

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 24CV028888-910

REPUBLICAN NATIONAL
COMMITTEE and NORTH
CAROLINA REPUBLICAN PARTY,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS, ALAN HIRSCH,
JEFF CARMON, KEVIN N. LEWIS,
SIOBHAN O'DUFFY MILLEN,
STACY "FOUR" EGGERS IV, in their
Official Capacity as Members of
NCSBE, and KAREN BRINSON
BELL, in her Official Capacity as
Executive Director of NCSBE,

Defendants.

**AFFIRMATIVE ACTION COALITION'S OPPOSITION TO MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

INTRODUCTION

Mere weeks before in-person voting begins, Plaintiffs demand that the Court change the voter identification rules threatening the voting rights of over 32,000 students and nearly 10,000 employees at the University of North Carolina-Chapel Hill (“UNC”). Plaintiffs have been aware that the State Board of Elections (“State Board”) approved UNC’s mobile One Card—the digital, default official university identification—for use as a valid voter identification since the Board made that decision, nearly a month ago. Yet Plaintiffs inexplicably sat on their hands and waited weeks to file this lawsuit until the election was imminent. Plaintiffs now ask the Court to rewrite North Carolina election law and force the State Board to rescind its approval and remove the option of the mobile One Card as a form of voter identification, even though nothing in state law prohibits the use of a digital identification card for voting. The brunt of Plaintiffs’ requested relief would be borne by lawful UNC voters who have prepared for the election with the understanding that they may use their mobile One Card—and may not learn in time that they must procure alternative acceptable identification in order to exercise their right to vote.

UNC’s universal ID card, the One Card, has been approved for voting since at least 2020. This year, the State Board approved UNC’s default ID card once again. The only difference from years past is that UNC is transitioning from physical One Cards to “mobile One Cards,” which are stored on a student or employee’s phone in Apple Wallet. Like many credit card issuers, banks, and airlines that have taken the same step, UNC has availed itself of the advantages of digital cards over their physical counterparts: improved security, increased versatility, and decreased cost. To maximize these benefits, UNC has designated the mobile One Card its default form of ID card for incoming students—while mobile One Cards are available for free to all, physical cards are issued only on a case-by-case basis, and for a fee.

Nothing about this change should affect the One Card's status as valid voter ID. Under unambiguous North Carolina statutes, UNC students are entitled to use their university-provided ID cards for voting so long as the ID satisfies certain statutory requirements. Being a physical piece of plastic is not one of those requirements, and Plaintiffs do not argue that mobile One Cards fail to meet any of the others. The merits of this case are accordingly straightforward: a mobile One Card is a valid UNC ID card (indeed, the default UNC ID), and it meets all statutory requirements. Mobile One Cards may therefore be used as voter IDs, and the State Board did not exceed its authority in approving such use.

Yet Plaintiffs insist that mobile One Cards are unlawful and seek eleventh-hour emergency relief. Such relief is unavailable for a host of reasons beyond the weakness of Plaintiffs' statutory claim. Chief among them is timing: Plaintiffs could have brought this lawsuit nearly a month ago, yet inexplicably sat on their hands. And during that period, UNC students returned to campus, started classes, and—crucially—decided which form of ID to obtain for the new academic year. Plaintiffs' request is therefore gravely inequitable—it risks disenfranchising the many UNC voters who reasonably relied on the State Board's approval of mobile One Cards. The Court should deny Plaintiffs' late attempt to change the rules that would make it more confusing, expensive, and difficult for UNC students and staff to vote.

BACKGROUND

I. Statutory Framework

North Carolina law requires a voter to provide identification. *See* N.C.G.S. § 163.166.16(a). Permissible forms of ID include a driver's license, a U.S. passport, a military ID, or a tribal enrollment card, among others. N.C.G.S. § 163-166.16(a)(1)–(2). Postsecondary student IDs are also permitted so long as three conditions are met. First, the ID and issuing institution must satisfy a list of statutory criteria—for instance, the ID must include a frontal photograph of the

student's face and must contain an expiration date, and the issuing institution must provide copies of the ID to assist the State Board with training. *See* N.C.G.S. § 163-166.17(a)(1). Second, the issuing institution must comply with any “reasonable security measures determined by the State Board to be necessary for the protection and security of the student identification process.” *Id.* § 163-166.17(a)(2). Third, the State Board must approve the ID's use as voter ID. *See id.* § 163-166.17(a). Notably, the State Board's duty to approve an ID that complies with the statutory criteria is mandatory; the statute requires that the Board “shall approve” a given student identification card so long as § 163-166.17(a)'s criteria “are met.” *Id.* Analogous rules govern approval of public employee IDs, such as those used by UNC staff. *See id.* § 163-166.18(a). The State Board has approved approximately 70 different student IDs, as well as nearly 40 public employee IDs, across the state.¹

II. Factual Background

The One Card is UNC's official student identification.² The State Board first approved the One Card as voter ID in 2020.³ In 2023, UNC launched the mobile One Card, and it is now the default form of the One Card issued to students.⁴ The mobile One Card is a cryptographically secured card housed in Apple Wallet—similar to a digital credit card stored in the same application

¹ Sarah Michels, *GOP May Fight Decision Letting UNC Students Use Digital ID to Vote*, Carolina Pub. Press (Aug. 27, 2024), <https://carolinapublicpress.org/65196/gop-may-fight-decision-letting-unc-students-use-digital-id-to-vote/>; *see also Student and Public Employee IDs Approved for Voting*, N.C. State Bd. of Elections, <https://www.ncsbe.gov/voting/voter-id/student-and-public-employee-ids-approved-voting> (last modified Sept. 3, 2024).

² *Mobile One Card*, Univ. of N.C. at Chapel Hill, <https://onecard.unc.edu/mobile-one-card/> (last accessed Sept. 17, 2024).

³ *See Mobile UNC One Card for Apple Wallet Approved for Voter ID Use*, Univ. of N.C. at Chapel Hill (Aug. 23, 2024), <https://onecard.unc.edu/news/2024/08/23/mobile-unc-one-card-for-apple-wallet-approved-for-voter-id-use/>.

⁴ *Id.*; *Get My Card*, Univ. of N.C. at Chapel Hill, <https://onecard.unc.edu/get-my-card/> (last accessed Sept. 17, 2024).

which can be used to make payments by tapping the phone on a credit card reader.⁵ UNC's website indicates that "[a]ll newly issued One Cards will be mobile One Cards" by default, with physical cards available only "on a case-by-case basis."⁶ A mobile One Card is free, while a physical card costs \$10.⁷ And, crucially, a student may have only one active ID at a time, meaning that once a student sets up a mobile One Card, any previously issued physical card will cease functioning.⁸ As a result, UNC students generally tend to carry only one form of the One Card—most often, the default mobile One Card. *See* Declaration of Alexander Denza ¶ 12 ("Denza Decl.") (Ex. 1 to Mot. to Intervene).

Mobile One Cards have several advantages over physical cards. Chief among them is security: Digital wallets like Apple Wallet are far more secure than their physical counterparts, for a simple reason: Digital wallets give users the protection of an additional, and incredibly powerful, layer of security. Both digital cards housed in digital wallets and physical cards housed in physical wallets enjoy some measure of *physical* security—a wallet or phone can be secured in one's pocket, bag, or purse. But digital wallets add a layer of *cryptographic* security—to access Apple Wallet, one must not only physically access the phone, but also unlock it using a secure pin, password, or biometric key (e.g. a fingerprint or facial recognition).⁹ Such security measures are

⁵ *Mobile UNC One Card for Apple Wallet Approved for Voter ID Use*, *supra* note 3.

⁶ *Get My Card*, *supra* note 4.

⁷ *Id.*

⁸ *See Mobile One Card*, *supra* note 2.

⁹ *See Apple Pay Security and Privacy Overview*, Apple (Apr. 12, 2024), <https://support.apple.com/en-us/101554> ("Apple Pay uses security features built-in to the hardware and software of your device to help protect your transactions. In addition, to use Apple Pay, you must have a passcode set on your device and, optionally, Face ID or Touch ID.").

difficult for even law enforcement to overcome, never mind the average citizen.¹⁰ Given these security advantages, it is no surprise that digital card technology has rapidly been adopted by security-minded enterprises ranging from credit card issuers and banks to airlines and universities.

The State Board approved mobile One Cards for use as voter ID on August 20, 2024.¹¹ Prior to the Board's vote, Executive Director Karen Brison Bell informed the Board that although multiple universities had requested approval of digital IDs, the Board staff was recommending approval of only UNC's, as it was the only submission that satisfied all statutory criteria.¹² The Board voted to approve the use of mobile One Cards 3-2.¹³ The two members who voted against based their opposition not on the governing statutory criteria but on their belief that a mobile card is not a "card."¹⁴

III. Procedural History

Plaintiffs, two Republican Party committees, filed this lawsuit on September 12, 2024, Verified Compl. at 1 ("Compl."). Although aware of the Board's decision at the time it was made, the Plaintiffs waited 23 days after the State Board approved mobile One Card's use as voter ID to file their lawsuit. At that point, the fall election schedule was already underway: North Carolina mail ballots were scheduled to go out on September 6 (although mailing was delayed to September

¹⁰ See, e.g., Jeff Guo, *Why Even the FBI Can't Hack the iPhone*, Wash. Post (Feb. 17, 2016), <https://wapo.st/34DbMXm> ("You can't just take a stab at guessing someone's iPhone passcode. After five wrong guesses, you're forced to wait a minute. After nine wrong guesses, you have to wait an hour. And depending on how the phone was set up, it might delete all its data after ten wrong tries.").

¹¹ The Board also approved use of the mobile One Card employer ID as voter identification for UNC employees. Plaintiffs challenge both approvals.

¹² *August 20, 2024 Meeting of the N.C. State Board of Elections* at 15:30–16:33, N.C. State Bd. of Elections (Aug. 20, 2024), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2024-08-20/State%20Board%20of%20Elections%20Meeting-20240820.mp4.

¹³ *Id.* at 22:39–23:29.

¹⁴ See *id.* at 10:18–14:41 (Stacy Eggers), 20:15–22:13 (Kevin Lewis).

20 pursuant to a court order), and election officials are busy getting ready for in-person early voting, which begins on October 17. Plaintiffs moved for a TRO and requested an expedited preliminary injunction in the alternative. Mot. for TRO or, in the Alternative, Expedited Prelim. Inj. at 1 (“Mot.”). Although Plaintiffs waited over three weeks to file their lawsuit, they demand that this Court grant them relief in just a week. *Id.* ¶ 4.

Affirmative Action Coalition (the “Coalition”) moved to intervene to protect its members’ fundamental right to vote, as well as its own scarce resources and capacity to mobilize members’ political power. The Coalition filed its motion and proposed answer on September 16, and this Court indicated it was inclined to grant the motion at the status hearing that same day.

ARGUMENT

I. Plaintiffs lack standing.

Standing “is a ‘necessary prerequisite to a court’s proper exercise of subject matter jurisdiction.’” *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 2022-NCSC-143, ¶ 67, 881 S.E.2d 32, 59–60 (“*United Daughters*”) (quoting *Willowmere Cmty. Ass’n, Inc. v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018)). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Est. of Apple ex rel. Apple v. Com. Courier Express, Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). That principle applies with equal force to Declaratory Judgment Act claims, like the one Plaintiffs assert here. *United Daughters*, 2022-NCSC-143, ¶ 70, 881 S.E.2d at 60 (“As this Court held long ago, the Declaratory Judgment Act ‘does not license litigants to fish in judicial ponds for legal advice.’” (quoting *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404 (1949))). In such cases, a “plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants’ actions.” *Id.* ¶ 32, 881 S.E.2d at 46–47.

These bedrock principles deprive this Court of jurisdiction: Neither Plaintiff has pleaded a

viable theory of standing, let alone met the higher burden to show likely standing for purposes of preliminary relief.

Start with the RNC. It claims in the Complaint to have “organizational standing” because the State Board’s decision will somehow “impact” its “core organizational missions of election security and providing services aimed at promoting Republican voter engagement and electing Republican candidates to office.” Compl. ¶ 6. But this conclusory allegation, even if credited as factually true, would not create “organizational standing” because it identifies no “a legal or factual *injury* arising from defendants’ actions.” *United Daughters*, 2022-NCSC-143, ¶ 32, 881 S.E.2d at 46–47 (emphasis added). Next, the RNC alleges “a strong interest in a legally structured competitive campaign environment in which [its] candidates compete for votes and [its] voters cast ballots.” Compl. ¶ 6. Competitive injuries, to be sure, can confer standing. But again, the RNC does not actually explain how its “interest” in competing for votes will be *injured* by the State Board’s actions. Nor would such an allegation make sense: the RNC is just as free to compete for UNC students’ votes as any other political committee, and can compete for their votes no matter what form of lawful ID they use.

The RNC also claims standing on the theory that the State Board has forced it “to divert significant attention and resources into combatting election fraud in North Carolina.” *Id.* ¶ 7. But the RNC fails to connect the dots—it neither shows that allowing mobile One Cards’ use as voter IDs is driving fraud, nor demonstrates—with particularized affidavits or some other reliable evidence—that it is actually diverting resources to combat that purported fraud. And the conclusory allegation that it has *already* diverted resources to combat fraud is particularly implausible—no UNC student has used a mobile One Card to vote yet, so it is entirely unclear what the RNC could be expending “otherwise focused time and money” on at this juncture. Again,

while resource diversion can in some circumstances confer standing, the RNC's "vague allegation of resource reallocation does not identify a direct injury for standing purposes." *Cnty. Success Initiative v. Moore*, 384 N.C. 194, 210, 886 S.E.2d 16, 30 (2023) (finding organization lacked standing where it just alleged without more that it was "forced to divert organizational resources away from activities core to its mission in furtherance of education and voter engagement efforts required to assist potential voters").

Plaintiff NCGOP offers little more. It joins the RNC's foregoing allegations, but those vague allegations no more confer standing on NCGOP than they do on the RNC. NCGOP's one addition is to assert standing on behalf of its members as well as itself, but an "association has standing to bring suit on behalf of its members" only when, among other things, "its members would otherwise have standing to sue in their own right." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Hunt v. Wash. State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977)). And although plaintiffs make vague reference to various constitutional provisions, *see e.g.*, Mot. ¶ 16, they fail to "describe how the *legal rights* of any of [NCGOP's] *individual members* have been violated." *United Daughters*, 2022-NCSC-143, ¶ 36, 881 S.E.2d at 48 (emphasis added). Absent such allegations, NCGOP fails as a matter of law "to allege facts sufficient to show" associational standing. *Id.*

Instead, NCGOP alleges that the State Board's approval of mobile One Cards will "dilute [its] members' votes when any one ineligible voter votes illegally in an election." Compl. ¶ 8. Putting aside that Plaintiffs' theory of injury baselessly assumes "[u]pon information and belief" that anyone who presents a mobile One Card is "ineligible" and perhaps a "non-citizen," *id.* ¶¶ 67–69, North Carolina courts have never recognized vote-dilution-based standing outside the redistricting context. And federal courts in this state have rejected it. *See, e.g., Moore v. Circosta*,

494 F. Supp. 3d 289, 312 (M.D.N.C. 2020) (“Indeed, lower courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Plaintiffs have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters.”) (collecting cases). The same is true of a “veritable tsunami” of courts around the country. *O’Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff’d*, No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022).¹⁵ So too should this Court.

In sum, as neither the RNC nor NCGOP has or will be injured by UNC students and faculty using their mobile One Card’s as identification to vote, the Court “has no subject matter jurisdiction to hear” their claims. *Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16. The Court need not go further.

II. Plaintiffs’ motion is untimely.

Plaintiffs’ motion fails for a second threshold reason: They waited far too long to bring this case, prejudicing the Coalition, its members, and UNC students and employees more broadly. The State Board approved the use of mobile One Cards to vote 23 days before Plaintiffs filed this

¹⁵ See also, e.g., *Hall v. D.C. Bd. of Elections*, No. CV 23-1261 (ABJ), 2024 WL 1212953, at *4 (D.D.C. Mar. 20, 2024) (“At bottom, they are simply raising a generalized grievance which is insufficient to confer standing.”); *Testerman v. N.H. Sec’y of State*, No. 23-CV-499-JL-AJ, 2024 WL 1482751, at *4 (D.N.H. Jan. 9, 2024) (“[C]ourts that have considered voters’ standing in circumstances similar to those here have uniformly rejected individual standing claims based on allegations of dilution resulting from allegedly illegal votes being cast.”); *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (noting that several courts have concluded that similar claims of vote dilution are “generalized grievance[s]”); *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) (“If every voter suffers the same incremental dilution of the franchise caused by some third-party’s fraudulent vote, then these voters have experienced a generalized injury.”); *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) (“[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.”).

lawsuit. By the time the Court resolves the instant motion, a full month or more will have passed since that approval—and most importantly, voting in the 2024 election will likely have begun. Plaintiffs’ delay has rendered any relief they might obtain remarkably injurious to the most important stakeholders—UNC voters. In these circumstances, laches bars such eleventh-hour changes to election laws.

Laches has three elements, that: “(1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and . . . worked to the disadvantage, injury or prejudice of the party asserting the defense; [and] (3) the delay of time has resulted in some change . . . in the relations of the parties.” *Town of Cameron v. Woodell*, 150 N.C. App. 174, 177, 563 S.E.2d 198, 201 (2002). There is no set formula; rather, “[t]he amount of delay required to establish laches depends on the facts and circumstances of each case.” *id.* Here, all three elements are satisfied with respect to relief for the impending election.

First, Plaintiffs knew of the Board’s vote in real time on August 20th. That very afternoon, Plaintiff North Carolina Republican Party posted on X (formerly Twitter) that “[p]ermitting a ‘Digital ID’ on its face VIOLATES Voter ID requirements” and warned: “Rest assured -- we won’t stand for it.”¹⁶ Yet Plaintiffs inexplicably sat on their hands for weeks before filing suit.

Second, Plaintiffs’ delay was “unreasonable.” *Woodell*, 150 N.C. App. at 177, 563 S.E.2d at 201. Indeed, although Plaintiffs bear the burden to show their entitlement to the extraordinary relief they seek, they have not provided any reason for their delay at all. And their unreasonable delay has inflicted “injury [and] prejudice,” *id.*, on the Coalition, its members, and any of UNC’s

¹⁶ @NCGOP, X.com (Aug. 20, 2024, 12:54 p.m.), <https://x.com/NCGOP/status/1825939594405466418/> [https://perma.cc/4T66-GB3Q].

42,000+ other students and employees who have opted into using mobile One Cards¹⁷—to say nothing of State Defendants, who are busy trying to run an election. Plaintiffs’ delay threatens to disenfranchise lawful voters who have prepared for the election with the understanding that they may use their mobile One Card. In particular, members of the Coalition plan to use a mobile One Card to vote in the upcoming election, as other UNC students surely do. *See* Denza Decl. ¶ 13. If that option is disallowed, students who currently plan on relying on the mobile One Card may not realize soon enough to change their plans and procure alternative identification in time to participate in the election. *See id.* ¶¶ 14–15.

Had Plaintiffs brought their action promptly, the Coalition, and UNC’s student body more broadly, would have been on notice that they may need an identification other than the mobile One Card for purposes of voting. UNC’s new semester began on August 19—the day before the Board vote—and registration concluded on August 23. Thus, during most of the critical period when UNC students and staff were returning to campus and deciding whether to go out of their way, and pay extra, to obtain a physical ID, the Board’s ruling was in effect and unchallenged. By delaying for weeks in bringing this lawsuit, Plaintiffs deprived UNC students of the opportunity to make a fully informed choice about which sort of ID to obtain for the academic year—a choice that results in textbook prejudice. And if Plaintiffs had timely sued, the Coalition could have taken prophylactic steps during that window and immediately after, such as warning its members and others about the downsides of using mobile One Cards.

But now, thanks to Plaintiffs’ tardiness, UNC students currently expect to be able to use the mobile One Card to vote. Any grant of relief will compel the Coalition and other student groups

¹⁷ *See By the Numbers*, Univ. of N.C. at Chapel Hill, <https://www.unc.edu/about/by-the-numbers/> (last accessed Sept. 17, 2024).

to scramble—with voting already underway—to attempt to warn UNC students that they need to obtain alternative voter ID. Those UNC students who learn of the eleventh-hour change too late will be left without time to procure a different ID and could very well be disenfranchised. And significant confusion would ensue with any change now, particularly if students show up at the polls expecting to be able to vote with their mobile One Cards, only to be turned away. *See Denza Decl.* ¶ 14.

For similar reasons, Plaintiffs’ delay has materially changed “the relations of the parties.” *Woodell*, 150 N.C. App. at 177, 563 S.E.2d at 201. In short, the Coalition and its members, as well as all UNC students and employees, have relied on State Defendants’ approval of mobile One Cards. And with the election a month closer than it would have been had Plaintiffs promptly filed their lawsuit, the Coalition members and other UNC students are left with far less time to procure an alternative ID, the Coalition with far less time to pivot its get-out-the-vote communications, and the State Defendants with far less time to respond to a court order. Because the elements of laches are plainly satisfied, Plaintiffs’ motion should be denied on that basis alone.¹⁸

III. Plaintiffs have not carried their heavy burden to show entitlement to preliminary relief.¹⁹

“A preliminary injunction . . . is an extraordinary measure taken by a court” usually “to

¹⁸ The so-called Purcell doctrine also counsels against relief here. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). In *Purcell*, the U.S. Supreme Court cautioned against courts altering voting rules shortly before an election in a manner that is likely to cause “voter confusion,” which may create an “incentive to remain away from the polls.” *Id.* As explained, judicial elimination of one of the approved forms of voter ID just days before ballots are to be mailed will inflict the very harms that *Purcell* warns against. Many UNC voters may not learn of the change in time to procure an alternative identification. And those UNC voters who do not learn of the late restriction will try to vote with their mobile One Cards, only to be turned away. Confusion is sure to follow. And that result is particularly troubling in the context of this case—where much confusion could have been avoided if Plaintiffs had moved swiftly to seek relief.

¹⁹ Because Plaintiffs’ motion is on notice, the Court should treat it as a request for a preliminary injunction rather than a TRO. *See* N.C.G.S. § 1A-1, Rule 24(2)(a)–(b).

preserve the status quo of the parties during litigation.” *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). “To obtain such relief, a plaintiff must generally show ‘a likelihood of success on the merits of his case and that plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of his rights during the course of litigation.’” *State ex rel. Stein v. MV Realty PBC, LLC*, No. 23 CVS 6408, 2023 WL 5658892, at *10 (Wake Cnty. Super. Ct. Aug. 30, 2023) (alterations adopted) (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466, 579 S.E.2d 449, 466 (2003)). The party seeking the preliminary injunction “bears the burden of proof.” *N.C. Elec. Membership Corp. v. N.C. Dep’t of Econ. & Cmty. Dev.*, 108 N.C. App. 711, 719, 425 S.E.2d 440, 445 (1993). Plaintiffs have not carried their burden here as to any of the required showings.

A. Plaintiffs are not likely to prevail on the merits.

Plaintiffs fall far short of their burden to establish that they are likely to prevail on the merits of their statutory claim. Sections 163-166.16 and .17 unambiguously permit the use of mobile One Cards as voting ID. Plaintiffs’ contrary arguments read restrictions into the statute that are simply not there in violation of settled principles of statutory construction.

Section 163-166.16 sets forth the various forms of identification that North Carolina voters may use to vote. These include, among other things, a North Carolina driver’s license, a passport, a special identification card, and—as relevant here—a “student identification card issued by a constituent institution of The University of North Carolina . . . provided that card is issued in accordance with G.S. 163-166.17.” N.C.G.S. § 163-166.16(a)(1)(g). Regardless of type, any of the listed forms of identification may be used to vote so long as it “contain[s] a photograph of the registered voter” and “is valid and unexpired, or has been expired for one year or less.” *Id.* § 163-166.16(a)(1). Section 163-166.17, in turn, lists criteria that student identification cards must meet in order to receive State Board approval. The statute does not require that a valid identification be

“physical,” “tangible” or “held in a person’s hand.” Mot. at ¶ 8.

Plaintiffs do not dispute that a mobile One Card is a form of “student identification” issued by UNC. They do not dispute that a mobile One Card contains a photograph of the student in question. And they do not dispute that the State Board properly concluded that mobile One Cards satisfy the lengthy list of substantive criteria set out in section 163-166.17—for instance, by listing “a date of expiration.” N.C.G.S. § 163-166.17(a)(1)(f). Plaintiffs’ only argument against the State Board’s approval decision is that mobile One Cards are not “cards” at all, because they are not “physical” or “tangible” like some of the other forms of identification authorized by section 163-166.16. Mot. ¶ 8. For three reasons, that argument fails.

First, a mobile One Card plainly is a “student identification card” under Section 163-166.16(a)(1)(g). In “examining statutes, words that are undefined by the legislature ‘must be given their common and ordinary meaning.’” *N.C. Dep’t of Env’t Quality v. N.C. Farm Bureau Fed’n, Inc.*, 291 N.C. App. 188, 193, 895 S.E.2d 437, 441 (2023) (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202–03 (1974)). In ordinary meaning, a mobile One Card is an identification card because it is a digital “document . . . bearing identifying information about and often a photograph of the individual whose name appears on it.” *ID*, Merriam–Webster.²⁰ The key feature of an identification card is that it allows the bearer to be identified as a given individual using certain personal details and a photograph. Plaintiffs do not dispute that a mobile One Card ably serves that purpose—indeed, it is the *default* form of student ID now used at this state’s flagship public university.

Plaintiffs’ misguided argument that the State Board flip-flopped about digital IDs, *see* Mot.

²⁰ Available at <https://www.merriam-webster.com/dictionary/id> (last accessed Sept. 17, 2024).

¶ 10, just proves the point. Plaintiffs claim that the State Board previously recognized that digital IDs like the mobile One Card are not valid voter ID because Numbered Memo 2023-03 advised that “a photocopy of a voter’s photo ID, or a picture of their photo ID stored electronically on a mobile device” was not a permissible form of voter identification. *Id.* (quoting Numbered Memo 2023-03). The problem with this argument is straightforward: A photocopy of an ID and a mobile ID like mobile One Card are completely different things. One is a replica of the original and takes the form of a photograph that can be duplicated, manipulated, or transferred between devices. The other is a cryptographically secured original ID card that is locked to a specific device and that cannot be manipulated or transferred the way a photocopy can. And Apple Wallet is so secure that every major American credit card issuer, along with many hundreds of banks, trust it to secure their users’ digital payment cards²¹—cards which millions of Americans use for transactions large and small every single day. Far from flip-flopping, the State Board was entirely consistent: it applied the unambiguous statute as written to determine that photocopies of physical identification cards are not “student identification cards,” while the secure mobile One Card is.

Second, the Legislature has not imposed any requirement that a voter ID be “physical” or “tangible.” *Contra* Mot. ¶ 8; Compl. ¶ 22. Despite Plaintiffs’ invitation, the Court may not write into the statute something the Legislature has not. Courts have a “duty to respect not only what [the legislature] wrote but, as importantly, what it didn’t write.” *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 765 (2019) (plurality op.). If the Legislature had wanted to require that voter ID be physical or tangible, the statute would say that. The Legislature enumerated comprehensive—and

²¹ See *Apple Pay participating banks in Canada, Latin America, and the United States*, Apple (Sept. 16, 2024), <https://support.apple.com/en-us/HT204916> .

exclusive—requirements that identification cards must meet, including criteria related to the ID’s contents, access to samples for training, and security. N.C.G.S. § 163-166.17. Lacking from this list is any requirement that the card be physical. Clearly, given the nearly a dozen requirements the Legislature imposed on student IDs, *see id.*, it could have imposed such requirements had it wished to do so. In approving the mobile One Card, the State Board properly looked only to the requirements the Legislature mandated. This Court should do the same.

Third, Plaintiffs are wrong to assume that Section 163-166.16’s list of other forms of identification support its argument. In fact, at least one other form of identification listed in that provision will soon be available in digital format. Under House Bill 199, which was signed into law earlier this year, North Carolinians will soon be able to utilize digital drivers’ licenses. *See* An Act to Make Various Changes to the Motor Vehicle . . . Laws Of The State, S.L. 2024-30, § 1.(a) (H.B. 199). Specifically, H.B. 199 permits the DMV to issue a “supplemental digital version of a valid drivers license that (i) is approved by the Commissioner, (ii) is issued by the Division of Motor Vehicles, (iii) is comprised of the same data elements as are found on a valid drivers license, and (iv) is capable of, and limited to, being linked to and displayed by a mobile device owned by the person to whom the valid drivers license is issued.” *Id.* ²²

²² Digital passports are similarly likely to be in widespread circulation soon. The European Union began trialing digital passports in one member country (Finland) over a year ago, and “wants at least 80% of citizens in the 27-country bloc to be using a digital ID by 2030.” Suzanne Rowan Kelleher, *Europe Is Testing the World’s First Digital Passport in Finland*, *Forbes* (Sept. 6, 2023), <https://www.forbes.com/sites/suzannerowankelleher/2023/09/06/europe-testing-digital-passport-finland/>. The United States is not far behind: TSA is trialing digital identity solutions at select TSA checkpoints, *see Facial Recognition and Digital Identity Solutions*, TSA, <https://www.tsa.gov/digital-id> (last accessed Sept. 17, 2024), and just a few days ago, Google announced beta testing of digital passports in collaboration with the TSA. Sheena Vasani, *Google Wallet will let you make a digital ID from a US passport*, *TheVerge* (Sept. 12, 2024), <https://www.theverge.com/2024/9/12/24242033/google-wallet-us-passport-drivers-license-digital-id>.

Crucially, section 163-166.16 does not require a “physical” or “tangible” driver’s license. It just requires a “North Carolina drivers license” of some sort. N.C.G.S. § 163-166.16(a)(1)(a). When H.B. 199 goes into effect in July 2025, North Carolina’s new digital drivers’ licenses will thus unquestionably be permissible voter ID. Had the Legislature intended otherwise, it would either have specified in H.B. 199 that digital driver’s licenses may not be used as voter ID, or it would have amended section 163-166.16 to require physical licenses. It did neither. Accordingly, Plaintiffs’ argument that mobile One Cards are unlike the other items listed in section 163-166.16 is wrong.²³

B. The equities weigh decidedly against granting preliminary relief.

To obtain preliminary relief, an applicant “must do more than merely allege that irreparable injury will occur. The applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur.” *United Tel. Co. of Carolinas v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). Plaintiffs fail to meet their burden.

Plaintiffs’ theory of harm is based solely on their unsubstantiated hypothetical concern that allowing UNC students to use their statutorily compliant mobile One Cards to vote might enable “ineligible voters” to cast ballots. Mot. ¶ 18. But “[a]n injunction [should not issue] merely to allay the fears and apprehensions or to soothe the anxieties of a party.” *Analog Devices*, 157 N.C. App. at 472, 579 S.E.2d at 455 (alterations in original) (quoting *Travenol Lab ’ys, Inc. v. Turner*, 30 N.C.

²³ In addition to their statutory argument, Plaintiffs make a cursory reference to their rights “to free and fair election[s]” and “equal protection.” Mot. ¶ 16. This argument is severely underdeveloped and so cannot justify extraordinary preliminary relief. In any case, neither of these rights creates an entitlement to prevent *other* qualified voters from using a certain specific form of ID to vote.

App. 686, 696, 228 S.E.2d 478, 486 (1976)). That is especially true here, where Plaintiffs “failed to present” *any*, much less “sufficient evidence tending to show” that any illegal voting “is threatened or actually going to occur” absent preliminary relief. *Id.* Instead, Plaintiffs repeat the conclusory allegation that “potentially ineligible voters” might cast “illegal votes,” causing their “votes [to be] diluted,” Compl. ¶ 78; *see also id.* ¶¶ 8, 68–73, without providing evidence that any purported “illegal voting” has or will occur. The only conceivable basis to support Plaintiffs’ theory of harm is their allegation that “[m]any states, including North Carolina, confront issues relating to non-citizens and other ineligible persons attempting to register to vote.” *Id.* ¶ 67. Even if that were true—it is not²⁴—Plaintiffs do not even attempt to explain how a non-citizen would be more likely to vote using a mobile One Card than any other form of acceptable identification. Because this premise is false, so is Plaintiffs’ yet more farfetched conclusion that allowing UNC students to use mobile One Cards to vote will “have a substantial chilling effect on North Carolinians right to vote.” Mot. ¶ 17. It is utterly implausible that significant numbers of voters will be so demoralized by the mobile One Card’s approval that they will opt out of voting entirely. Without more, Plaintiffs have wholly failed to show they will suffer any injury, *see supra* Argument § I—and certainly not an irreparable injury—absent emergency preliminary relief. *See United Tel. Co. of Carolinas*, 287 N.C. at 236, 214 S.E.2d at 52 (denying preliminary relief when

²⁴ To support the allegation regarding noncitizens, Plaintiffs cite a state law requiring election officials to remove noncitizens from the voter rolls and one article regarding a voter registration audit in Ohio that is no longer available at the link cited in Plaintiffs’ complaint. Neither of these citations supports Plaintiffs’ insinuation that noncitizens will use the UNC mobile One Card to vote illegally. Moreover, it was recently reported that many naturalized citizens in Ohio were wrongly identified as noncitizens in the audit. *See* Nick Evans, *Citizens caught in Ohio noncitizen voting audit say latest letter offers incomplete information*, Ohio Capital J. (Sept. 4, 2024), <https://ohiocapitaljournal.com/2024/09/04/citizens-caught-in-ohio-noncitizen-voting-audit-say-latest-letter-offers-incomplete-information/>.

plaintiff's "evidence fail[ed] to support the broad allegations of irreparable injury contained in its complaint").

The balance of equities also strongly disfavors preliminary relief. *See Holmes v. Moore*, 270 N.C. App. 7, 34, 840 S.E.2d 244, 265 (2020) (in analyzing irreparable harm, North Carolina courts "weigh the equities for and against a preliminary injunction" (quotation omitted)). As explained, on the flip side of Plaintiffs' complete lack of harm in the absence of an injunction, granting Plaintiffs' requested relief would inflict direct, immediate, and in some cases irreparable harm on UNC students who plan to vote using their mobile One Cards. *See supra* Argument § II.A; *see also* Denza Decl. ¶¶ 13–14 (explaining that Plaintiffs' requested relief would deprive UNC students of their most accessible and straightforward option for voting). Plaintiffs have it backwards when they suggest that their requested relief would "avoid[] confusion over proper voter photo identification." Mot. ¶ 30 (emphasis added). It is this eleventh-hour lawsuit that threatens confusion. Put simply, granting preliminary relief would "cause significant confusion, because students currently expect to be able to use the mobile One Card." Denza Decl. ¶ 14. Thus, rejecting Plaintiffs' request for preliminary relief will further "the public interest[, which] favors permitting as many qualified voters to vote as possible." *Holmes*, 270 N.C. App. at 35, 840 S.E.2d at 266 (alterations in original) (quoting *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)).²⁵

²⁵ Moreover, Plaintiffs nowhere acknowledge that preliminary injunctions typically issue to preserve the status quo—here, the continued availability of mobile One Cards as voter ID—not change it, pending full adjudication of claims. UNC's One Card has been an acceptable form of voter ID since 2020. *Mobile One Card*, *supra* note 2. Accordingly, UNC students have no reason to expect that mobile One Cards, which are now UNC's default form of identification, will be treated any differently. From the perspective of the stakeholders who matter most—the voters—preserving the status quo thus entails preserving the State Board's decision.

CONCLUSION

The Court should deny the motion for a TRO and the alternative request for an expedited preliminary injunction.

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Respectfully submitted,

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STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 24CV028888-910

REPUBLICAN NATIONAL
COMMITTEE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS, *et al.*,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing document in the above-captioned matter on counsel for all parties by electronic mail at:

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