

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. _____

DEMOCRACY NORTH CAROLINA,)
)
 Plaintiff,)
 vs.)
)
 NORTH CAROLINA STATE BOARD OF)
 ELECTIONS and DURHAM COUNTY BOARD)
 OF ELECTIONS,)
)
 Defendant.)
 _____)

**. MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND
DECLARATORY RELIEF**

Plaintiffs submit this memorandum of law, along with the Affidavit of Allison Riggs, in support of their emergency motion for preliminary injunction. Without the Court's intervention, some qualified voters will not be able to exercise their right to vote in Durham County in violation of federal and state law.

After voting began on November 8, 2016, because of issues at approximately 5 Durham precincts with use of the electronic pollbooks ("epollbooks"), every precinct in Durham County was instructed to discontinue use of epollbooks and to instead use paper pollbooks. This has caused backups and excessive wait times for voters checking in. Many pollworkers apparently did not know how to use the paper pollbooks. *See Riggs Affidavit*. It also caused precincts to run out of paper authorization to vote (ATV) forms. As background, with epollbooks, pollworkers are able to print out ATV forms for each voter. When required to use only paper

pollbooks, precincts had to rely on the extra paper ATV forms they had available. As a result, numerous voters were turned away and could not vote.

Voters have been turned away from at least Glenn Elementary School (Precinct 29) and Bethesda Ruritan Club (Precinct 31). The following precincts had significant slow-downs in processing voters, and accompanying long lines, attributable to problems associated with the switch to paper pollbooks, and that may have deterred voters from voting, and these slow-downs persisted for more than 15 minutes: Ivy Commons (Precinct 34-2), North Regional Library (Precinct 44), East Regional Library (Precinct 30-1), South Regional Library, North Carolina Central University and Triangle Presbyterian. Some sites do not have their pollbooks as of the filing of the Complaint, which may further exacerbate the situation. Specifically, as of 3 PM, South Regional Library was still not back to using epollbooks and was still relying on paper ATV forms. As a result of these events, voting in Durham County was interrupted at multiple sites for at least one hour.

N.C.G.S.A. § 163-166.01 authorizes the North Carolina State Board of Elections to extend polling times in the event of an interruption that temporarily shuts down polling places:

In every election, the voting place shall be open at 6:30 A.M. and shall be closed at 7:30 P.M. If the polls are delayed in opening for more than 15 minutes, or are interrupted for more than 15 minutes after opening, the State Board of Elections may extend the closing time by an equal number of minutes. As authorized by law, the State Board of Elections shall be available either in person or by teleconference on the day of election to approve any such extension. If any voter is in line to vote at the time the polls are closed, that voter shall be permitted to vote. No voter shall be permitted to vote who arrives at the voting place after the closing of the polls.

Pursuant to § 302(c) of the Help America Vote Act, “[a]ny individual who votes in an election for Federal office as a result of a Federal or State court order or any other order extending the time established for closing the polls by a State law in effect 10 days before the

date of that election may only vote in that election by casting a provisional ballot under subsection (a). Any such ballot cast under the preceding sentence shall be separated and held apart from other provisional ballots cast by those not affected by the order.” Accordingly, all ballots cast pursuant to this Court’s order by voters who are not in line at the regularly-scheduled close of polls must be cast as provisional ballots, should be secured separately from other provisional ballots, and should be identified as having been cast pursuant to the order of this Court.

Counsel for Plaintiff first became aware of the violations of law alleged in this Complaint as they were occurring. At around 12:30 p.m. counsel for Plaintiff contacted State Board of Election, informed it of these events, and demanded immediate action to rectify the situation, including (1) extending the time to vote in Durham County for one hour, and (2) opening the Durham County Board of Elections office as a “super precinct,” where any Durham County voter can vote. (A copy of this letter is attached to this Complaint as Exhibit A.) Plaintiff, through its counsel, requested a teleconference with the State Board of Elections, during which Defendant State Board refused to extend the time for voting. As of the time of the filing of this Complaint, upon information and belief, the violations complained of herein have not been corrected, and no reason has been provided to believe that – absent timely relief from this Court – those violations will be corrected.

Under North Carolina law, a plaintiff is entitled to a preliminary injunction when they suffer an injury that is immediate, pressing, irreparable, and clearly established. *Clinard v. Lambeth*, 234 N.C. 410, 419, 67 SE 2d 452, 458 (1951). Plaintiffs satisfy this standard.

Plaintiffs have demonstrated that Defendants have violated clearly established law under state law. As discussed above, N.C.G.S.A. § 163-166.01 authorizes the North Carolina State Board of Elections to extend polling times in the event of an interruption that temporarily shuts down polling places. The Board did not have good cause in refusing to extend the polling times.

Regarding federal law, the First and Fourteenth Amendments of the United States Constitution protect the right to vote as a fundamental right. The First Amendment's guarantees of freedom of speech and association protect the right to vote and to participate in the political process. The right to vote is a fundamental constitutional right also protected by both the due process and equal protection clauses of the Fourteenth Amendment. *See, e.g., Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (Virginia's poll tax violates the Equal Protection Clause); *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983) (the right to vote is incorporated into the Due Process Clause).

Absent relief, voters in Durham County will be disenfranchised. Laws precluding citizens from voting entirely impose a severe burden on the right to vote, and courts routinely so hold. *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 709 (N.D. Ohio 2006); *Northeastern Ohio Coalition for the Homeless v. Husted* ("NEOCH"), 696 F.3d 580 (6th Cir. 2012); *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-

324-jdp, 2016 WL 4059222 (W.D. Wis. July 29, 2016); *Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I.), *aff'd*, 37 F.3d 726 (1st Cir. 1994).

Indeed, several courts in this election cycle have extended voter registration deadlines to avoid a violation of the fundamental right to vote. The U.S. District Court for the Northern District of Florida issued a preliminary injunction extending Florida's voter registration deadline by a full week in light of Hurricane Matthew, "to afford a full opportunity to register for those who may have been affected by Hurricane Matthew's destruction." Order Granting Preliminary Injunction, *Fla. Dem. Party v. Scott*, No. 16-cv-626, Doc. 29 at 2 (N.D. Fla. Oct. 12, 2016). The U.S. District Court for the Northern District of Georgia extended the voter registration deadline in Georgia by one week for the same reason. Order, *Georgia Coalition for The Peoples' Agenda, Inc. et al. v. Deal*, No. 16-cv-219, Doc. 16 at 1 (N.D. Ga. Oct. 14, 2016). In addition, the U.S. District Court in the Northern District of Virginia extended the voter registration deadline when the State's online registration system became inoperable on the day of the voter registration deadline. Order, *New Virginia Majority Education Fund v. Virginia Department of Elections*, No 16-cv-01319, Doc. 10 at 2 (E.D. Va. Oct. 20, 2016). The same basic principle that applied to the voter registration deadline case applies here: the fundamental right to vote protects voters who would be disenfranchised through no fault of their own

The injury here is immediate, pressing, and irreparable. In the absence of injunctive relief from this Court, some individuals in Durham County will suffer irreparable harm because they will not be able to exercise their constitutional and statutory right to vote in the November 8, 2016 general election. The right to vote is a "fundamental political right . . . preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Accordingly, courts have long recognized that any unlawful restriction on an individual's right to vote constitutes irreparable injury.

For the foregoing reasons, this Court should enter an order granting Plaintiffs' emergency motion for a preliminary injunction and declaratory relief and such further relief it deems just and proper.

Dated: November 8, 2016

Respectfully submitted,

/s/ Allison J. Riggs
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