

FILED

NORTH CAROLINA 2020 SEP -3 PM 3: 58

COUNTY OF WAKE WAKE CO., C.S.C.

MAUDIE V. CHAMBERS; BARBARA HART;
JOHN T. ROBERTS; and KRISTINA M.
SPURGIN,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA;
TIM MOORE, SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; PHILIP E. BERGER,
PRESIDENT PRO TEMPORE OF THE
NORTH CAROLINA SENATE; THE NORTH
CAROLINA STATE BOARD OF
ELECTIONS; and DAMON CIRCOSTA,
CHAIR OF THE NORTH CAROLINA STATE
BOARD OF ELECTIONS,

Defendants,

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 20 CVS 500124

ORDER ON INJUNCTIVE RELIEF

This matter comes before the undersigned three-judge panel upon Plaintiffs' motion for preliminary injunction, filed on July 21, 2020, pursuant to Rule 7(b) and Rule 65 of the North Carolina Rules of Civil Procedure.

In this litigation, Plaintiffs seek a declaration that N.C.G.S. § 163-231 and N.C. Session Law 2020-17, the North Carolina statute and session law governing witness requirements for the submission of absentee ballots, is facially unconstitutional and invalid under the North Carolina Constitution during the COVID-19 pandemic. Specifically, Plaintiffs contend portions of N.C.G.S. § 163-231 and N.C. Session Law 2020-17 (collectively referred to hereinafter as the "Witness Requirements") violate Article I, Sections 10, 12, 14, and 19 of our Constitution.

Plaintiffs seek three forms of injunctive relief in their motion: 1) An order prohibiting Defendants, their agents, officers, and employees from enforcing the Witness Requirements for absentee ballots for all North Carolina voters for the 2020 general election and all subsequent elections in North Carolina until the in-person interactions required by the Witness

Requirements no longer pose a risk to public health and personal safety and North Carolina residents are no longer subject to an Executive Order recommending social distancing; 2) An order commanding Defendants to issue guidance instructing county election officials to count otherwise validly cast absentee ballots that are missing a witness signature for the November 3 general election in North Carolina; and, 3) An order commanding Defendants to conduct a public information campaign informing North Carolina voters about the elimination of these requirements, in coordination with county election officials.

PROCEDURAL HISTORY

Plaintiffs filed their complaint in this matter on July 10, 2020, and the present motion for preliminary injunction on July 21, 2020. Plaintiffs then submitted a memorandum in support of their motion for preliminary injunction on August 12, 2020.

On August 28, 2020, this action was transferred to a three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1 and N.C.G.S. § 1A-1, Rule 42(b)(4). On August 31, 2020, the Chief Justice of the Supreme Court of North Carolina, pursuant to N.C.G.S. § 1-267.1, assigned the undersigned threejudge panel to preside over the facial constitutional challenges raised in this litigation.

On September 1, 2020, Defendants State of North Carolina, the North Carolina State Board of Elections, and Damon Circosta, Chair of the North Carolina State Board of Elections (collectively referred to as the "State Defendants"), submitted a brief in opposition to Plaintiffs' motion. On that same date, Defendants Tim Moore, Speaker of the North Carolina House of Representatives, and Philip E. Berger, President Pro Tempore of the North Carolina Senate (collectively referred to as the "Legislative Defendants"), also submitted a brief in opposition to Plaintiffs' motion. Plaintiffs, State Defendants, and Legislative Defendants have all submitted numerous affidavits, exhibits, deposition and testimony designations, and other related materials with their briefs. Additionally, by separate Order entered September 3, 2020, the Court denied a motion to intervene filed on August 4, 2020, by Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, and North Carolina Republican Party (collectively referred to as "Intervenor-Applicants"); however, in that order, the Court accepted Intervenor-Applicants' brief in opposition to Plaintiffs' motion as an amicus brief.

On September 3, 2020, Plaintiffs' motion was virtually heard by the undersigned threejudge panel via WebEx pursuant to the Chief Justice's orders regarding virtual hearings in light of the COVID-19 pandemic. The matter was thereafter taken under advisement.

Upon considering the pleadings, parties' briefs and submitted materials, arguments, pertinent case law, and the record established thus far, the Court finds and concludes, for the purposes of this Order, as follows:

WITNESS REQUIREMENTS WHEN VOTING BY ABSENTEE BALLOT

Subsection (a) of Section 163-231 of our General Statutes governs the procedure for voting by absentee ballot as follows:

In the presence of two persons who are at least 18 years of age, and who are not disqualified by G.S. 163-226.3(a)(4) or G.S. 163-237(b1), the voter shall do all of the following:

- (1) Mark the voter's ballots, or cause them to be marked by that person in the voter's presence according to the voter's instruction.
- (2) Fold each ballot separately, or cause each of them to be folded in the voter's presence.
- (3) Place the folded ballots in the container-return envelope and securely seal it, or have this done in the voter's presence.
- (4) Make the application printed on the container-return envelope according to the provisions of G.S. 163-229(b) and make the certificate printed on the container-return envelope according to the provisions of G.S. 163-229(b).
- (5) Require those two persons in whose presence the voter marked that voter's ballots to sign the application and certificate as witnesses and to indicate those persons' addresses. Failure to list a ZIP code does not invalidate the application and certificate.
- (6) Do one of the following:
 - a. Have the application notarized. The notary public may be the person in whose presence the voter marked that voter's ballot.
 - b. Have the two persons in whose presence the voter marked that voter's ballots to certify that the voter is the registered voter submitting the marked ballots.

Alternatively to the prior paragraph of this subsection, any requirement for two witnesses shall be satisfied if witnessed by one notary public, who shall comply with all the other requirements of that paragraph. The notary shall affix a valid notarial seal to the envelope, and include the word "Notary Public" below his or her signature.

The persons in whose presence the ballot is marked shall at all times respect the secrecy of the ballot and the privacy of the absentee voter, unless the voter requests assistance and that person is otherwise authorized by law to give assistance. When thus executed, the sealed container-return envelope, with the ballots enclosed, shall be transmitted in accordance with the provisions of subsection (b) of this section to the county board of elections which issued the ballots.

N.C.G.S. § 163-231(a).

On June 12, 2020, Session Law 2020-17 (also referred to as House Bill 1169) was enacted into law, providing, in relevant part, that:

For an election held in 2020, notwithstanding G.S. 163-229(b) and G.S. 163-231(a), and provided all other requirements for absentee ballots are met, a voter's returned absentee ballot shall be accepted and processed accordingly by the county board of elections if the voter marked the ballot in the presence of at least one person who is at least 18 years of age and is not disqualified by G.S. 163-226.3(a)(4) or G.S. 163-237(c), provided that the person signed the application and certificate as a witness and printed that person's name and address on the container-return envelope. For an election held in 2020, notwithstanding G.S. 163-229(b), the State Board of Elections may prepare applications for each container-return envelope providing for a space for the identification of one person witnessing the casting of the absentee ballot in accordance with G.S. 163-231, that person's signature, and that person's printed name and address.

2020 N.C. Sess. Laws 17 § 1.(a).

INJUNCTIVE RELIEF

"The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a 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 a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Plaintiffs' burden to show a likelihood of success on the merits of their claims is substantial because when, as here, a plaintiff challenges the facial constitutionality of a statute, the courts presume "that any act passed by the legislature is constitutional," and "will not strike it down if [it] can be upheld on any reasonable ground." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281-82 (1998)); *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (explaining that courts will not declare a law invalid unless it is determined to be "unconstitutional beyond a reasonable doubt"). Accordingly, "[a]n individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.'" *Thompson*, 349 N.C. at 491 (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)).

Plaintiffs contend the Witness Requirements violate rights guaranteed by four specific provisions of the Declaration of Rights in our Constitution: Article I, Sections 10, 12, 14, and 19. Section 10 of Article I declares that "[a]ll elections shall be free." N.C. Const. art. I, § 10. Section 12 of Article I declares, in relevant part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" N.C. Const. art. I, § 12. Section 14 of Article I declares, in relevant part, that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained[.]" N.C. Const. art. I, § 14. And Section 19 of Article I declares, in relevant part, that "[n]o person shall be denied the equal protection of the laws," N.C. Const. art. I, § 19.

The Court finds there is not a substantial likelihood that Plaintiffs will prevail on the merits and show beyond a reasonable doubt that the Witness Requirements in N.C.G.S. § 163-231 and S.L. 2020-17 are in violation of Article I, §§ 10, 12, 14, and 19 of the North Carolina Constitution.

Furthermore, even if Plaintiffs had shown a substantial likelihood of prevailing on the merits, the equities do not weigh in their favor. On one hand, Plaintiffs assert that the challenged statute and session law violate their constitutional rights in such a manner that they, and thousands of North Carolinians in similar circumstances, would be forced to choose between voting by absentee ballot and following Center for Disease Control and Department of Health and Human Services guidelines designed to protect them from the COVID-19 pandemic.

On the other hand, State Defendants assert that well over 430,000 absentee ballots have been requested and will be mailed to voters on September 4, 2020.¹ This figure is significantly higher than the number of absentee ballot requests received both at this time prior to the 2016 general election and in total in that election. As such, State Defendants would be required to replace or modify existing absentee ballot envelopes, as well as voter guides, which have already cost the state hundreds of thousands of dollars to procure. Any modification or redaction of information contained on the existing envelopes would be a time-, labor-, and cost-intensive process. Indeed, such a process will create delays in mailing ballots for *all* North Carolinians voting by absentee ballot in the 2020 general election and would likely lead to voter confusion as to the process for voting by absentee ballot.

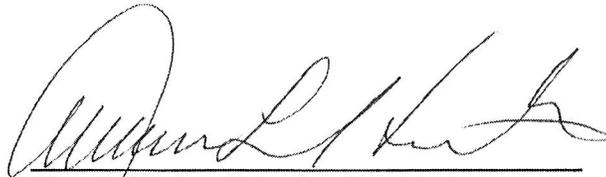
Accordingly, after carefully weighing the potential harm to Plaintiffs if the preliminary injunction is not issued against the potential harm to Defendants if injunctive relief is granted, the Court concludes the balance of the equities weighs in Defendants' favor.

CONCLUSION

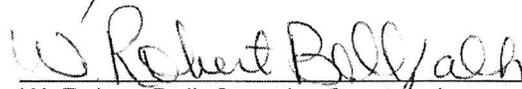
Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested extraordinary remedy shall not issue. For the foregoing reasons, Plaintiffs' motion for preliminary injunction is DENIED.

SO ORDERED, this the 3rd day of September, 2020.

¹ At the hearing of this matter on September 3, 2020, counsel for State Defendants informed the Court that this number has currently grown to over 600,000 absentee ballot requests.



Alma L. Hinton, Superior Court Judge



W. Robert Bell, Superior Court Judge

Thomas H. Lock, Superior Court Judge

Accordingly, after carefully weighing the potential harm to Plaintiffs if the preliminary injunction is not issued against the potential harm to Defendants if injunctive relief is granted, the Court concludes the balance of the equities weighs in Defendants' favor.

CONCLUSION

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested extraordinary remedy shall not issue. For the foregoing reasons, Plaintiffs' motion for preliminary injunction is DENIED.

SO ORDERED, this the 3rd day of September, 2020.

Alma L. Hinton, Superior Court Judge

W. Robert Bell, Superior Court Judge



Thomas H. Lock, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below, pursuant to the September 2, 2020 Case Management Order, via e-mail transmission addressed as follows:

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This the 3rd day of September 2020.


Kellie Z. Myers
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*Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.