

STATE OF NORTH CAROLINA
COUNTY OF DUPLIN

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,

Defendants.

**VERIFIED COMPLAINT; MOTION
FOR TEMPORARY, PRELIMINARY,
AND PERMANENT INJUNCTION; AND
MOTION FOR EXPEDITED
DISCOVERY**

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May the state agency responsible for election administration shield certain ballots from challenges to their validity, while subjecting others to the possibility of rigorous scrutiny? State law and the state Constitution say no, but the North Carolina State Board of Elections (“State Board”) says yes. The State Board is illegally preventing voters from observing the processing of mail-in ballots and thus withholding from voters any assurance that the laws are followed and all valid votes counted.

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; and Jeff Carmon III in his official capacity as a Member of the State Board of Elections; and Karen Brinson Bell, in her official capacity as Executive Director of the State Board of Elections. 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. Sunshine is the best disinfectant.

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 2, 2020, that 1,157,606 persons have requested an absentee ballot. See <https://www.ncsbe.gov/>. Moreover, as of that same date, 340,795 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 comply with the Constitution and state law and issue guidance to the county boards of election providing a clear process by which the public may:

- (a) 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;
- (b) lodge challenges to the approvals or disapprovals during county absentee meetings and continuing through election day;
- (c) have their challenges adjudicated by the county board before any challenged ballots are tabulated; and,
- (d) appeal the adjudication of those challenges by the county board using the same process that would be used to appeal adjudications of challenges during the period during and after election day.

4. State law does provide a narrow window for absentee by mail challenges on election day. Under normal circumstances, this window of time is sufficient because absentee by mail voting is exponentially lower. But the absentee by mail voting surge combined with Defendants' refusal to implement additional procedures to safeguard absentee by mail voting virtually guarantees that Plaintiffs' challenge rights will be lost and ineligible votes will be tabulated, thus diluting eligible votes in violation of the Constitution. Further, if voters may challenge some ballots during a tiny window on and after election day, the Constitution mandates that voters must have the right to challenge all ballots in the same manner.

5. Contrast this to in-person absentee voting, commonly referred to as early voting. This year such early voting will span multiple weeks. During that time, observers may observe the voting process and voters may challenge ineligible votes. The same observer and challenge

opportunities are available for in-person election day voting. In light of the surge in absentee by mail votes caused by the pandemic, 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' concerns about safeguards in this process are warranted, especially with regard to absentee ballots. According to the Commission on Federal Election Reform—a bipartisan commission chaired by former President Jimmy Carter and Secretary of State James A. Baker III, and cited extensively by the U.S. Supreme Court—absentee voting is “the largest source of potential voter fraud.” Building confidence in U.S. Elections 46, <https://bit.ly/3dXH7rU> (the “Carter-Baker Report”).

7. Courts repeatedly caution that absentee ballots are uniquely susceptible to fraud. As Justice Stevens noted, “flagrant examples of [voter] fraud ... have been documented throughout this Nation’s history by respected historians and journalists,” and “the risk of voter fraud” is “real” and “could affect the outcome of a close election.” *Crawford*, 553 U.S. at 195-196 (plurality op. of Stevens, J.) (collecting examples). Similarly, Justice Souter observed that mail-in voting is “less reliable” than in-person voting. *Crawford*, 553 U.S. at 212, n.4 (Souter, J., dissenting) (“election officials routinely reject absentee ballots on suspicion of forgery”); *id.* at 225 (“absentee-ballot fraud ... is a documented problem in Indiana”).

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

JURISDICTION AND VENUE

9. Jurisdiction is proper in this Court.

10. Venue is proper under N.C. Gen. Stat. § 1-82.

PARTIES

11. 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 improperly cast or fraudulent absentee by mail ballots.

12. 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 when 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.

13. 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.

14. 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.

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

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

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

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

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

STATEMENT OF FACTS

20. 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.

21. 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 application and certificate as witnesses and to indicate those persons' addresses.” N.C.G.S. § 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.

22. On August 21, 2020, Defendant Bell issued Numbered Memo 2020-19 to address absentee processes (“August Memo 2020-19”). A copy of August Memo 2020-19 is attached as Exhibit A. 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.

23. 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.

24. That additional guidance purportedly came in the form of Numbered Memo 2020-25 which was not issued until September 22, 2020. A copy of Memo 2020-25 is attached as Exhibit B. 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.

25. Memo 2020-25 states that members of the public will be able to attend the county board absentee meetings but will not be permitted to 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.

26. 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). 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, 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.

27. The surge in absentee by mail voting combined with Defendants' lack of transparency in the pre-election day processing of those ballots will make it effectively impossible for election day challenges to occur and virtually guarantee that eligible votes will be disapproved and ineligible ballots will be counted. It also creates an unconstitutionally unequal status among voters who vote absentee by mail versus voters who vote in-person, whether through early voting or on election day. In-person voters will have their votes subject to being challenged by observers who will have the information necessary to lodge any such challenge. On the other hand, challenging absentee by mail voters will be effectively impossible without timely access to the container-return envelopes and a process for lodging and adjudicating challenges prior to election day.

28. North Carolina law requires Defendants to “establish procedures to provide appropriate safeguards” in the pre-election day processing of absentee by mail ballots. N.C. Gen.

Stat. § 163-230.1(g). The pandemic has created a surge in mail voting that does not typically occur and may not occur again in the future. Safeguards are urgently needed to ensure that this surge does not result in unequal challenge processes, the dilution of valid in-person votes from ineligible votes, and the failure to count valid mail votes. At a minimum, such safeguards should include timely access by the public to the container-return envelopes and a pre-election day challenge procedure for this election.

29. On September 22, 2020, Defendants issued a revised version of Memo 2020-19 (the “September Memo 2020-19”). The September Memo 2020-19, among other things, eliminated the witness requirement for absentee by mail ballots required by state law. On October 3, 2020, a United States District Court judge issued a Temporary Restraining Order against the Defendants enjoining their attempted elimination of the witness requirement. *Moore v. Circosta*, No. 5:20-CV-507-D (E.D.N.C. Oct. 3, 2020), at D.E. 25 (order granting temporary restraining order). It is currently unclear whether and to what extent Defendants will follow the witness requirement. The relief requested by Plaintiffs in this action is therefore even more urgent. Plaintiffs must have access to the container-return envelopes so that, regardless of what action the Defendants take as to the witness requirement, Plaintiffs have the information necessary to protect voters prior to election day.

30. On September 24, 2020, Donald J. Trump for President, Inc. sent Defendant Bell a letter requesting the relief described herein. A copy of the letter is attached as Exhibit C. The letter explained the constitutional issues posed by the surge in mail voting combined with the Defendants’ lack of transparency and procedures.

31. On Tuesday, September 29, 2020, Defendant State Board responded to the letter. A copy of the response is attached as Exhibit D. In its response, the State Board refused to make any

commitment to transparency with respect to both the container-return envelopes and a process for challenging invalid ballots. Significantly, the State Board took the position that challenges to deficient absentee by mail ballots are not even allowed under North Carolina law, a proposition which is demonstrably incorrect. State law plainly allows challenges to absentee by mail ballots where the “ballot does not comply with the provisions” of the absentee by mail statute. N.C. Gen. Stat. § 163-89(c).

32. On Tuesday, September 29, 2020, Plaintiffs and many others similarly situated citizens attempted to observe the processing of mail ballots and container envelopes at numerous county boards of election meetings throughout the state. True to the instructions issued by Defendants so far, many voters across the State were denied the right to challenge any ballots, denied the right to observe the county staff processing the ballots and container-return envelopes, and denied the right to inspect ballots and container-return envelopes.

33. On Friday, October 2, 2020, at 10:03 a.m., Plaintiff NCRP sent a public records request regarding the container-return envelopes. The request is attached as Exhibit E. Plaintiff asked for a response by 2:00 p.m. that day, but as of the date of this Verified Complaint, no response has been received.

34. Accordingly, this legal action followed.

CLAIMS

COUNT ONE

(Violation of North Carolina Public Records Act)

35. Plaintiffs incorporate all previous allegations set forth herein.

36. 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.

37. Defendants collectively are an agency of North Carolina government and are the custodians of these public records. Moreover, Defendants have the authority to compel North Carolina county boards of election to make these public records available to the public.

38. 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.

39. 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.

40. Defendants’ refusal violates the Public Records Act.

COUNT TWO

(Denial of Equal Protection Under the State Constitution)

41. Plaintiffs incorporate all previous allegations set forth herein.

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

43. 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).

44. Equal protection requires that “one person’s vote must be counted equally with those of all other voters in a State.” *Reynolds*, 377 U.S. at 560. 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).

45. 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.

46. 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.”).

47. “[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.

48. Allowing the pre-election day processing of absentee by mail ballots under the Defendants’ current procedures creates an unconstitutionally unequal status among voters who vote absentee by mail versus voters who vote in-person, whether through early voting or on

election day. In-person voters will have their votes subject to being challenged by observers who will have the information necessary to lodge any such challenge. On the other hand, challenging absentee by mail voters will be effectively impossible without timely access to the container-return envelopes and a process for lodging and adjudicating challenges prior to election day. In addition, allowing the pre-election day processing of absentee by mail ballots under the Defendants' current procedures also creates 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. Plaintiffs and other similarly situated voters have been denied equal treatment under the Fourteenth Amendment to the U.S. Constitution.

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

50. 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)

51. Plaintiffs incorporate all previous allegations set forth herein.

52. 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.

53. 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 challenges are appropriate and to ensure all eligible votes count.

54. 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 challenge invalid ballots.

55. 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.

56. If Defendants do not provide a process for challenging improper absentee by mail ballots, Plaintiffs will lose their right to challenge such ballots and Defendants will irreparably violate the equal protection rights of Plaintiffs and those similarly situated.

57. 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 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;
- (b) A declaratory judgment that the requested container-return envelopes are public records pursuant to the Public Records Act and that requires Defendants to make the records available to Plaintiffs immediately as requested by Plaintiffs in the public records request described in this Verified Complaint;

- (c) A permanent injunction prohibiting Defendants from continuing 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 and election day challenge process;
- (d) Temporary and preliminary injunctive relief in the form specified above during the pendency of this action;
- (e) Treat this Verified 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;
- (f) Pending the issuance of preliminary injunctive relief, treat this Verified 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;
- (g) Accord this matter priority and set it down for an immediate hearing pursuant to N.C. Gen. Stat. § 132-9(1);
- (h) Plaintiffs' reasonable costs and expenses, including attorneys' fees pursuant to N.C. Gen. Stat. § 132-9(c) and any other applicable law; and
- (i) All other preliminary and permanent relief that Plaintiffs are entitled to, and that the Court deems just and proper.

Dated: October 5, 2020

Respectfully submitted,

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