

## MEMORANDUM

**From:** North Carolina Department of Justice

**To:** Members of the North Carolina State Board of Elections

**RE:** COVID-19-Related Litigation

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The State Board and its members are parties to a multitude of constitutional challenges to state elections law as applied to the November 2020 general election, which will be held in the midst of the COVID-19 health crisis. These include multiple cases in both federal and state courts.

This memo assesses the principal requests for relief sought by the plaintiffs in these cases, and identifies areas of concern, as well as potential resolution.

The requests for relief generally fall into the following categories:

- (1) relaxation of absentee ballot signature verification procedures,
- (2) lifting the witness requirement for absentee ballots,
- (3) prepaid postage,
- (4) extension of the civilian absentee-ballot receipt deadline,
- (5) removal of restrictions on assistance with requesting absentee ballots,
- (6) removal of restrictions on assistance with returning absentee ballots,
- (7) extending early voting,
- (8) providing electronic ballots for visually impaired voters,
- (9) cure procedures for witness signature requirement on absentee ballots and
- (10) implementation of contactless absentee ballot return procedures.

Litigation on these issues remains pending in numerous state and federal courts in North Carolina. To date, some preliminary rulings have been issued, and while most claims have been denied, some have been granted. For example, the Department of Justice recently defended the Board and its members against challenges to the application of the witness requirement, lack of prepaid postage, restrictions on assistance with absentee-ballot request forms, and restrictions on assistance with returning absentee ballots. *See Democracy North Carolina v. State Board of Elections*, No. 20-cv-457 Dkt. 134 (M.D.N.C. 2020) (denying motion for preliminary injunction on challenges to multiple requirements, while granting motion as to the availability of a cure process for absentee ballots and allowing nursing home employees to assist a named plaintiff in marking, witnessing, and returning his absentee ballot); *Chambers v. North Carolina*, No. 20

CVS 500124 (Wake Cty. Sup. Ct. 2020), Order on Injunctive Relief (denying motion for preliminary injunction on challenge to the application of the witness requirement).

In one case (*Taliaferro v. North Carolina State Bd. of Elections* (E.D.N.C.)), the law compelled us to concede that the Board's current processes do not comply with the Americans with Disabilities Act and that the plaintiffs are likely to succeed in the case. This determination was based on a 2016 case from the United States Court of Appeals for the Fourth Circuit, *National Federation of the Blind v. Lamone*, which held that Maryland's failure to provide any means by which a blind voter could vote absentee without assistance resulted in a clear denial of meaningful access to the absentee voting program. 813 F.3d 494, 506-07 (4th Cir. 2016). We are not aware of any measures taken by the State Board to comply with this ruling since it was issued in 2016. It is our understanding that Board staff believes it is now too late to implement effective and secure measures to comply with this ruling for the 2020 election. However, compliance for future elections should be among the Board's highest priorities.

On many of the issues outlined above, the risk of adverse and unpredictable rulings remains.

Similar claims have been brought in other states, with many courts ruling in favor of the challengers.

- *See, e.g., Arizona Democratic Party v. Hobbs*, No. 2:20-cv-1143 (D. Ariz) (granting motion for preliminary and permanent injunction challenging the state's failure to afford voters an opportunity to cure the omission of a signature from an otherwise-valid mail-in ballot); *Democratic Nat'l Committee v. Hobbs*, No. 18-15845 (9th Cir. 2020) (striking down statute that criminalizes assistance with absentee-ballot delivery); *Vote Latino v. Hobbs*, No. 2:19-cv-05685 (D. Ariz.) (settlement of challenge to absentee ballot receipt deadline); *New Georgia Project v. Raffensperger*, No. 1:20-cv-1986 (N.D. Ga.) (granting preliminary injunction to challenge of absentee ballot receipt deadline); *Frederick v. Lawson*, No. 1:19-cv-1959 (S.D. Ind.) (permanent injunction granted precluding the rejection of "any mail-in absentee ballot on the basis of a signature mismatch absent adequate notice and cure procedures to the affected voter"); *LaRose v. Simon*, No. 62-cv-20-3149 (Minn. Dist. Ct., Ramsey Cty.) (consent decree lifting the witness requirement for November general elections and changing the election day receipt deadline for mail-in ballots); *Western Native Voice v. Stapleton*, No. DV-2020-377 (Mont. Dist. Ct., Yellowstone Cty.) (granting preliminary injunction enjoining enforcement of restrictions on absentee ballot assistance laws); *Frye v. Gardner*, 1:20-cv-751 (D. N.H.) (settlement providing that state will take steps to ensure that blind voters can vote absentee without sacrificing secrecy); *Gallagher v. N.Y. State Bd. of Elections*, No. 1:20-cv-5504 (S.D.N.Y.) (granting preliminary injunction against requirement that ballots be postmarked and postponing absentee ballot receipt deadline); *Hernandez v. N.Y. State Bd. of Elections*, No. 1:20-cv-4003 (S.D.N.Y.) (settling with agreement to provide online absentee balloting capabilities to blind voters); *Self Advocacy Solutions North Dakota v. Jaeger*, No. 3:20-cv-71 (D. N.D.) (permanent injunction granted against state law allowing rejection of ballots with signature mismatch issues without providing opportunity to cure); *Common Cause Rhode Island v. Gorbea*, No. 1:20-cv-318 (D.R.I.)

(consent decree enjoining witness requirement); *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C.) (settling dispute re prepaid postage requirement); *Thomas v. Andino*, No. 3:20-cv-1552 (D.S.C.) (enjoining enforcement of the witness requirement); *League of Women Voters v. Hargett*, No. 3:19-cv-385 (M.D. Tenn.) (enjoining state laws that restrict ability of community-based organizations to provide voter registration assistance); *Gary v. Va. Dept. of Elections*, No. 1:20-cv-860 (E.D.Va.) (partial consent judgment on access to electronic voting for blind voters); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-23 (W.D.Va.) (consent decree lifting witness requirement in 2020).

Reasonable settlement of certain claims may heighten the Board's ability to ensure that resulting orders and requirements are practical and administrable.

Because North Carolina has already begun sending out absentee ballots and as we approach Election Day and the early voting period, an adverse ruling may become increasingly difficult to administer. This difficulty may cause confusion for pollworkers, county staff, and voters.

In some cases, courts will conclude that these considerations counsel against granting relief. But it is likely that in other cases, courts may find those considerations are outweighed by the impact of what they conclude is a legal violation.

In addition, as with all litigation, there is a significant possibility that the court grants relief that the parties did not ask for or that is greater and/or more difficult to administer than the relief requested by the parties. *See, e.g., Community Success Initiative v. State Bd. of Elections* (Wake. Cty. Sup. Ct.) (enjoining the State Board from prohibiting those who are serving extended probation sentences for failure to pay fines and fees, where no party requested this relief).

Settlement may lessen exposure to claims for attorneys' fees and costs by prevailing plaintiffs.

In light of these considerations, and the recent wave of court decisions around the country granting challengers relief in the midst of the global pandemic, the Department of Justice recommends that consideration be given to the following potential pathways to resolution of some claims in pending litigation.

### **Potential Areas for Compromise**

#### *Signature verification requirement*

- Challenge to requirement that absentee voters must sign the absentee ballot container envelope, arguing that the State Board has failed to provide county boards with sufficient guidance to verify the absentee voter's signature.
- This claim is a misapprehension of the State's signature verification requirement.

- Settlement offer from plaintiffs: The plaintiffs are willing to settle this claim, in light of the guidance provided by the State Board through Numbered Memo 2020-19, published on August 21, 2020.

*Civilian absentee ballot receipt deadline*

- Challenge to the civilian absentee ballot receipt deadline of Election Day + 3 days (5 p.m. on Friday, November 6).
- Potential settlement position: Allow for all ballots mailed by Election Day to be counted if received by the day before canvass (same deadline as UOCAVA ballots).
- This would align with the lawsuit that the State has filed separately against the U.S. Postal Service challenging the new policies causing delays in election mail delivery.
- By extending the deadline, we would be adhering to the U.S. Postal Service's warnings that there should be at least one week from the request deadline to the postmark deadline *and* at least one week from the postmark deadline to the receipt deadline by the county board.
- This would provide the plaintiffs with less than the full scope of relief they seek (lifting the postmark requirement).
- This resolution may be sufficient for the plaintiffs in the remaining challenges to the absentee ballot receipt deadline.

*Application of witness requirement*

- Challenge to one-witness requirement for absentee voters in November 2020 elections.
- Note: the State Board is already under an injunction not to reject any ballots without an appropriate and court-approved cure process. At this point in time, we do not have a court-approved cure process in place at all—no ballots may be rejected for deficiencies at this time.
  - The State Board staff have developed some cure provisions that have been circulated by Numbered Memo to the counties. But the plaintiffs are still challenging these provisions and this Numbered Memo has now become the subject of further litigation and a new lawsuit.
- The witness requirement is the subject of multiple other lawsuits.
  - Two of these are scheduled for hearings before Judge Bryan Collins on Friday.
- Potential settlement position: Provide cure procedures that are somewhat more voter-friendly (e.g., confirmation from voter that s/he is the one who filled out the absentee ballot).
- This would align with the evidence the State Board has provided in other litigation that the primary purpose of the witness signature requirement is not to verify the voter's identity (which is done through other means), but rather to prevent the voter from having her ballot stolen and marked without her knowledge.
- This offer would provide the plaintiffs with less than the full scope of relief they seek (lifting the witness requirement altogether) and would leave the state law intact.
- In addition, it would address the claim of inadequate cure procedures for incorrect or missing witness signatures on absentee ballots.

- This resolution may be sufficient for the plaintiffs in the remaining challenges to the witness requirement and witness-signature cure procedures.

*Lack of contactless absentee ballot return provisions*

- Challenge to lack of provisions allowing for contactless absentee ballot return.
- Potential settlement position: Allow for absentee ballots to be dropped off at early voting sites with verbal confirmation instead of formal logging.
- We have been told that a challenge to the lack of contactless drop boxes and the logging procedure may be imminent, potentially as an additional claim in one or more existing cases.
- We believe the above settlement position may be sufficient to avoid the lawsuit.

**Other Claims (Compromise Not Recommended at this Time)**

*Lack of prepaid postage*

- Challenge to failure of the State to provide prepaid postage.
- We do not recommend settling this claim, unless the State Board believes that the most recent appropriation by the General Assembly would allow for prepaid postage.
- The only other cases in which the state has provided prepaid postage through litigation have resulted from negotiated settlements.
- Ballots have already gone out in North Carolina—it would be unfair to only provide prepaid postage for those whose ballots have not gone out. Moreover, it would be difficult and confusing to try to send prepaid envelopes out now to those who have already received their ballots.

*Restrictions on assistance with requesting and returning absentee ballots*

- Challenge to restrictions on assistance with requesting and returning absentee ballots.
- We do not recommend settling these claims at this time.
- In most cases challenging these restrictions in other states, the states have prevailed.
- North Carolina's most recent experience with CD-9 supports the need for some restrictions.

*Extending early voting*

- Challenge to 17-day early voting period, seeking a period that begins three weeks earlier.
- We do not recommend settling these claims at this time.
- It would be a Herculean administrative burden to procure the leases on early voting sites and sufficient pollworkers at a time when staffing the current early voting period is already difficult.
- Note that it may be sufficient for the plaintiffs if the State Board allowed counties, by unanimous vote or approval by the State Board, to extend the hours of their early voting sites after early voting has commenced, should the crush of voters become difficult for the counties to manage within 8 a.m. and 7:30 p.m. and their weekend early voting hours.

*Availability of electronic ballots for the visually impaired*

- Challenge to failure to provide electronic absentee ballots to blind voters.
- We do not recommend settling these claims at this time, unless the Board decides that providing this opportunity through existing technology is secure and otherwise appropriate.
- There is a controlling Fourth Circuit decision that identifies this as an ADA violation, and the Board is likely to lose this case on the merits, when ultimately decided. However, we understand the Board staff has determined that correcting this problem for the November 2020 election would create unacceptable logistical and security risks.
- Accordingly, the Department of Justice has filed an opposition to the plaintiffs' motion for a preliminary injunction requiring the State Board to provide electronic absentee voting access to blind voters.
- Until such time as the court rules, there is little opportunity to change course, unless the Board decides that, as a matter of policy, such a change is possible and prudent.