCRP") bring this action for preliminary and permanent injunctive relief against 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; Jeff Carmon III in his official capacity as a Member of the State Board of Elections; Karen Brinson Bell, in her official capacity as Executive Director of the State Board of Elections (“State Board Defendants”), and the Wake County Board of Elections; Buncombe County Board of Elections; and Duplin County Board of Elections (“County Board Defendants”). Plaintiffs allege as follows:

BACKGROUND

1. This is an action to compel transparency in the pre-election day processing of absentee by mail ballots to ensure that all eligible votes count, once.

2. A surge in absentee by mail voting is occurring in the November 2020 election because of the ongoing coronavirus pandemic. The website for the North Carolina Board of Elections reports, as of October 28, 2020, that 1,451,227 persons have requested an absentee ballot. See <https://www.ncsbe.gov/>. Moreover, as of that same date, 854,993 absentee by mail ballots have been cast by North Carolina voters. Each absentee ballot must comply with statutory safeguards such as a witness requirement. N.C. Gen. Stat. § 163-231. A simple review of the container-return envelope enclosing the ballot can determine whether a ballot complies with these safeguards. But the county boards of election’s processing of those ballots and their review of the container-return envelopes is largely occurring in secret.

3. Beginning September 29, 2020, members of the various North Carolina county boards of election began meeting at least weekly to approve or disapprove absentee by mail ballots based largely on this secret work taking place out of public view. But North Carolina law requires the State Board of Elections to “establish procedures to provide appropriate safeguards” in the pre-processing of absentee by mail ballots. N.C. Gen. Stat. § 163-230.1(g). And Defendants’ failure to establish such clear safeguards threatens Plaintiffs’ rights. Therefore, Plaintiffs request that this

Court order Defendants to provide access to the container-return envelopes so that the public may timely inspect the container-return envelopes of absentee by mail ballots that have been approved and disapproved during any processing that takes place prior to election day.

4. State law provides a mechanism for filing election protests involving irregularities in the conduct of an election. N.C. Gen. Stat. § 163-182.9. Counting ineligible votes or failing to count eligible votes would certainly constitute an irregularity warranting an election protest. Election protests must be filed on or around the date of the county board of election's canvass meeting. This year that meeting will occur November 13, 2020. *See* N.C. Gen. Stat. § 163-182.5. The absentee by mail voting surge combined with the County Defendants' refusal to provide access to container-return envelopes virtually guarantees that Plaintiffs' protest rights will be lost and ineligible votes will be tabulated, thus diluting eligible votes in violation of the Constitution, and eligible votes may be denied, thus disenfranchising some voters.

5. Contrast this to in-person absentee voting, commonly referred to as early voting. This year such early voting will span multiple weeks and is ongoing at the present time. During that time, observers may observe the voting process and voters may submit election protests regarding any irregularities in the process. The same protest opportunities are available for in-person election day voting. In light of the surge in absentee by mail votes caused by the pandemic, the County Defendants' refusal to implement transparency-focused procedures arbitrarily and unconstitutionally subjects in-person voters to disfavored treatment compared with absentee by mail voters. The constitutional cure for this set of circumstances is simple: open up the absentee by mail process to public scrutiny so that all voters are treated the same regardless of the method they use to vote.

6. Plaintiffs now seek declaratory and injunctive relief from this Court to prevent the violation of state law and constitutional rights.

JURISDICTION AND VENUE

7. Jurisdiction is proper in this Court.

8. By order entered October 22, 2020, the Court transferred venue to Wake County Superior Court for the convenience of witnesses and parties. Venue is proper under N.C. Gen. Stat. § 1-82.

PARTIES

9. Adrain Arnett is a registered voter in Pink Hill, Duplin County, North Carolina, and intends to vote absentee in-person. As such, Arnett's vote is subject to observation and challenge while similar voters voting absentee by mail will not be subjected to observation and challenge because of Defendants' lack of transparency and the surge of absentee by mail votes caused by the pandemic. In addition, Arnett has a serious concern that his vote will be negated by ineligible absentee by mail ballots.

10. Arnett is also Chairman of the Duplin County Republican Party. In that capacity, he is responsible for ensuring a fair election by recruiting and organizing voters to monitor the election as allowed by law. This includes selecting observers to monitor the processing of absentee by mail ballots. The surge in absentee voting caused by the pandemic has made this duty even more important. Defendants' actions are thwarting Arnett's ability to monitor this process by refusing to allow public participation and monitoring of container-return envelopes and raising appropriate concerns about absentee by mail voting.

11. Plaintiff NCRP is a North Carolina state political party organization recognized under state and federal law. *See* 11 C.F.R. 100.15; N.C. Gen. Stat. § 163-96.

12. A fundamental focus of the NCRP's mission is to support Republican candidates running in North Carolina elections. In the 2020 election, the NCRP will be supporting a full slate of candidates for elected office in the State of North Carolina. In addition, NCRP is recruiting observers to participate in the pre-election day processing of absentee by mail votes and to prepare any appropriate challenges to ensure all eligible votes count. Defendants' actions are preventing NCRP and its members from participating in the process and exercising their rights under state law.

13. Defendant North Carolina State Board of Elections is the agency responsible for the administration of the election laws of the State of North Carolina.

14. Defendant Damon Circosta is the Chair of the North Carolina State Board of Elections. Mr. Circosta is sued in his official capacity.

15. Defendant Stella Anderson is the Secretary of the North Carolina State Board of Elections. Ms. Anderson is sued in her official capacity.

16. Defendant Jeff Carmon III is a Member of the North Carolina State Board of Elections. Mr. Carmon is sued in his official capacity.

17. Defendant Karen Brinson Bell is the Executive Director of the North Carolina State Board of Elections. Ms. Brinson Bell is sued in her official capacity.

18. The County Board Defendants are the agencies responsible for the administration of elections in their respective county.

STATEMENT OF FACTS

19. In 2001, the General Assembly made absentee voting available to all voters, who may choose to vote absentee for no stated reason. N.C. Gen. Stat. § 163-226(a). But recognizing that absentee voting is less transparent than voting in person, the General Assembly has for a long time adopted several related provisions to ensure that absentee voting would be conducted without

fraud or suspicion of fraud, that absentee voting could be administered in an efficient and fair way, and that public confidence in the election process and results would be maintained.

20. A witness requirement is among those provisions. To cast a valid absentee ballot, North Carolina law ordinarily requires voters to mark a ballot “in the presence of two persons who are at least 18 years of age,” and to “[r]equire those two persons . . . to sign the application and certificate as witnesses and to indicate those persons' addresses.” N.C. Gen. Stat. § 163-231(a). In June 2020, in light of the ongoing pandemic, the North Carolina General Assembly reduced the number of required witnesses to one. S.L. 2020-17 § 1.(a). The law requires the witness to print and sign his name and address on the container-return envelope in which the ballot is enclosed.

21. On August 21, 2020, Defendant Bell issued Numbered Memo 2020-19 to address absentee processes (“August Memo 2020-19”). The memo stated that county board staff would review the container-return envelopes for compliance with the statutorily-mandated requirements, such as the witness requirement. The memo provided a process to cure or otherwise address deficiencies.

22. August Memo 2020-19 also addressed county board meetings at which absentee by mail ballots would be processed. August Memo 2020-19 at p. 6. The memo acknowledged the likelihood of increased numbers of absentee by mail ballots this year and stated that additional guidance would be forthcoming regarding processing of the increased volume of such ballots.

23. That additional guidance purportedly came in the form of Numbered Memo 2020-25 which was not issued until September 22, 2020. Memo 2020-25 stated that county boards would begin acting upon absentee by mail ballots starting September 29, 2020. Memo 2020-25, at p.1.

24. Memo 2020-25 states that members of the public can attend the county board absentee meetings but cannot speak or otherwise raise challenges to the board's action on absentee ballots. Memo 2020-25, at p. 3. Moreover, the Memo allows the county board to delegate most of the absentee ballot review process to staff and provides no mechanism for public participation or oversight of that work. Memo 2020-25, at pp. 4-5. For ballots that staff recommend for approval, the Memo permits the county board members to forego any review of the container-return envelopes altogether. Memo 2020-25, at p. 5. Finally, Memo 2020-25 acknowledges that the container-return envelopes are public records under state law except for limited confidential portions. Memo 2020-25, at pp. 9-10. However, the Memo provides no guidance or direction to the county boards to ensure members of the public may review the envelopes prior to election day.

25. Thus, under the procedures currently allowed by the State Board Defendants, staff of the County Board Defendants may review and effectively approve or disapprove absentee ballot envelopes in secret with only pro forma review by the appointed members of the county board of elections. The only way for the public to verify the accuracy of that secret work is to be allowed to inspect or copy the container-return envelopes. Without access to the envelopes, the public will not know if all eligible votes were counted and lose confidence in the results.

26. This is not a theoretical concern. On October 2, 2020, Plaintiff NCRP made a public records request to the Scotland County Board of Elections for copies of the container-return envelopes processed in that county. The Scotland County Board of Elections promptly complied by turning over electronic scans of all container-return envelopes processed to date on October 10, 2020. Plaintiff NCRP's analysis of the envelopes, however, revealed that many container-return envelopes lacked a witness as required by law. Many more of the container-return envelopes lacked witness identifying information such as an address. These container-return envelopes

should have been subjected to a lawful cure process instead of opened and counted. On information and belief, hundreds if not thousands of absentee by mail votes across the State will be incorrectly approved or disapproved, casting doubt on the results of State and local election contests, many of which are expected to be close.

27. State law provides a mechanism for filing election protests involving irregularities in the conduct of an election. N.C. Gen. Stat. § 163-182.9. Counting ineligible votes or failing to count eligible votes would certainly constitute an irregularity warranting an election protest. Election protests must be filed on or around the date of the county board of election's canvass meeting. This year that meeting will occur November 13, 2020. See N.C. Gen. Stat. § 163-182.5. In most years, absentee by mail voting is one of the least used forms of voting. For instance such voting accounted for approximately only 4% of all votes cast in the 2016 general election. See <https://www.ncsbe.gov/>. Under normal circumstances there is sufficient time to obtain and review container-return envelopes and ensure that all eligible votes count. However, as mentioned above, the pandemic has caused a surge in absentee by mail voting and the number of such votes cast will be exponentially higher than 4% of all votes.

28. The absentee by mail voting surge combined with the County Board Defendants' refusal to provide access to container-return envelopes virtually guarantees that Plaintiffs' protest rights will be lost and ineligible votes will be tabulated, thus diluting eligible votes in violation of the Constitution, and eligible votes may be denied. Contrast this to in-person absentee voting, commonly referred to as early voting. This year such early voting will span multiple weeks and is ongoing at the present time. During that time, observers may observe the voting process and voters may submit election protests regarding any irregularities in the process. The same protest opportunities are available for in-person election day voting. In light of the surge in absentee by

mail votes caused by the pandemic, the County Board Defendants' refusal to implement transparency-focused procedures arbitrarily and unconstitutionally subjects in-person voters to disfavored treatment compared with absentee by mail voters.

29. On October 2, 2020, Plaintiff NCRP made a public records request to the State Board Defendants for access to the container-return envelopes and made the same request by copy to the County Board Defendants, among other counties. The County Board Defendants ignored or failed to comply with this request. On October 16, 2020, following this Court's denial of injunctive relief against the State Board Defendants, Plaintiff NCRP made another public records request to the County Board Defendants, among others. Many county boards of election have complied and are complying with Plaintiff's request to inspect or copy the envelopes. The County Board Defendants have either failed or refused to comply with the request or ignored it altogether.

30. On or about October 17, 2020, the Director of the Wake County Board of Elections received and opened Plaintiff NCRP's public records request. The Wake County Board of Elections has since completely ignored the request despite multiple follow-up attempts.

31. On or about October 20, 2020, the Buncombe County Board of Elections indicated that it would not even attempt to fulfill the public records request prior to the canvass. The Board has since continued to refuse to provide access until after the canvass.

32. The Duplin County Board of Elections has completely ignored the NCRP public records request.

33. In stark contrast to the County Board Defendants, many county boards of elections, both big and small, have cooperated with NCRP to fulfill the public records request. As noted, the Scotland County Board of Elections promptly copied and provided the container-return envelopes to NCRP. Moreover, the Guilford County Board of Elections has provided scans of over 7,000

envelopes and is in the process of scanning the remaining envelopes to provide them to the NCRP. Many other county boards of elections are similarly working to fulfill the public records request. The cooperating counties demonstrate that it is in fact possible to fulfill the NCRP public records request and that with regard to the County Board Defendants, it is not an issue of resources, but instead a lack of will to comply with North Carolina law on this issue.

34. On October 29, 2020, NCRP, through counsel, sent a demand for mediation to counsel for the County Board Defendants.

35. Having exhaustively attempted to get voluntary cooperation from all of the Defendants, and with the election protest deadlines looming, this legal action followed.

CLAIMS

COUNT ONE

(Violation of North Carolina Public Records Act)

36. Plaintiffs incorporate all previous allegations set forth herein.

37. The container-return envelopes containing absentee by mail ballots are public records under the North Carolina Public Records Act, contained in Chapter 132 of the North Carolina General Statutes.

38. Defendants collectively are an agency of North Carolina government and are the custodians of these public records. State Board Defendants have the authority to compel North Carolina county boards of election to make these public records available to the public. Moreover, County Board Defendants are indisputably in possession of these records and can make them available for inspection or copying.

39. The Public Records Act provides that custodians of public records “shall permit any record in the custodian’s custody to be inspected and examined at reasonable times and under reasonable supervision by any person.” N.C. Gen. Stat. § 132-6(a). In addition, the custodian of

the records “shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.” N.C. Gen. Stat. § 132-6(a). The failure to provide access or copies as provided by the Act is tantamount to denial of the right to such access or copies. Both the State Board Defendants and the County Board Defendants are custodians of the public records at issue here.

40. Plaintiffs have made a reasonable request to Defendants for access and copies as required by the Public Records Act. Defendants have refused to provide access or copies of public records.

41. Through this Amended Complaint and by separate demand to the County Board Defendants, Plaintiffs demand mediation pursuant to N.C. Gen. Stat. § 7A-38.3E. Plaintiffs ask that mediation occur no later than November 4, 2020, using any mediator deemed acceptable to the Defendants. Plaintiffs further request that if the mediation does not occur or results in an impasse, that the Court hear Plaintiffs’ request for a temporary restraining order as soon thereafter as the Court’s schedule will permit.

42. Defendants’ refusal to provide access to the requested records violates the Public Records Act.

COUNT TWO

(Denial of Equal Protection Under the State Constitution)

43. Plaintiffs incorporate all previous allegations set forth herein.

44. Article I, Section 19 of the state constitution guarantees to all North Carolina citizens the equal protection of the laws.

45. The right to vote on equal terms is a fundamental right. The North Carolina Supreme Court has stated that “[n]o right is more precious in a free country than that of having a

voice in the election of those who make the laws under which, as good citizens, we must live.” *Blankenship v. Bartlett*, 363 N.C. 518, 521 (2009).

46. Equal protection requires that “one person’s vote must be counted equally with those of all other voters in a State.” *Reynolds v. Sims*, 377 U.S. 533, 560 (1964). In other words, “whenever a state or local government decides to select persons by popular election to perform governmental functions, [equal protection] requires that each qualified voter must be given an equal opportunity to participate in that election” *Hadley, v. Junior College District*, 397 U.S. 50, 56 (1968).

47. Therefore, the government is prevented from treating similarly situated voters differently without a compelling justification for doing so. *Bush v. Gore*, 531 U.S. 98, 104-5 (2000) (“[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”). The requirement of equal treatment is stringently enforced as to laws that affect the exercise of fundamental rights, including the right to vote.

48. Moreover, the government must “avoid arbitrary and disparate treatment of the members of its electorate.” *Charfauros v. Bd. of Elections*, 249 F.3d 941, 951 (9th Cir. 2001) (quoting *Bush*, 531 U.S. at 105); see also *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.”); *Gray*, 372 U.S. at 380 (“The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [the Supreme Court’s] decisions.”).

49. “[T]reating voters differently” is particularly unlawful when the disparate treatment is the result of arbitrary, ad hoc processes. *Charfauros*, 249 F.3d at 954. Indeed, a “minimum

requirement for non-arbitrary treatment of voters [is] necessary to secure the fundamental right [to vote].” *Bush*, 531 U.S. at 105.

50. The absentee by mail voting surge combined with the County Board Defendants’ refusal to provide access to container-return envelopes virtually guarantees that Plaintiffs’ protest rights will be lost and ineligible votes will be tabulated, thus diluting eligible votes in violation of the Constitution, and eligible votes may be denied. However, as to in-person absentee voting, observers may observe the voting process and voters may submit election protests regarding any irregularities in the process. The same protest opportunities are available for in-person election day voting. In light of the surge in absentee by mail votes caused by the pandemic, the County Board Defendants’ refusal to implement transparency-focused procedures arbitrarily and unconstitutionally subjects in-person voters to disfavored treatment compared with absentee by mail voters.

51. Defendants, through their acts or omissions, have infringed upon the equal protection rights of Plaintiffs, their members, and all qualified North Carolina voters.

52. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from pre-processing and counting absentee by mail ballots without the safeguards required by state law and necessary to prevent the violation of Plaintiffs’ constitutional rights.

COUNT THREE

(Injunctive Relief)

53. Plaintiffs incorporate all previous allegations set forth herein.

54. Defendants are refusing to allow Plaintiffs and those similarly situated to Plaintiffs to challenge absentee by mail ballots that do not comply with state law.

55. Through their violation of the Public Records Act, Defendants are also refusing to give Plaintiffs and those similarly situated to Plaintiffs the information they need to determine if election protests are appropriate and to ensure all eligible votes count.

56. Defendants are processing and counting absentee by mail ballots without complying with North Carolina law allowing access and inspection of the process and the ability to lodge well founded election protests.

57. Because of the surge in absentee by mail ballots, there will not be enough time to inspect container-return envelopes to ensure compliance with state law if this Court does not issue injunctive relief requiring compliance with state law.

58. If Defendants do not provide a process for challenging improper absentee by mail ballots, Plaintiffs will lose their election protest rights and Defendants will irreparably violate the equal protection rights of Plaintiffs and those similarly situated.

59. The Court should issue injunctive relief compelling compliance with state law as described above to avoid irreparable injury to Plaintiffs and scores of North Carolina voters.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in their favor and award the following relief:

- (a) A permanent injunction ordering Defendants to provide timely access to inspect or copy the container-return envelopes such that Plaintiffs' right to lodge election protests based on inappropriately approved or disapproved absentee by mail ballots will not be effectively and irreparably lost;
- (b) Temporary and preliminary injunctive relief in the form specified above during the pendency of this action;

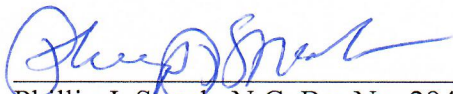
- (c) Treat this First Amended Complaint as a motion for a temporary restraining order under Rule 65 of the North Carolina Rules of Civil Procedure, and issue a temporary restraining order restraining the Defendants in the manner and form described above;
- (d) Pending the issuance of preliminary injunctive relief, treat this First Amended Complaint as a Motion for Expedited Discovery under Rules 26(d), 30, 33, and 34, N.C. R. Civ. P., and grant plaintiff leave to commence expedited discovery immediately in aid of preliminary injunction proceedings before the Court;
- (e) Treat this First Amended Complaint as a demand for mediation pursuant to N.C. Gen. Stat. § 7A-38.3E to occur no later than November 4, 2020 using a mediator of Defendants' choice, and ordering that if the mediation does not occur or results in an impasse, the Court will accord this matter priority and set it down for an immediate hearing pursuant to N.C. Gen. Stat. § 132-9(1);
- (f) Plaintiffs' reasonable costs and expenses, including attorneys' fees pursuant to N.C. Gen. Stat. § 132-9(c) and any other applicable law; and
- (g) All other preliminary and permanent relief that Plaintiffs are entitled to, and that the Court deems just and proper.

Dated: October 29, 2020

Respectfully submitted,



G. Braxton Price, N.C. Bar No. 35514
Hunter & Price, P.A.
PO Box 277
Kenansville, NC 28349
Phone: 910-296-9838
Email: gbprice@hunterandprice.com



Phillip J. Strach, N.C. Bar No. 29456
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
8529 Six Forks Road, Suite 600
Raleigh, North Carolina 27615
Telephone: (919) 789-3179
Email: phil.strach@ogletree.com

Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this date upon the persons named below
via electronic mail as follows:

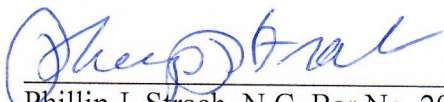
Paul Cox
North Carolina Department of Justice
114 W. Edenton St
Raleigh, NC 27603
(919) 716-6932
pcox@ncdoj.gov

Counsel for Defendants

John R. Wallace
Wallace & Nordan L.L.P.
3737 Glenwood Ave., Suite 260
Post Office Box 12065 (27605)
Raleigh, North Carolina 27612
jrwallace@wallacenordan.com

Counsel for Intervenor-Defendant

This the 29th day of October, 2020.



Phillip J. Strach, N.C. Bar No. 29456
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
8529 Six Forks Road, Suite 600
Raleigh, North Carolina 27615
Telephone: (919) 789-3179