

STATE OF NORTH CAROLINA  
COUNTY OF DUPLIN

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,

Defendants,

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

2020 OCT 12 A 9:18  
20-CVS-570  
COUNTY, C.S.D.

**PROPOSED DEFENDANT-  
INTERVENOR NORTH CAROLINA  
DEMOCRATIC PARTY'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL STAY  
PENDING TRANSFER TO THREE-  
JUDGE PANEL**

Proposed Defendant-Intervenor North Carolina Democratic Party respectfully moves this Court to stay proceedings related to Plaintiffs Adrain Arnett's and North Carolina Republican Party's (collectively "NCGOP") constitutional claims against North Carolina laws governing challenges to and the pre-election processing of absentee ballots. Under recent and clear precedent, the Court lacks jurisdiction to adjudicate Plaintiffs' equal protection claims, which are animated by Plaintiffs' contention that the lack of a pre-election challenge process and the pre-election processing of absentee ballots facially violates the North Carolina constitution. Those claims can only be adjudicated by a three judge panel of this Court under Sections 1-267.1 of the General Statutes and North Carolina Rule of Civil Procedure 42(b)(4). As discussed below, the proper approach is to stay the equal protection claims, determine whether the NCGOP's Public

Records Act claim is contingent upon the resolution of these facial challenges, and then transfer any remaining claims to a three-judge panel of this Court.

## **INTRODUCTION**

The Court should stay all proceedings related to the NCGOP's equal protection claims related to procedures for processing and challenging absentee ballots because the Court lacks jurisdiction over them. These equal protection claims are facial constitutional challenges to state statutes that can only be resolved before a three-judge panel of this Court. As the Court of Appeals recently explained in *Holdstock v. Duke University Health System, Inc.*, 841 S.E.2d 307 (N.C. Ct. App. 2020), this Court must first determine whether NCGOP's Public Records Act claim is contingent on the outcome of its facial challenge to the statutes governing absentee ballot challenges. After the Court determines that question, and, if necessary, resolves NCGOP's Public Records Act claim, it should transfer the facial challenge to the statutes governing absentee ballot challenges to a three-judge panel of this Court, which has jurisdiction to resolve those claims.

## **BACKGROUND AND STATUTORY FRAMEWORK**

The NCGOP's Complaint asserts two causes of action. First, the NCGOP claims that the State Board's alleged failure to provide access and copies of absentee ballot container return envelopes violates the North Carolina Public Records Act, Compl. ¶¶ 35-40; *id.* at 14 (seeking declaratory judgment that "container-return envelopes are public records pursuant to the Public Records Act and that requires [the State Board] to make the records available to [NCGOP] immediately"). Second, the NCGOP claims that two aspects of North Carolina law violate the equal protection guarantees of the state constitution: the absence of a pre-election day challenge process, and the pre-election day processing of absentee ballots "without the public's timely access to container-return envelopes[.]" Compl. ¶¶ 41-50; *id.* at 14 (seeking declaratory judgment that "the pre-election day processing of absentee by mail ballots without the public's timely

access to container-return envelopes or a pre-election day challenge process violates the equal protection clause of the state constitution[.]”).

## **I. Public Records Act**

The North Carolina 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, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.” N.C. Gen. Stat. Ann. § 132-6.

## **II. Processing and Challenging Absentee Ballots<sup>1</sup>**

Absentee ballots are returned to county boards of elections in sealed envelopes. Voters are required to provide certain information on the outside of the container-return envelopes, including a signature. North Carolina law provides that each county board *must* hold weekly meetings to determine whether the container-return envelope has been properly executed, and if so, approve the ballot to be counted. N.C. Gen. Stat. Ann. §§ 163-230.1(e)-(f).<sup>2</sup> The county board has the last word on the contents of the container-return envelope: North Carolina law provides that “[t]he decision of the board on the validity” of the absentee ballot container envelope “*shall be final*” subject only to such review as may be necessary in the event of an election contest. The

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<sup>1</sup> Proposed Defendant Intervenor provides the following overview of the statutory framework governing absentee ballot processing and challenges. For the Court’s convenience, Proposed Defendant Intervenor provides the same overview in the background section of the Opposition to the Motion for Temporary and Preliminary Injunction, filed concurrently with this brief.

<sup>2</sup> The statute confusingly refers to the contents of the absentee ballot container return envelope that the voter completes as the “application for absentee ballots. *See, e.g.*, N.C. Gen. Stat. Ann. § 163-230.1(d), (e). By contrast, the document that voters submit to *request* that an absentee ballot be sent to them in the first place is termed a “written request form for an absentee application[.]” *See, e.g.*, N.C. Gen. Stat. Ann. § 163-230.1(a). Thus, references in Section 163-230.1 to “applications for absentee ballots” refer to the absentee ballot container return envelope, not an application requesting an absentee ballot itself.

county board of elections shall constitute the proper official body to pass upon the validity of all applications for absentee ballots received in the county[.]” *Id.* § 163-230.1(f) (emphasis added).

During these weekly meetings, state law also expressly permits county boards, after they have approved the absentee ballot container envelope as valid, to remove the absentee ballots from their container envelopes and run them through the optical scanner. N.C. Gen. Stat. Ann. § 163-234(3). By scanning absentee ballots throughout the absentee voting period—but not tallying the votes cast on those ballots—the statute significantly lessens the administrative burden on county boards on election night while ensuring that vote totals are not released prior to the close of polls. But crucially, as explained below, the fact that an absentee ballot has been processed and scanned *does not* mean that it will be included in the final canvass of votes.

Both absentee ballots and ballots cast in-person (either during early voting or on election day) can be challenged by another voter in the county, but state law sets forth substantive and procedural limits on such challenges. Section 163-89, titled “Procedures for challenging absentee ballots” specifically sets out the procedures for challenging absentee ballots. It provides that “[t]he absentee ballot of any voter may be challenged on the day of any [ . . . ] general election [ . . . ] beginning no earlier than noon and ending no later than 5:00 P.M.” N.C. Gen. Stat. Ann. § 163-89(a).<sup>3</sup> Only voters in the same precinct as the absentee voter may issue a challenge. Challenges are made in writing on a form prescribed by the State Board. *Id.* § 163-89(b)-(c). There is no provision in North Carolina law permitting challenges to absentee ballots prior to election day. While challenges must be filed during the windows of time specified above, they

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<sup>3</sup> For absentee ballots received after election day that are eligible to be counted, the statute provides a second window for challenges that ends at 5:00 p.m. on the next business day following the deadline for receipt of such ballots. *See* N.C. Gen. Stat. Ann. § 163-89(a).

are not resolved during that timeframe; rather, challenges are heard by the county board on the day set for the canvass of the election returns. *Id.* § 163-89(e).

Article 8, titled “Challenges,” limits the substantive grounds on which a ballot can be challenged through this process. For absentee ballots, Section 163-89(c), titled “Form and Nature of Challenge” states that “Each challenge [to a voter’s absentee ballot] shall specify the reasons why the ballot does not comply with *the provisions of this Article* or why the absentee voter is not legally entitled to vote in the particular primary or election.” N.C. Gen. Stat. Ann. § 163-89(c) (emphasis added). Article 8, in turn, enumerates a limited set of valid reasons for challenging a ballot: *e.g.*, that the voter is not qualified to vote (for example, because the voter is not resident of the state or the county) or has already voted in that primary or election. N.C. Gen. Stat. Ann. §§ 163-85(c), 163-87(2). The validity of the absentee ballot container envelope is notably absent from these valid challenge reasons, and for good reason: as noted above, state law is clear that “[t]he decision of the board on the validity of an application for absentee ballots shall be final” except in an election contest. N.C. Gen. Stat. Ann. § 163-230.1(f).

Because state law contemplates that some absentee ballots may be approved and scanned through an optical scanner prior to election day as described above, state law also provides a mechanism by which those ballots may still be challenged on election day: if a challenge lodged on election day is ultimately sustained by the county board, the ballots challenged and sustained are withdrawn from the appropriate boxes, and the board determines how those ballots were voted, deducts such ballots from the returns, and adjusts the appropriate abstracts of returns. N.C. Gen. Stat. Ann. §§ 163-234(6), 163-89(e).

The procedures for challenging ballots cast in-person are slightly different. Another voter in the county may challenge a person voting in-person on election day when the voter attempts

to vote. N.C. Gen. Stat. Ann. § 163-87. These kinds of challenges are heard and decided by the chief judge and judges of election of the voter's precinct. N.C. Gen. Stat. Ann. § 163-88(a). An in-person voter against whom a challenge is sustained may vote a challenged ballot, which can be ruled upon by the county board in an election contest. N.C. Gen. Stat. Ann. § 163-88.1. Challenges to in-person voters during early voting proceed similarly, but the challenge is heard by the county board on the day of the canvass using the same procedures as challenges to absentee voting. *See* N.C. Gen. Stat. Ann. § 163-227.2(i). The same limited set of valid reasons for challenging a ballot that apply to absentee voters also apply to in-person voters on election day or during early voting. *See id.*; N.C. Gen. Stat. Ann. § 163-87.

The NCGOP's objection to this settled arrangement arrives in the middle of election season, with voting already in full swing. Over a third of the 1.2 million absentee ballots that have been requested in North Carolina have already been cast.<sup>4</sup> County Boards have been holding absentee meetings since September 29, 2020, and are processing newly received absentee ballots with each passing week. *See* Compl. at Exh. B.

### LEGAL STANDARD

State law requires certain challenges to the acts of the General Assembly to be decided by a three-judge panel in the Wake County Superior Court. As relevant here, "any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County[.]" N.C. Gen. Stat. Ann. § 1-267.1(a1).

Sections 1-267.1 and North Carolina Rule of Civil Procedure 42(b)(4) are not a model of clarity, and the Court of Appeals in *Holdstock v. Duke University Health System, Inc* recently

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<sup>4</sup> *See supra*, at n.1.

issued an opinion clarifying the trial court's obligations when considering constitutional challenges to state statutes. *See* 841 S.E.2d 307 (N.C. Ct. App. 2020). Pursuant to that precedent, the trial court's "first duty" is to determine whether Plaintiffs' complaint raises a facial challenge to an act of the General Assembly in accordance with Rule 42(b)(4). "The trial court's determination of this issue then would dictate the actions thereafter required." *Id.* at 315. If Plaintiffs properly raised a facial challenge in their complaint, the facial challenge could only be heard and decided by a three-judge panel, and the trial court would have no jurisdiction to decide it.

As is relevant here, the trial court is also required to determine if there are any claims at issue that are *not* "contingent upon the outcome of [Plaintiffs'] challenge to [the challenged statute's] facial validity[.]" Rule 42(b)(4); *see also Holdstock*, 841 S.E.2d at 315. The trial court must resolve those matters prior to considering whether Rule 42(b)(4) mandates transfer of Plaintiffs' facial challenge to the three-judge panel. *See* Rule 42(b)(4); *see also Holdstock*, 841 S.E.2d at 315. If the trial court decides, after all issues not contingent on the outcome of Plaintiffs' facial challenge are resolved, that resolution of Plaintiffs' facial challenge is still required to permit resolution of remaining issues, it shall, "on its own motion, transfer that portion of the action challenging the validity of [the challenged statute] to the Superior Court of Wake County for resolution by a three-judge panel[.]" and "stay all matters that are contingent upon the outcome of the challenge to [the challenge statute's] facial validity pending a ruling on that challenge and until all appeal rights are exhausted." Rule 42(b)(4); *see also Holdstock*, 841 S.E.2d at 317.

## ARGUMENT

### **I. The NCGOP's equal protection claim is a facial constitutional challenge to state statutes that can only be heard by a three-judge panel of this Court.**

This Court lacks jurisdiction over all of the NCGOP's claims except Count I, which raises a challenge under the Public Records Act, because each of the NCGOP's remaining claims rely on their contention that North Carolina law regulating the processing of and challenge to absentee ballots facially violate the North Carolina Constitution. As such, all of the NCGOP's claims, save the Public Records Act claim, must be heard before a three-judge panel of this Court.

*First*, while the NCGOP attempts to cast its Complaint as a challenge to the State Board's procedures, even a cursory examination of the allegations reveals that the NCGOP is in fact challenging the constitutionality of state statutes that set the times and procedures under which absentee ballots may permissibly be subject to challenge. The NCGOP's Complaint expressly seeks "a declaratory judgment that the *pre-election day processing of absentee by mail ballots* without the public's timely access to container-return envelopes or *a pre-election day challenge process* violates the equal protection clause of the state constitution[.]" Compl. at 14 (emphasis added). While the Complaint attempts to blame the State Board for purportedly failing to implement procedures that allow for this pre-election day challenge regime, the Complaint acknowledges that it is *state law* that stands in the way of the relief it seeks: "*North Carolina law provides* a narrow window for challenges to absentee by mail ballots. State law permits challenges to absentee by mail ballots for a few hours on election day and on the day following the receipt deadline for such ballots. N.C. Gen. Stat. § 163-89(a)." Compl. ¶ 26 (emphasis added). And state law also requires pre-election day processing of absentee ballots. N.C. Gen. Stat. Ann. §§ 163-230.1(e)-(f). The cause of the alleged equal protection violation identified by the NCGOP is state law, not State Board procedures.



*Second*, the NCGOP's attack on these state statutes regulating pre-election day absentee ballot processing and challenges to absentee ballots is a facial challenge, not an as-applied challenge. Challenges to government actions may be styled as facial challenges or as-applied challenges: "The basic distinction is that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016), *aff'd*, 369 N.C. 722, 799 S.E.2d 611 (2017) (quoting *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999)). In *Frye*, the U.S. District Court for the Middle District of North Carolina articulated several factors that distinguish facial challenges from as-applied challenges. For example, a hallmark of a facial challenge is a plaintiff's contention that the law cannot be applied in a constitutional manner to anyone. *See Frye*, 109 F. Supp. 2d at 440. Similarly, another indicator of a facial challenge is that the plaintiff seeks a remedy that would enjoin the state from applying the challenged statute to anyone in the present or future. *See id.* The nature of the factfinding inquiry also differs between facial and as-applied challenges: while a facial challenge typically involves a generalized inquiry into the challenged statutes, an as-applied challenge typically invokes an ad hoc inquiry into the specific circumstances faced by the plaintiff. *See id.*; *see also Kimberley Rice Kaestner 1992 Family Tr. v. N. Carolina Dep't of Revenue*, 371 N.C. 133, 138, 814 S.E.2d 43, 47 (2018) (construing challenge as as-applied where allegations and evidence were relevant solely to whether defendant unconstitutionally collected income taxes from plaintiff during certain years).

The NCGOP's equal protection claims bear all the hallmarks of a facial challenge. Most prominently, the relief sought in the complaint is expansive: the Complaint seeks a declaratory judgment that "pre-election day processing of absentee by mail ballots without *the public's* timely access to container-return envelopes or a pre-election day challenge process violates the equal protection clause" and seeks a *permanent* injunction prohibiting the State Board from processing absentee ballots until the NCGOP's preferred procedures are implemented. Compl. at 14-15 (emphasis added). None of this requested relief is limited to any particular context or to this election only: the relief would enjoin the state from applying the statutorily prescribed challenge procedures to anyone in the present or the future. In addition, the NCGOP is clear that in its view, the statutes governing challenges cannot be applied in a constitutional manner to anyone, because the challenge procedures—which allow challenges to be filed while a voter is voting in person but preclude challenges to absentee ballots until election day—inherently create unequal status among all voters who vote absentee and all voters who vote in person. *See* Compl. ¶ 48; *see also id.* ("Plaintiffs *and other similarly situated voters* have been denied equal treatment[.]"). And when it comes to the alleged equal protection violations described in the Complaint, almost none of the factual allegations concern how the challenge statute applies in the specific context in which the NCGOP plans to act. Rather, the Complaint offers a generalized description of the challenge procedures and how they purportedly affect voters. *See, e.g.,* Compl. ¶ 27 (generally describing unconstitutionally unequal status among voters).

The closest the Complaint gets to suggesting that it does not challenge the constitutionality of these statutes in all contexts is its observation that the COVID pandemic has caused a surge in absentee ballots. *See* Compl. ¶¶ 2, 26. But nothing about the Complaint suggests that the constitutional infirmities it identifies are limited to the specific context of an election held in the

middle of a global pandemic. Indeed, the Complaint's equal protection theory is in no way dependent on the surge of absentee balloting. Rather, the Complaint is clear that the alleged unconstitutionality of the challenge procedures results from the differential treatment of voters who vote in person (and are challenged before they vote) and voters who vote absentee (and are challenged only on election day, regardless of when their ballot was received and processed). *See, e.g.,* Compl. ¶ 48 (alleges that statutes "create[] an unconstitutionally unequal status among voters whose ballots are processed on election day and are challengeable versus those that arrive early and are pre-processed *without the same ability to challenge*") (emphasis added). These alleged constitutional infirmities would apply with equal force even if only a small number of voters voted absentee.

Indeed, all of the paragraphs alleged in support of Count Two and Three of the Complaint rely on the NCGOP's allegation that not allowing for pre-election challenges of absentee ballots facially denies North Carolina's citizens "the equal protection of the laws," in purported violation of the North Carolina Constitution. Thus, the only fair reading of the Complaint is that it states a facial challenge to North Carolina's failure to provide a pre-election challenge process and to permit the pre-election processing of absentee ballots that must be heard by a three judge panel of this Court.<sup>5</sup>

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<sup>5</sup> The Complaint relies entirely on cases interpreting the U.S. Constitution (and even at one point states that "Plaintiffs and other similarly situated voters have been denied equal treatment under the Fourteenth Amendment to *the U.S. Constitution*," Compl. ¶ 48 (emphasis added), but the prayer for relief and the title of the count itself seek adjudication only of a claim under the North Carolina Constitution.

**II. The Court must determine whether the Public Records Act claim is contingent upon the resolution of the NCGOP's facial challenge before the facial challenge can be transferred to a three-judge panel.**

Although the NCGOP's equal protection claim is a facial challenge to a state statute that must be transferred to a three-judge panel, the NCGOP's Public Records Act claim is not. However, under *Holdstock*, claims that are not facial challenges but are contingent upon the resolution of a facial challenge must also be stayed pending the resolution of the facial challenge by a three-judge panel. *See* 841 S.E.2d at 316-17. Conversely, if this Court determines that the NCGOP's Public Records Act claim is not contingent upon the outcome of NCGOP's facial challenge, the Court "is required" to resolve the Public Records Act claim prior to considering whether Rule 42(b)(4) mandates transfer of Plaintiffs' facial challenge to the three-judge panel. *See* Rule 42(b)(4); *see also Holdstock*, 841 S.E.2d at 315.

**CONCLUSION**

For the foregoing reasons, the North Carolina Democratic Party respectfully requests that the Court stay all proceedings other than the NCGOP's Public Records Act claim, and upon prompt resolution of that claim, transfer any remaining claims to a three judge panel of this Court.


Dated: October 12, 2020

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Respectfully submitted,

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\*Motion for admission pro hac vice pending

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