

Did the COVID-19 Pandemic Finally Force North Carolina To Protect Marginalized Communities' Right To Vote, or Did History Repeat Itself?

November 3, 2020, culminated in an election cycle like none other. The partisan divide reached its peak, with a packed Democratic primary, a divisive Republican candidate, and a hyperaware electorate. The right to vote resurfaced as a contentious, newly partisan issue. Questions of voter suppression and issues surrounding the ease of voting dominated the news cycle, reigniting issues of race at the ballot box. And, on top of it all, a global pandemic was raging. The combination of these circumstances resulted in the most litigious election in recent memory. As a quintessential swing state, North Carolina was at the center of national attention, placing intense scrutiny on the North Carolina State Board of Elections, the General Assembly, and federal and state courts.

This Recent Development first provides a review of the 2020 election changes instituted by the North Carolina State Board of Elections and the General Assembly, comparing them with those of other states. The judicial response to the multitude of lawsuits filed is then considered, specifically focusing on whether North Carolina federal and state courts protected the right to vote, public health, or neither. Upon analysis, this Recent Development argues that North Carolina fell in the middle of the pack when protecting the right to vote—the state and courts enacted and upheld several imperative changes, but did not implement policies that significantly eased burdens when voting during a global pandemic. However, regardless of the positive changes made leading up to November 3, North Carolina immediately reverted to its old ways, forgetting—or ignoring—to protect marginalized communities' right to vote.

INTRODUCTION

Over the past decade, voting rights have resurfaced as a modern political and civil rights struggle. The last reauthorization of the Voting Rights Act of 1965 (“VRA”) in 2006¹ marked a decisive shift in the voting rights landscape that has only intensified.² In the preceding decade, some of the most

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1. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified as amended in scattered sections of 42 and 52 U.S.C.).

2. In 2006, the VRA was reauthorized in the Senate 98–0. *Roll Call Vote 109th Congress—2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212 [<https://perma.cc/8P2Y-4EHW>]. Nothing about voting rights has been bipartisan since.

consequential Supreme Court decisions have considered challenges to the VRA;³ the topic has dominated organizing efforts and the news media;⁴ and millions of dollars have poured into lobbying efforts.⁵ In the most contentious legislation pending in the United States, Congress seeks to expand voting rights protections and overhaul election administration.⁶ More voting rights bills—both restrictive and expansive—have been introduced at the state level than in decades.⁷ This resurgence comes, in part, from the evolution of schemes of voter suppression from overt to covert.⁸ Seemingly race-neutral time, place, and manner restrictions have grown in popularity, as explicitly racist barriers to

3. See generally *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (invalidating the VRA's coverage formula that required jurisdictions with a history of voting discrimination to preclear all voting changes with the U.S. Department of Justice or in the U.S. District Court for the District of Columbia); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (creating a list of "guideposts" to govern VRA Section 2 claims and finding that out-of-precinct and ballot collection policies did not violate Section 2).

4. One must only scroll through *The New York Times*' "Voting Rights" page to get a sense of how many stories have been written recently. *Voting Rights*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/voting-rights-registration-and-requirements> [<https://perma.cc/NK5B-32LU> (dark archive)].

5. See, e.g., Nick Corasaniti, *Democratic Group Will Pour \$20 Million into Voting Rights Efforts*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/06/22/us/politics/priorities-usa-voting-rights.html> [<https://perma.cc/Y6JT-B9B9> (dark archive)]; Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie> [<https://perma.cc/DQC5-5S5A> (dark archive)].

6. Freedom to Vote Act, S. 2747, 117th Cong. (2021) (protecting voting access, banning partisan gerrymandering, reforming the campaign finance system, and creating new safeguards to protect against election subversion); For the People Act, H.R. 1, 117th Cong. (as passed in House, Mar. 3, 2021) (modernizing voter registration, restoring voting rights to people with prior convictions, strengthening mail-voting systems, instituting nationwide early voting, preventing unreasonable wait times at polls, protecting against deceptive practices, banning partisan gerrymandering, and reforming the campaign finance system); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (as passed in House, Aug. 24, 2021) (creating an updated coverage formula under Section 4(a) of the VRA); Protecting Our Democracy Act, H.R. 8363, 116th Cong. (2020) (addressing abuses of presidential power, accountability and transparency, and foreign interference in elections).

7. *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021> [<https://perma.cc/7GYM-HXGC>].

8. See Jelani Cobb, *Voter-Suppression Tactics in the Age of Trump*, NEW YORKER (Oct. 21, 2018), <https://www.newyorker.com/magazine/2018/10/29/voter-suppression-tactics-in-the-age-of-trump> [<https://perma.cc/7GYM-HXGC> (dark archive)] ("Literacy tests, poll taxes, and grandfather clauses . . . have been consigned to the history books, but one need [not look far] to see their modern equivalents in action.").

voting have been outlawed.⁹ However, it has become clear that subtle voter suppression tactics still achieve racially disparate impacts.¹⁰

Voter identification (“ID”) laws, gerrymandered redistricting plans, and voter roll purges often garner the greatest attention for their disproportionate burden on voters of color.¹¹ However, restrictions to every aspect of election administration have increased in frequency as well—particularly because they continue to perpetuate racial inequalities and inequities—but do not evoke the same level of skepticism as their more overt predecessors.¹² For instance—just to name a few—voter registration hurdles, polling place closures and relocations, cuts to early voting, bans on no-excuse absentee voting, signature match laws, and outlawing ballot drop boxes and third-party ballot collection all restrict and deter voters.¹³ Any one of these practices “might appear minor,” but, when compounded and implemented, “the end result is death by a thousand cuts.”¹⁴

9. The apparent constitutionality of these race-neutral time, place, and manner restrictions comes from the Elections Clause: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. CONST. art. I, § 4, cl. 1.

10. See Cobb, *supra* note 8 (“The [modern] suppression of minority votes is . . . an attempt to place a white thumb on the demographic scale.”); see also Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. (Jan. 16, 2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> [<https://perma.cc/X9LT-UC49>] (“[T]he racial cause and effect of these seemingly race-neutral laws are hard to escape.”).

11. See Johnson & Feldman, *supra* note 10; see also Michael Li, *The GOP’s Redistricting Loophole*, BRENNAN CTR. FOR JUST. (Nov. 16, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/gop-redistricting-loophole> [<https://perma.cc/2BCG-QMH8>].

12. Voter ID laws, gerrymandering, and voter roll purges have been challenged in court time and time again. See generally, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (declaring partisan gerrymandering claims to be nonjusticiable); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (upholding Ohio’s voter roll maintenance procedures); *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (finding Texas’s congressional and statewide redistricting plans did not constitute a racial gerrymander); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding Indiana’s voter ID law); *Shaw v. Reno*, 509 U.S. 630 (1993) (invalidating North Carolina’s congressional redistricting plan as an unconstitutional racial gerrymander); N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295 (4th Cir. 2020) (upholding North Carolina’s voter ID law after a yearslong court battle); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (finding Texas’s voter ID law to be racially discriminatory).

13. Matt DeRienzo, *Analysis: New and Age-Old Voter Suppression Tactics at the Heart of the 2020 Power Struggle*, CTR. FOR PUB. INTEGRITY (Oct. 28, 2020), <https://publicintegrity.org/politics/elections/ballotboxbarriers/analysis-voter-suppression-never-went-away-tactics-changed> [<https://perma.cc/9QKT-Q8XT>] (studying the impact of modern voter suppression tactics that were largely implemented post-*Shelby County* and concluding that “2020 voter suppression tactics are modern-day cousins of the white supremacist measures taken to keep Black people from voting in the Jim Crow era”).

14. *The Implications of Brnovich v. Democratic National Committee and Potential Legislative Responses: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Const., C.R., & C.L.*, 117th Cong. 6 (2021) (written statement of Sean Morales-Doyle, Acting Director, Voting Rights and Elections

The right to vote has a long legislative and judicial history, particularly in North Carolina.¹⁵ Because of the state's history of racially discriminatory voting laws and election administration¹⁶—not to mention events leading to the nation's only successful government coup to overthrow Wilmington's majority Black government¹⁷—some of the most restrictive legislation has come from North Carolina,¹⁸ leading to far-reaching voting rights cases. The leading vote-dilution case, *Thornburg v. Gingles*,¹⁹ came from North Carolina and challenged the use of multimember districts in federal court.²⁰ *Shaw v. Reno*,²¹ an objection in federal court to North Carolina's congressional redistricting plan, outlawed racial gerrymandering.²² *Rucho v. Common Cause*,²³ another federal challenge to North Carolina's congressional redistricting plan, led to the current law on partisan gerrymandering.²⁴ And the Fourth Circuit's opinion in *North Carolina*

Program, Brennan Center for Justice at NYU School of Law) [hereinafter Written Statement of Sean Morales-Doyle].

15. See *infra* notes 16–26 and accompanying text.

16. Vann R. Newkirk II, *The Battle for North Carolina*, ATLANTIC (Oct. 27, 2016), <https://www.theatlantic.com/politics/archive/2016/10/the-battle-for-north-carolina/501257/> [<https://perma.cc/5NKM-CSUX> (dark archive)] (“While . . . voting-rights activists [have] won victories in the courts, the final outcome of voting rights in North Carolina and the century-old battle for its soul is far from settled.”); see also Julia Jacobs, *In North Carolina, Voting Controversies Are Common. Here's the Recent History.*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/politics/north-carolina-voting-rights.html> [<https://perma.cc/5WGL-M3YJ>] (dark archive)] (“In the past decade, North Carolina has been a central battleground for the partisan fight over voting restrictions.”).

17. In the “Wilmington race-riot” of 1898, white politicians and voters used voter disenfranchisement, intimidation, and violence to quash Wilmington's Black political leaders. William J. Barber II & Jonathan Wilson-Hartgrove, *The Strange Career of James Crow, Esquire*, ATLANTIC (Feb. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/02/jim-crows-new-legal-career/459879/> [<https://perma.cc/995F-E4GV> (dark archive)].

18. See, e.g., Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505 (codified as amended in scattered sections of N.C. GEN. STAT.); see also William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the ‘Monster’ Law*, WASH. POST (Sept. 2, 2016), https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html [<https://perma.cc/38D3-MWRH> (staff-uploaded, dark archive)] (“[T]he North Carolina legislature passed a law that cut a week of early voting, eliminated out-of-precinct voting and required voters to show specific types of photo ID—restrictions that election board data demonstrated would disproportionately affect African Americans and other minorities. Critics dubbed it the ‘monster’ law—a sprawling measure that stitched together various voting restrictions being tested in other states.”).

19. 478 U.S. 30 (1986).

20. *Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

21. 509 U.S. 630 (1993).

22. *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom. Shaw v. Reno*, 509 U.S. 630 (1993).

23. 139 S. Ct. 2484 (2019).

24. *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019).

*NAACP v. McCrory*²⁵ provided the oft-quoted declaration that the state's voting rights omnibus bill was crafted "with almost surgical precision" to target African Americans.²⁶

All of this—the voting rights resurgence, the evolution of voter suppression, and North Carolina's shameful voting rights history—coincided with the 2020 presidential election cycle. But, on top of it all, the COVID-19 pandemic was raging.²⁷ While health-related concerns were paramount, the pandemic also emphasized the outdated and restrictive methods of voting and election administration. In particular, as states attempted to administer an election during a global pandemic, the time, place, and manner policies were the first to be altered. The most common changes included polling place closures,²⁸ modifications to signature match laws,²⁹ and bans on no-excuse absentee voting,³⁰ ballot drop boxes,³¹ and third-party ballot collection.³² Unsurprisingly, all of these measures had racial implications.³³ Thus, while COVID-19 certainly exacerbated the impacts of these voting regulations, their restrictiveness and discriminatory impact had been there all along.

Unsurprisingly, the 2020 election's intersection of health and voting spilled into courts and state legislatures. In fact, there were more voting rights

25. 831 F.3d 204 (4th Cir. 2016).

26. *Id.* at 214.

27. Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> [<https://perma.cc/J953-JBA8> (dark archive)].

28. See, e.g., Alison Dirr & Mary Spicuzza, *What We Know So Far About Why Milwaukee Only Had 5 Voting Sites for Tuesday's Election While Madison Had 66*, MILWAUKEE J. SENTINEL, <https://www.jsonline.com/story/news/politics/elections/2020/04/09/wisconsin-election-milwaukee-had-5-voting-sites-while-madison-had-66/2970587001/> [<https://perma.cc/FX3R-UALDf> (dark archive)] (Apr. 9, 2020, 6:36 PM).

29. Maya Lau & Laura J. Nelson, 'Ripe for Error': *Ballot Signature Verification Is Flawed—and a Big Factor in the Election*, L.A. TIMES (Oct. 28, 2020, 5:27 AM), <https://www.latimes.com/california/story/2020-10-28/2020-election-voter-signature-verification> [<https://perma.cc/X328-W6MY> (dark archive)].

30. Kate Rabinowitz & Brittany Renee Mayes, *At Least 84% of American Voters Can Cast Ballots by Mail in the Fall*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/graphics/2020/politics/vote-by-mail-states/> [<https://perma.cc/4VK2-38RS> (dark archive)] (showing that voters required a non-COVID-19 related excuse to vote by mail in Indiana, Louisiana, Mississippi, Tennessee, and Texas).

31. Nathaniel Rakich, *More States Are Using Ballot Drop Boxes. Why Are They So Controversial?*, FIVETHIRTYEIGHT (Oct. 5, 2020, 7:00 AM), <https://fivethirtyeight.com/features/more-states-are-using-ballot-drop-boxes-why-are-they-so-controversial/> [<https://perma.cc/RT5T-EA55>].

32. Caitlin Huey-Burns & Musadiq Bidar, *What Is Ballot Harvesting, Where Is It Allowed and Should You Hand Your Ballot to a Stranger?*, CBS NEWS (Sept. 1, 2020, 12:17 PM), <https://www.cbsnews.com/news/ballot-harvesting-collection-absentee-voting-explained-rules/> [<https://perma.cc/QA9M-U6HT>].

33. *What Democracy Looks Like: Protecting Voting Rights in the US During the Covid-19 Pandemic*, HUM. RTS. WATCH (Sept. 22, 2020), <https://www.hrw.org/report/2020/09/22/what-democracy-looks-protecting-voting-rights-us-during-covid-19-pandemic> [<https://perma.cc/WUN5-LMN7>].

lawsuits challenging legislative and administrative changes in 2020 than in the previous decade.³⁴ The flood of litigation made the judicial system determinative in deciding when voters could cast their ballots, where they could do so, and how they could go about it—in essence, these decisions directly implicated the right to vote. As expected, North Carolina’s state and federal courts were not immune to this wave of litigation. After the state adopted new voting procedures two months before Election Day,³⁵ the guidelines were challenged in state court, federal district court, and the Fourth Circuit, with one case reaching the Supreme Court.³⁶ Compared to other states, these cases garnered even greater attention because of North Carolina’s lengthy history of racially discriminatory voter suppression tactics³⁷ and its status as a battleground state.³⁸ In light of the nationwide controversy regarding changes in voting procedures, crucial questions arose: Did North Carolina’s state and federal courts and state legislators again set aside voting rights, veiled as a pursuit of public health and safety? Did the two branches break with tradition and uphold greater access to the ballot? Or did they do neither, tossing both aside? Upon analysis, it appears that North Carolina gave greater consideration to voting rights concerns than usual but still left much to be desired. After Election Day, however, North Carolina immediately reverted to its old ways.

Part I of this Recent Development outlines the voting and election changes North Carolina made to address the COVID-19 pandemic and then compares them with what other states implemented. Part II analyzes the voting rights challenges to North Carolina laws heard in the months leading up to the 2020 election and evaluates whether state and federal courts prioritized voting

34. *More Voting Rights Lawsuits Filed in 2020 than in 2016*, TRAC REPS. (Sept. 21, 2020), <https://trac.syr.edu/tracreports/civil/625/> [<https://perma.cc/EV4T-MG6Q>] (“According to court information analyzed by the Transactional Records Access Clearinghouse (TRAC) at Syracuse University, the last six months have seen the highest number of recorded voting rights suits since TRAC’s systematic tracking of federal civil litigation began in October 2007.”). This is now even more so the case, considering many lawsuits were filed after the report’s publication date. See *COVID-Related Election Litigation Tracker*, STAN.-MIT HEALTHY ELECTIONS PROJECT, <https://healthyelections-case-tracker.stanford.edu/cases> [<https://perma.cc/P6XW-6U9X>] (finding that there were “over 500 cases and appeals, comprising over 350 case families (i.e. all cases and appeals arising from a single complaint)” relating to COVID-19 and the 2020 election).

35. See *infra* Section I.A.

36. See *infra* Part II.

37. Martha Waggoner, “*Sordid History*” Cited as Judge Blocks NC’s Voter ID Law, AP NEWS (Dec. 31, 2019), <https://apnews.com/article/562a2b86f0a6c8ae95b1113cd2159b93> [<https://perma.cc/E267-EXFC>] (“North Carolina has a sordid history of racial discrimination and voter suppression stretching back to the time of slavery, through the era of Jim Crow, and, crucially, continuing up to the present day.”).

38. See *The 2020 Battleground States: Updates on the Swing Voters*, N.Y. TIMES, <https://www.nytimes.com/live/2020/battleground-states-2020-election#north-carolina-an-invisible-line-cleaves-a-region-into-political-camps> [<https://perma.cc/QLV6-UH3C> (dark archive)] (Nov. 4, 2020) (discussing the dozen or so key battleground states of the 2020 presidential race, including North Carolina).

rights, public health, or neither. Part III considers the state of voting rights in North Carolina, in 2020 and beyond.

I. COVID-19 INSPIRED ELECTION CHANGES

The COVID-19 pandemic struck the United States in the midst of primary election season. The first case of COVID-19 was confirmed only weeks before elections were scheduled to be held, and the pandemic was in full swing by Super Tuesday.³⁹ Twenty-two states rescheduled their election dates, whether for presidential primaries, state primaries, or runoffs.⁴⁰ In a number of states that did not alter their calendars, in-person voting was cancelled, resulting in elections conducted entirely by mail.⁴¹ While North Carolina left its presidential primary untouched on March 3, it moved the date of its runoff, originally planned for May 12, to June 23.⁴² These primary elections may have left election administrators and officials feeling more prepared for November 3, but pending litigation and conflicting rulings in the few months prior left an abundance of questions unanswered.⁴³ In fact, more than one-third of the cases addressing elections remained unresolved as early voting was underway.⁴⁴

The following sections review how North Carolina adapted its election administration in light of the pandemic and compares these changes with those of other states.

39. The first COVID-19 case in the United States was confirmed on January 21, 2020. Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS (Sept. 22, 2020, 11:55 AM), <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165> [<https://perma.cc/4UCF-GTJW>]. COVID-19 infections and deaths began to intensify in February and March, coinciding with scheduled primaries. *Id.*; *2020 State Primary Election Dates*, NAT'L CONF. ST. LEGISLATURES (Nov. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/2020-state-primary-election-dates.aspx> [<https://perma.cc/49Z3-RZ7Q>].

40. *2020 State Primary Election Dates*, *supra* note 39.

41. *Id.*

42. *Id.*

43. When appeals were exhausted, decisions in North Carolina were not released until late September through the end of October. *See* *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C.), *reconsideration denied*, No. 20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020); *Taliaferro v. N.C. State Bd. of Elections*, 489 F. Supp. 3d 433 (E.D.N.C. 2020) (released September 24); *Findings of Fact and Conclusions of Law Supporting October 2, 2020 Order Granting Joint Motion for Entry of Consent Judgment*, N.C. All. for Retired Ams. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 WL 10758664 (N.C. Super. Ct. Oct. 5, 2020) (released October 26); *Moore v. Circosta*, 494 F. Supp. 3d 289 (M.D.N.C. 2020), *injunctive relief denied*, 141 S. Ct. 46 (2020) (mem.) (released October 28).

44. Lila Hassan & Dan Glaun, *COVID-19 and the Most Litigated Presidential Election in Recent U.S. History: How the Lawsuits Break Down*, PBS FRONTLINE (Oct. 28, 2020), <https://www.pbs.org/wgbh/frontline/article/covid-19-most-litigated-presidential-election-in-recent-us-history/> [<https://perma.cc/CD9M-ARU9>].

A. *How North Carolina's Election Administrators and Legislators Responded to COVID-19*

1. Changes to Voter Registration Procedures

In partnership with the North Carolina State Board of Elections (“NCSBE”), the North Carolina Division of Motor Vehicles allowed its customers to register to vote, update their voter registration addresses, and change their political affiliations online.⁴⁵ Prior to COVID-19, these applications and changes were required to be sent by mail or completed in person.⁴⁶ With many county boards of election offices forced to close to the general public,⁴⁷ this provision significantly eased access for voters. And to ensure that all voters could access these new tools and resources, including those in hospitals and residential care facilities, the North Carolina Department of Health and Human Services provided guidance to multipartisan assistance teams (“MATs”)⁴⁸ to help patients and residents in facilities to conduct business online.⁴⁹

2. Changes to Vote by Mail Procedures

By early September, the NCSBE announced new COVID-19-friendly guidelines for the general election scheduled on November 3, 2020.⁵⁰ Most notably, the NCSBE shored up its no-excuse absentee voting procedures.⁵¹

45. *Voter Registration Application*, N.C. DIV. MOTOR VEHICLES, <https://www.ncdot.gov/dmv/offices-services/online/Pages/voter-registration-application.aspx> [https://perma.cc/Y5XS-HG8U] (Sept. 30, 2020).

46. *See State Board, DMV Partner To Expand Online Voter Registration Service*, ALAMANCE CNTY. N.C. (Mar. 30, 2020), <https://www.alamance-nc.com/blog/2020/03/30/state-board-dmv-partner-to-expand-online-voter-registration-service/> [https://perma.cc/65S2-CPPZ] (“[T]he State Board of Elections and N.C. Division of Motor Vehicles launched a service to allow NCDMV customers to apply to register to vote or update existing voter registration information online.”).

47. *See Guidance on Multipartisan Assistance Teams (MAT) Visitation Procedure for Hospitals, Clinics, Nursing Homes, Assisted Living or Congregate Settings*, N.C. DEP'T HEALTH & HUM. SERVS. (Aug. 1, 2020), <https://s3.amazonaws.com/dl.ncsbe.gov/Outreach/Absentee/MAT%20Visit%20Guidance%20DHHS.pdf> [https://perma.cc/TSD5-6VE4].

48. A MAT “is a group appointed by a county board of elections to provide assistance with mail-in absentee voting and other services to voters living at facilities[,] such as hospitals, clinics, and nursing homes.” *Assistance for Voters in Care Facilities*, N.C. ST. BD. ELECTIONS, <https://www.ncsbe.gov/voting/help-voters-disabilities/assistance-voters-care-facilities> [https://perma.cc/UD2P-C5WM].

49. *Id.*

50. *See* Press Release, North Carolina State Board of Elections, State Board Hosting Online Press Availability, as Absentee Voting Set To Begin (Sept. 2, 2020), <https://www.ncsbe.gov/news/press-releases/2020/09/02/state-board-hosting-online-press-availability-absentee-voting-set> [https://perma.cc/3RS5-HSHJ].

51. *See* Press Release, North Carolina State Board of Elections, State Board Launches Absentee Ballot Request Portal (Sept. 1, 2020), <https://www.ncsbe.gov/news/press-releases/2020/09/01/state->

While North Carolinians have had the option to vote by mail in the last few election cycles—meaning that no special circumstances, like old age or absence from the county, are required⁵²—the NCSBE worked to make the process easier for voters.⁵³ The NCSBE also wanted to ensure that the state’s one hundred county boards of election were fully prepared to handle the expected increase in mail-in ballots, so it worked to prepare the boards with updated guidelines and best practices.⁵⁴ In an election expected to be held largely by mail, these were incredibly important and necessary changes.⁵⁵ The NCSBE also announced that it would accept absentee ballots until November 12—a nine-day extension—so long as they were postmarked by November 3.⁵⁶ Under normal circumstances, North Carolina requires that absentee ballots be postmarked on or before Election Day and received by 5:00 p.m. on the Friday after the election.⁵⁷ In an election plagued by postal service delays—particularly in battleground states like North Carolina⁵⁸—this was a crucial change to prevent thousands of voters from being disenfranchised.⁵⁹

board-launches-absentee-ballot-request-portal [https://perma.cc/L5H5-B363] (“The Absentee Ballot Request Portal will streamline voting by mail for voters who choose this voting option.”).

52. *Vote by Mail*, N.C. ST. BD. ELECTIONS, https://www.ncsbe.gov/voting/vote-mail [https://perma.cc/W24S-2SCE].

53. See Gary D. Robertson, *North Carolina Board Agrees to More Absentee Ballot Changes*, AP NEWS (Sept. 22, 2020), https://apnews.com/article/election-2020-virus-outbreak-north-carolina-elections-raleigh-6798f202bccc5070c1649b24c77b0bd1 [https://perma.cc/PE58-LTPL] (“The change[s] . . . w[ill] likely yield an upward tick in the number of counted ballots in this presidential battleground state.”).

54. See *FAQ: Voting by Mail in 2021*, N.C. ST. BD. ELECTIONS, https://www.ncsbe.gov/voting/vote-mail/faq-voting-mail-2021 [https://perma.cc/LZV7-4RLB] (answering questions for county boards of election about the procedures for requesting, marking, and returning absentee ballots).

55. See Vianney Gomez & Bradley Jones, *As COVID-19 Cases Increase, Most Americans Support ‘No Excuse’ Absentee Voting*, PEW RSCH. CTR. (July 20, 2020), https://www.pewresearch.org/fact-tank/2020/07/20/as-covid-19-cases-increase-most-americans-support-no-excuse-absentee-voting/ [https://perma.cc/6WRW-K9RX] (“The prospect of conducting the presidential election during a pandemic has prompted many states to reexamine their plans for how to conduct the election safely, including when it comes to access to early or absentee voting.”).

56. Press Release, North Carolina State Board of Elections, Receipt Deadline Is November 12 for Ballots Postmarked by Election Day (Oct. 29, 2020), https://www.ncsbe.gov/news/press-releases/2020/10/29/receipt-deadline-november-12-ballots-postmarked-election-day [https://perma.cc/KNC2-H7EF].

57. *FAQ: Voting by Mail in 2021*, *supra* note 54 (answering the following question: “When is the ballot return deadline for the 2021 municipal elections?”).

58. Jacob Bogage & Christopher Ingraham, *Swing-State Voters Face Major Mail Delays in Returning Ballots on Time, USPS Data Shows*, WASH. POST (Oct. 30, 2020, 1:15 PM), https://www.washingtonpost.com/business/2020/10/30/postal-service-absentee-ballots-2020-election/ [https://perma.cc/FK7D-T3RQ (dark archive)] (“In North Carolina, [only] 84.7 percent of ballots in the Greensboro district and 85.1 percent in the Mid-Carolinas district have been delivered on time in the past five days.”).

59. *See id.*

The NCSBE also issued a memo regarding deficiencies in absentee ballots,⁶⁰ in compliance with multiple court orders.⁶¹ First, the memo forbade county boards of election from conducting signature verification.⁶² Instead, “[a]bsent clear evidence to the contrary,” county boards were to presume that the signature was the voter’s, even if it was illegible.⁶³ Second, the memo directed county boards to review envelopes every business day “to ensure that voters have every opportunity to correct deficiencies.”⁶⁴ If there were curable deficiencies,⁶⁵ it was required that the voter be contacted within one business day by mail and, if possible, by email or phone.⁶⁶

The North Carolina General Assembly also eased absentee ballot requirements. The Bipartisan Elections Act of 2020—passed solely to address voting concerns during COVID-19—reduced the ballot witness requirement from two people to one,⁶⁷ because a pandemic that required social distancing created a barrier for some voters with respect to witness requirements.⁶⁸ However, the modification would have been more impactful if the legislation had done away with the witness requirement completely. The legislation also permitted absentee ballot applications to be submitted by email, fax, and online.⁶⁹ Just like conducting voter registration processes online, this change

60. Memorandum 2020-19 from Karen Brinson Bell, Exec. Dir., North Carolina State Bd. of Elections, to County Boards of Elections Regarding Absentee Container-Return Envelope Deficiencies 1 (Aug. 21, 2020) [hereinafter Memorandum 2020-19], https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-19_Absentee%20Deficiencies.pdf [<https://perma.cc/7LQF-JANE>].

61. See *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 239 (M.D.N.C. 2020); Findings of Fact and Conclusions of Law Supporting October 2, 2020 Order Granting Joint Motion for Entry of Consent Judgment, *supra* note 43, at 8.

62. In other words, “[t]he law does not require that the voter’s signature on the [container-return] envelope be compared with the voter’s signature in their registration record.” Memorandum 2020-19, *supra* note 60, at 2.

63. *Id.* at 1–2.

64. *Id.* at 2.

65. Curable deficiencies include: (1) “Voter did not sign the [v]oter [c]ertification”; (2) “Voter signed in the wrong place”; (3) “Witness or assistant did not print name”; (4) “Witness or assistant did not print address”; and (5) “Witness or assistant signed the wrong line.” *Id.* at 2–3. Incurable deficiencies include: (1) “Witness or assistant did not sign”; (2) “[T]he envelope is unsealed”; and (3) “The envelope indicates the voter is requesting a replacement ballot.” *Id.* at 3.

66. *Id.* at 3–4.

67. Bipartisan Elections Act of 2020, ch. 17, 2020 N.C. Sess. Laws 104 (codified as amended in scattered sections of N.C. GEN. STAT. ch. 163).

68. Pam Fessler, *Need a Witness for Your Mail-In Ballot? New Pandemic Lawsuits Challenge Old Rules*, NPR (June 1, 2020, 5:00 AM), <https://www.npr.org/2020/06/01/865043618/need-a-witness-for-your-mail-in-ballot-new-pandemic-lawsuits-challenge-old-rules> [<https://perma.cc/TM5T-K6HW>].

69. 2020 N.C. Sess. Laws 104.

offered greater access to voters,⁷⁰ including those assisted by MATs,⁷¹ than the original written request process would have.⁷²

3. Changes to In-Person Voting Procedures

While many of the election changes involved the expansion of mail-in voting, the NCSBE also established guidelines to ensure the safety of in-person voting. The following requirements were implemented by all county boards of election: (1) enforcement of social distancing; (2) distribution of hand sanitizer and masks for voters and election workers; (3) distribution of gloves and face shields for election workers; (4) construction of barriers at check-in tables; (5) distribution of single-use pens, cotton swabs, or disposable styluses for paper and digital ballots; (6) frequent cleaning of surfaces and equipment; and (7) recruitment of poll workers who were less vulnerable to COVID-19.⁷³ However, voters were not required to wear masks in the polling place.⁷⁴

All told, it is fair to conclude that North Carolina fell in the middle of the pack when it came to adjusting its electoral processes in response to COVID-19.

B. *How North Carolina's Changes Compared to Other States*

Some uniformity and predictability to voting changes across the country existed prior to COVID-19 but were largely decided and implemented on a state-by-state basis, as much of election administration is.⁷⁵ For example, thirty states and the District of Columbia made changes to increase absentee ballot

70. See *supra* notes 45–47 and accompanying text.

71. See *supra* notes 48–49 and accompanying text.

72. See N.C. GEN. STAT. §§ 163-230.1(a), .2(a) (LEXIS through Sess. Laws 2021-106 of the 2021 Reg. Sess. of the Gen. Assemb.).

73. *Voting and Coronavirus*, N.C. ST. BD. ELECTIONS, <https://www.ncsbe.gov/about-elections/voting-coronavirus/10-facts-about-voting-north-carolina-during-covid-19-pandemic> [<https://perma.cc/3SKR-M83F>].

74. Adam Wagner, *N.C. Elections Officials Want Voters To Wear Masks. Here's Why They're Not Required.*, NEWS & RECORD (Oct. 13, 2020), https://greensboro.com/news/state/n-c-elections-officials-want-voters-to-wear-masks-heres-why-theyre-not-required/article_ef6f53e4-0d73-11eb-9442-0749095b418b.html [<https://perma.cc/J5B7-H3QY>].

75. See *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [<https://perma.cc/2WEK-QXXM>] (“[N]o state administers elections in exactly the same way as another state”); see also U.S. CONST. art. I, § 4, cl. 1 (declaring that, to a large extent, the implementation of election laws is to be administered on a state-by-state basis).

accessibility.⁷⁶ How states improved access, however, varied widely.⁷⁷ Changes ranged from modest to radical. Some states removed or relaxed strict absentee

76. Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting amid the Coronavirus Pandemic*, ABC NEWS (Sept. 22, 2020, 6:57 PM), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> [<https://perma.cc/DV3A-RZ3F>]. These states include Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, West Virginia, and Wisconsin, as well as Washington, D.C. See ALA. ADMIN. CODE § 820-2-3-.06-.11 (Westlaw through July 28, 2021); Press Release, Asa Hutchinson, Governor, State of Arkansas, Governor Hutchinson's Weekly Address: Voting in the Age of COVID-19 (July 10, 2020) [hereinafter Arkansas Press Release], <https://governor.arkansas.gov/news-media/press-releases/governor-hutchinsons-weekly-address-voting-in-the-age-of-covid-19> [<https://perma.cc/6WNU-4VFK>]; Assemb. B. 860, 2019–2020 Leg., Reg. Sess. (Cal. 2020); Act of July 31, 2020, ch. 3, 2020 Conn. Acts 198 (Spec. Sess.) (codified as CONN. GEN. STAT. § 9); Act of July 1, 2020, ch. 245, 82 Del. Laws 245(1) (codified in scattered sections of DEL. CODE ANN. tit. 15); *General Election 2020*, D.C. BD. ELECTIONS, <https://dcoeb.org/Request-Your-Ballot-by-Mail> [<https://perma.cc/D6A7-A9VE>]; Press Release, Brad Raffensperger, Sec'y of State, State of Georgia, Raffensperger Takes Unprecedented Steps To Protect Safety and Voter Integrity in Georgia (2020), https://sos.ga.gov/index.php/elections/raffensperger_takes_unprecedented_steps_to_protect_safety_and_voter_integrity_in_georgia [<https://perma.cc/AWW9-JENB>]; Act of June 16, 2020, Pub. L. No. 101-0642, 2020 Ill. Laws 17 (codified as amended in scattered sections of Ill. Laws ch. 5 and ch. 10); Stephen Gruber-Miller, *Iowa Secretary of State Extends Absentee Voting Period for June Primary Due to Coronavirus*, DES MOINES REG. (Mar. 23, 2020, 6:21 PM), <https://www.desmoinesregister.com/story/news/politics/2020/03/23/iowa-secretary-state-extends-absentee-voting-period-june-primary-coronavirus-covid-19/2876215001/> [<https://perma.cc/N2UC-CNKK>]; Ky. Exec. Order No. 2020-688 (Aug. 14, 2020), <https://www.sos.ky.gov/elections/Documents/2020GeneralElection/EO-GeneralElection.pdf> [<https://perma.cc/PC9B-K9NT>]; Press Release, Office of Governor Larry Hogan, State of Maryland, Governor Hogan Directs State Board of Elections To Conduct November General Election with Enhanced Voting Options (July 8, 2020), <https://governor.maryland.gov/2020/07/08/governor-hogan-directs-state-board-of-elections-to-conduct-november-general-election-with-enhanced-voting-options> [<https://perma.cc/RZ6B-3RER>]; *Important Election Updates*, WILLIAM FRANCIS GALVIN SEC'Y COMMONWEALTH MASS., <https://www.sec.state.ma.us/ele/covid-19/covid-19.htm> [<https://perma.cc/63BS-AGXZ>] (Sept. 23, 2020) [hereinafter Massachusetts, *Important Election Updates*]; Press Release, State of Michigan, MDHHS Provides Recommendations for Michiganders To Vote Safely During COVID-19 (Oct. 27, 2020) [hereinafter Michigan Press Release], <https://www.michigan.gov/coronavirus/0,9753,7-406-98158-543506--,00.html> [<https://perma.cc/DL4D-4CS4>]; *Minnesota Elections in 2020*, OFF. MINN. SEC'Y ST. STEVE SIMON, <https://www.sos.state.mn.us/elections-voting/how-elections-work/minnesota-elections-in-2020/> [<https://perma.cc/48HF-85HN>]; Act of June 4, 2020, 2020 Mo. Laws 818 (codified in scattered sections of MO. REV. STAT.); *COVID-19 Voting Updates*, VOTING IN MONT., <https://votinginmontana.com/covid-19-voting-updates> [<https://perma.cc/Y4KV-AKQU>] (Sept. 23, 2020); Martha Stoddard, *Nebraska Sending Mail-In Ballot Applications to All Registered Voters*, OMAHA WORLD HERALD (Aug. 19, 2020), https://omaha.com/news/state-and-regional/govt-and-politics/nebraska-sending-mail-in-ballot-applications-to-all-registered-voters/article_98d340c7-b4d1-57a9-8f4e-7098ed2397bd.html [<https://perma.cc/K85H-M8MR>]; Assemb. B. 4, 2020 Gen. Assemb., 32d Spec. Sess. (Nev. 2020); Act of July 17, 2020, ch. 14, 2020 N.H. Laws 50 (codified in scattered sections of N.H. STAT. ANN. tit. LXIII); N.J. Exec. Order No. 177 (2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-177.pdf> [<https://perma.cc/Z2HX-HA49>]; S.B. 8015, 2020 State Assemb., 243d Leg. Sess. (N.Y. 2020); *Voting and Coronavirus*, *supra* note 73 (explaining North Carolina's rule changes); Ryan Haidet, *Ohio Absentee Ballot Request Forms Being Mailed to Registered Voters this Week: Here's What You Need To Do*, WKYC STUDIOS (Sept. 2, 2020, 8:55 AM),

excuse requirements. Others used ballot drop boxes or offered prepaid postage. Some states even sent absentee ballot applications (or, in some cases, the ballots themselves) to all active registered voters.⁷⁸ North Carolina was among the thirty states to make changes,⁷⁹ though it implemented more modest reforms, like offering no-excuse absentee voting and slightly adjusting its witness requirements.⁸⁰ Further, of the sixteen states that have strict excuse requirements for absentee ballots, eleven relaxed their requirements by including COVID-19 concerns as an excuse or eliminated the excuse requirements altogether.⁸¹ Twelve states used absentee ballot drop boxes.⁸²

<https://www.wkyc.com/article/news/politics/elections/ohio-absentee-ballot-request-forms-mailed/95-1c8e7354-f60b-4b25-801b-573afeb04cdb> [<https://perma.cc/C5HS-HWMC>]; *Covid-19 and Oklahoma Elections*, OKLA. ST. ELECTION BD., <https://oklahoma.gov/elections/voter-info/covid-19-and-2020-elections.html> [<https://perma.cc/WV3F-9XUU>] (Aug. 11, 2021); *Voting by Mail-In or Absentee Ballots Is Safe, Secure, and Easy*, VOTE PA, <https://www.vote.pa.gov/Pages/default.aspx> [<https://perma.cc/ZW7D-SUU5>]; Press Release, Rhode Island Office of the Secretary of State, Secretary Gorbea: All Active RI Voters To Receive Mail Ballot Applications for November Election (Sept. 11, 2020), <https://www.ri.gov/press/view/39308> [<https://perma.cc/N4JA-RDLU>]; *COVID-19: 2020 General Election*, S.C. ELECTION COMM'N, https://www.scvotes.gov/sites/default/files/COVID_2020GE.pdf [<https://perma.cc/YLE5-KEMR>] [hereinafter South Carolina, *COVID-19*]; *Concerned About COVID-19? A Guide on How To Vote by Mail in Texas*, FOX 7 AUSTIN (Sept. 18, 2020), <https://www.fox7austin.com/news/concerned-about-covid-19-a-guide-on-how-to-vote-by-mail-in-texas> [<https://perma.cc/KSJ9-AQS9>]; *Early & Absentee Voting*, VT. SEC'Y ST., <https://sos.vermont.gov/elections/voters/early-absentee-voting/> [<https://perma.cc/R4ME-2QJT>]; *Absentee Voting Information*, SEC'Y ST. MAC WARNER, <https://sos.wv.gov/elections/Pages/AbsenteeVotingInformation.aspx> [<https://perma.cc/PY6Y-RD7J>] [hereinafter West Virginia, *Absentee Voting Information*]; *COVID-19 Information for Voters*, WIS. ELECTIONS COMM'N, <https://elections.wi.gov/covid-19> [<https://perma.cc/J74Z-QRF2>] [hereinafter Wisconsin, *COVID-19 Information*].

77. See sources cited *supra* note 76.

78. Scanlan, *supra* note 76.

79. *Id.*; see *Voting and Coronavirus*, *supra* note 73.

80. See Rabinowitz & Mayes, *supra* note 30; see also Rob Schofield, *The Pandemic Election: NC Makes Voting Slightly Easier, but More Action Is Needed*, NC POL'Y WATCH (July 21, 2020), <https://www.ncpolicywatch.com/2020/07/21/the-pandemic-election-nc-makes-voting-slightly-easier-but-more-action-is-needed/> [<https://perma.cc/2ETE-XRSJ>] (“As voting rights advocates have argued persuasively, other obvious steps to lower barriers to voting should have . . . been taken . . .”).

81. Scanlan, *supra* note 76. These states include Alabama, Arkansas, Connecticut, Delaware, Kentucky, Massachusetts, Missouri, New Hampshire, New York, South Carolina, and West Virginia. See ALA. ADMIN. CODE § 820-2-3-.06-.11 (Westlaw through May 28, 2021); Arkansas Press Release, *supra* note 76; Act of July 31, 2020, ch. 3, 2020 Conn. Acts 198; Act of July 1, 2020, ch. 245, 82 Del. Laws 245(1); Ky. Exec. Order No. 2020-688; Massachusetts, *Important Election Updates*, *supra* note 76; Act of June 4, 2020, 2020 Mo. Laws 818; Act of July 17, 2020, ch. 14, 2020 N.H. Laws; S. 8015-D, 2020 State Assemb., 243d Leg. Sess. (N.Y. 2020); South Carolina, *COVID-19*, *supra* note 76; West Virginia, *Absentee Voting Information*, *supra* note 76.

82. Scanlan, *supra* note 76. These states include Arizona, California, Colorado, Hawaii, Montana, New Mexico, Oregon, and Washington. See ARIZ. REV. STAT. ANN. §§ 16-548, -550, -579, -584 (Westlaw through 1st Spec. Sess. of the 55th Leg. and legislation through July 10, 2021 of the 1st Reg. Sess. of the 55th Leg.), CAL. ELEC. CODE § 3025 (2021); CAL. CODE REGS. tit. 2, §§ 20132–20137 (Westlaw through Nov. 12, 2021 Register 2021, No. 46); COLO. REV. STAT. § 1-7.5-107(4)(b)(I)(A) (LEXIS through ch. 282 of 2021 Reg. Sess.); HAW. REV. STAT. § 11-1 (2020); MONT. CODE ANN. § 13-19-307(1)(a) (2019), N.M. STAT. ANN. § 1-6-9 (Westlaw through the end of the 1st Reg. Sess. and 1st Spec. Sess., 55th Leg. 2021); OR. REV. STAT. § 254.470(6)(b) (2019); WASH. REV. CODE

Twenty-two states paid for absentee ballot postage.⁸³ Ten states and the District of Columbia mailed ballots directly to all registered or active voters,⁸⁴ and two

§ 29A.40.160(4) (2021). In addition, Georgia, Maryland, and Pennsylvania used ballot drop boxes this cycle. *See* Press Release, Brad Raffensperger, Sec'y of State, State of Georgia, Secretary of State Raffensperger Reopens Grants for Absentee Ballot Drop Boxes (2020), https://sos.ga.gov/index.php/elections/secretary_of_state_raffensperger_reopens_grants_for_absentee_ballot_drop_boxes [https://perma.cc/9K8H-PRW2]; Press Release, Maryland State Board of Elections, Maryland State Board of Elections Posts Ballot Drop Box Locations (Sept. 18, 2020), https://elections.maryland.gov/press_room/documents/Ballot%20Drop%20Box%20Locations.pdf [https://perma.cc/9X6H-TGFS]; Tucker Higgins, *Pennsylvania Supreme Court Sides with Democrats on Absentee Ballot Deadline and Drop Boxes*, CNBC (Sept. 17, 2020, 4:44 PM), <https://www.cnn.com/2020/09/17/2020-election-pennsylvania-supreme-court-hands-democrats-a-win.html> [https://perma.cc/8AE2-8AJ5].

83. Scanlan, *supra* note 76. This includes Arizona, California, Delaware, Hawaii, Idaho, Indiana, Iowa, Maryland, Minnesota, Missouri, New Mexico, Oregon, Rhode Island, Washington, West Virginia, and Wisconsin. *See* ARIZ. REV. STAT. ANN. § 16-542(C) (Westlaw through 1st Spec. Sess. of the 55th Leg. and legislation through July 10, 2021 of 1st Reg. Sess. of the 55th Leg.); CAL. ELEC. CODE § 3010(a)(2) (2019); DEL. CODE ANN. tit. 15, § 5504(c) (LEXIS through 83 Del. Laws, c. 266); HAW. REV. STAT. § 11-182 (2020); IDAHO CODE § 34-308(2) (LEXIS through all acts passed by the Leg. and signed by the governor from the 2021 Reg. Sess.); IND. CODE § 3-11-4-20 (2019); IOWA CODE § 53.8(1)(a)(1) (2021); MD. CODE ANN. ELEC. LAW § 9-310(a)(3)(iv) (Westlaw through 2021 Reg. Sess. of the Gen. Assemb.); MINN. STAT. § 203B.07(1) (Westlaw through 2021 Reg. Sess. and 1st Spec. Sess.); MO. ANN. STAT. § 115.285 (Westlaw through West ID No. 45 of the 2021 1st Reg. and 1st Extraordinary Sess. of the 101st Gen. Assemb.); NEV. REV. STAT. § 293.323(3) (2020); N.M. STAT. ANN. § 1-6-8(A)(2) (Westlaw through the end of the 1st Reg. Sess. and 1st Spec. Sess., 55th Leg. (2021)); OR. REV. STAT. § 254.470(6)(c) (2019); 17 R.I. GEN. LAWS ANN. § 17-20-10(d)(1) (Westlaw through ch. 424 of the 2021 Reg. Sess.); WASH. REV. CODE § 29A.40.091(4) (2021); W. VA. CODE § 3-3-5(e)(1)(C) (2021); WIS. STAT. § 6.87(3)(a) (2020). In addition, Massachusetts, Montana, Pennsylvania, and South Carolina paid for postage. *See* Massachusetts, *Important Election Updates*, *supra* note 76; Rob Rogers, *Montana's Primary Election Moves to Mail Ballot*, BILLINGS GAZETTE (Apr. 7, 2020), https://billingsgazette.com/news/state-and-regional/govt-and-politics/montanas-primary-election-moves-to-mail-ballot/article_cfb42771-38b1-5f21-aba4-c2526a644dd9.html [https://perma.cc/3767-T7QQ (dark archive)]; J. Edward Moreno, *Pennsylvania To Use Coronavirus Aid for Prepaid Postage on Ballots in November Election*, HILL (July 31, 2020, 3:35 PM), <https://thehill.com/homenews/state-watch/510027-pennsylvania-to-use-coronavirus-aid-to-pay-for-postage-on-ballots-in> [https://perma.cc/Y3MJ-D2E8]; *SC Will Pay Postage for All Mail-In Ballots in November*, AP NEWS (July 9, 2020), <https://apnews.com/article/1a7023193ba835d4fa3770b5ea1c41c2> [https://perma.cc/3K25-H85F].

84. Scanlan, *supra* note 76. This includes Washington, D.C., and the states of California, Colorado, Hawaii, Nevada, New Jersey, Oregon, Utah, Vermont, and Washington. *See* Press Release, Office of Governor Gavin Newsom, Governor Newsom Issues Executive Order To Protect Public Health by Mailing Every Registered Voter a Ballot Ahead of the November General Election (May 8, 2020), <https://www.gov.ca.gov/2020/05/08/governor-newsom-issues-executive-order-to-protect-public-health-by-mailing-every-registered-voter-a-ballot-ahead-of-the-november-general-election/> [https://perma.cc/KHN3-568M]; Megan Verlee & Francie Swidler, *Everything You Need To Know About Voting, and Mail-In Voting, in Colorado*, COLO. PUB. RADIO (Sept. 17, 2020), <https://www.cpr.org/2020/09/17/how-to-vote-mail-in-voting-colorado/> [https://perma.cc/9Z4K-ZVTD]; Martin Austermulhe, *D.C. Plans To Mail Every Voter a Ballot for November's Presidential Election*, WAMU 88.5 (June 17, 2020, 4:14 PM), <https://dcist.com/story/20/06/17/dc-plans-mail-ballot-2020-election-day-president/> [https://perma.cc/42UC-TFT6]; *Hawaii Votes by Mail Resources*, ST. HAWAII, <https://elections.hawaii.gov/hawaii-votes-by-mail-resources/> [https://perma.cc/V3DT-YK7Z]; Sam Metz, *Nevada Passes Bill To Mail All Voters Ballots Amid Pandemic*, AP NEWS (Aug. 2, 2020), <https://apnews.com/article/bills->

states permitted counties to do this.⁸⁵ Eight states sent absentee ballot applications to all registered or active voters.⁸⁶ Three states eliminated their witness signature requirement.⁸⁷ And twenty-four states and the District of

elections-nevada-virus-outbreak-donald-trump-920b6ae449382301fdacea3014ff80d [https://perma.cc/5NYF-NSGW]; Brent Johnson, 'Everybody Gets a Ballot.' *Murphy Says N.J. To Have Mostly Mail-In Voting in November Election Because of COVID-19.*, NJ.COM, https://www.nj.com/coronavirus/2020/08/everybody-gets-a-ballot-murphy-says-nj-to-have-mostly-mail-in-voting-in-november-election-because-of-covid-19.html [https://perma.cc/HB4J-FR3M] (Sept. 21, 2020, 10:27 AM); *Voting in Oregon: Learn About Vote by Mail*, OR. SEC'Y ST. SHEMIA FAGAN, https://sos.oregon.gov/voting/Pages/voteinor.aspx [https://perma.cc/U27U-HYXK]; KSL News Staff, *How Does Voting by Mail Work?*, KSL NEWS RADIO (Sept. 29, 2020, 9:21 AM), https://kslnnewsradio.com/1934194/how-does-voting-by-mail-work/ [https://perma.cc/2AGX-TZ5H] (explaining voting by mail in Utah); *Vermont To Send Ballots to Voters To Promote Mail-In Voting for November Election*, BURLINGTON FREE PRESS (July 20, 2020, 2:45 PM), https://www.burlingtonfreepress.com/story/news/politics/elections/2020/07/20/vote-by-mail-vermont-will-send-ballots-voters/5473015002/ [https://perma.cc/5C5Q-K9LQ]; Gilad Edelman, *Despite Coronavirus, Washington Isn't Worried About Its Primary*, WIRED (Mar. 10, 2020, 8:00 AM), https://www.wired.com/story/coronavirus-washington-state-primary-2020/ [https://perma.cc/486Q-AFWK].

85. Scanlan, *supra* note 76. These states include Montana and Nebraska. See Gwen Florio, *Most Montana Counties Opt for Mail Ballot*, MISSOULIAN (Aug. 31, 2020), https://missoulian.com/news/state-and-regional/govt-and-politics/most-montana-counties-opt-for-mail-ballot/article_9a072e6e-a669-54cc-9464-9d963261d7bb.html [https://perma.cc/Y7EP-BKLD (staff-uploaded, dark archive)]; *Nebraska To Send Early Ballot Application to All Voters*, AP NEWS (Aug. 19, 2020), https://apnews.com/article/virus-outbreak-election-2020-ne-state-wire-3bb28824731e79a5090311f9f6f54cb1 [http://perma.cc/MV4B-V5XG (staff-uploaded archive)].

86. Scanlan, *supra* note 76. These states include Delaware, Iowa, Ohio, Maryland, Massachusetts, Michigan, Rhode Island, and Wisconsin. See Sophia Schmidt, *Vote-by-Mail Ballot Applications Out to Voters*, DEL. PUB. MEDIA (Aug. 4, 2020, 3:11 PM), https://www.delawarepublic.org/post/vote-mail-ballot-applications-out-voters [https://perma.cc/5WGH-YTRT]; Stephen Gruber-Miller, *Iowa Secretary of State Will Mail Ballot Request Forms to All Voters Before Fall Election*, DES MOINES REG. (July 17, 2020, 7:06 PM), https://www.desmoinesregister.com/story/news/politics/2020/07/17/iowa-secretary-state-paul-pate-mail-absentee-ballot-request-form-registered-voters-covid-19-pandemic/5458727002/ [https://perma.cc/TRQ3-UP4F (dark archive)]; Sharon Bernstein, *Ohio Set To Send All Voters Absentee Ballot Applications Before Presidential Election*, REUTERS (June 15, 2020, 8:25 PM), https://www.reuters.com/article/us-usa-election-ohio/ohio-set-to-send-all-voters-absentee-ballot-applications-before-presidential-election-idUSKBN23N00Q [https://perma.cc/DJ4R-9NKX]; Emily Opilo, *Your Ballot Application Will Arrive Any Day Now, Maryland. Then What?*, BALT. SUN (Aug. 31, 2020, 3:49 PM), https://www.baltimoresun.com/politics/elections/bs-md-pol-ballot-application-20200831-75v4kvnrobhw7jdf6dtr535gae-story.html [https://perma.cc/GQW3-4J7S]; Massachusetts, *Important Election Updates*, *supra* note 76; Gus Burns, *Michigan Sending Absentee Ballot Applications to All May 5 Election Voters Because of Coronavirus Outbreak*, MLIVE, https://www.mlive.com/public-interest/2020/03/michigan-sending-absentee-ballots-to-all-voters-for-may-5-election-because-of-coronavirus-outbreak.html [https://perma.cc/MY36-NU48] (Mar. 24, 2020, 12:54 PM); Shaun Towne, *Mail Ballot Applications Going Out to All Registered RI, Mass. Voters*, WPRI.COM, https://www.wpri.com/news/elections/mail-ballot-applications-going-out-to-all-registered-ri-voters/ [https://perma.cc/3ZJ5-TYST] (Sept. 11, 2020, 6:23 PM); Simon Lewis, *Wisconsin To Send Mail-In Ballot Applications to 2.7 Million Voters*, REUTERS (May 27, 2020, 8:13 PM), https://www.reuters.com/article/us-usa-election-w675exas675sinwisconsin-to-send-mail-in-ballot-applications-to-2-7-million-voters-idUSKBN23400H [https://perma.cc/DT6C-4TWM].

87. Scanlan, *supra* note 76. These states include Minnesota, Rhode Island, and South Carolina. See Steve Karnowski, *Minnesota Waives Absentee Ballot Witness Signature Mandate*, AP NEWS (June 17, 2020), https://apnews.com/article/f793027ebeafae8e524e6d6cc3eddf47 [https://perma.cc/ZJ3T-M3B

Columbia extended their absentee ballot deadline to require only that ballots be postmarked either before or on Election Day.⁸⁸

However, of all the states that made voting more accessible, there were still many others that failed to ease their requirements, like Texas, which refused to expand absentee voting eligibility⁸⁹ and only provided one ballot drop box

T]; Katherine Gregg, *R.I. Board, Fearing Deluge of 400,000 Mail Ballots, Suspends Some Requirements for November Election*, PROVIDENCE J. (Aug. 28, 2020, 1:57 PM), <https://www.providencejournal.com/story/news/coronavirus/2020/08/28/ri-board-fearing-deluge-of-400000-mail-ballots-suspends-some-requirements-for-november-election/42445665/> [https://perma.cc/3E9T-Y8QH]; Zak Koeske, *SC Counties Ordered To Stop Rejecting Absentee Ballots over Mismatched Signatures*, STATE, <https://www.thestate.com/news/politics-government/election/article246741881.html> [https://perma.cc/SJ58-T46Q (dark archive)] (Oct. 27, 2020, 3:57 PM).

88. Scanlan, *supra* note 76. In addition to Washington D.C., the states include Alaska, California, Illinois, Kansas, Maryland, Mississippi, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Texas, Utah, Virginia, Washington, and West Virginia. See ALASKA STAT. § 15.20.081(e) (LEXIS through 2021 legislation); CAL. ELEC. CODE § 3020(b)(1) (Westlaw through 2021 Reg. Sess.); D.C. CODE § 1-1001.05(a)(10A) (LEXIS through 2021 legislation); 10 ILL. COMP. STAT. ANN. 5/19-8(c); KAN. STAT. ANN. § 25-1132(b) (Westlaw through 2021 Reg. Sess. of the Kan. Leg.); MD. CODE ANN., ELEC. LAW § 9-505(a)(2)(ii) (LEXIS through 2021 Reg. Sess. of the Gen. Assemb.); MISS. CODE ANN. § 23-15-637(1)(a) (LEXIS through the 2021 Reg. Sess.); NEV. REV. STAT. § 293.317(1)(b)(1) (2020); N.J. STAT. ANN. § 19:63-22 (Westlaw through 2021 legislation); N.Y. ELEC. LAW § 8-412(1) (McKinney 2021); N.C. GEN. STAT. § 163-231(b)(2)(b) (LEXIS through Sess. Laws 2021-106 of the 2021 Reg. Sess.); N.D. CENT. CODE § 16.1-07-09 (LEXIS through the end of the 2021 67th Legis. Assemb.) (requiring that an absentee ballot postmarked *before* election day be counted); OHIO REV. CODE ANN. § 3509.05(B)(1) (LEXIS through File 47 (except File 30 which only includes the immediately effective Revised Code sections) of the 134th (2021–2022) Gen. Assemb.) (same); TEX. ELEC. CODE ANN. § 86.007(d)(2) (Westlaw through 2021 Reg. Sess.) (same); UTAH CODE ANN. § 20A-3a-204(2)(a)(i) (LEXIS through 2021 1st Spec. Sess.) (same); VA. CODE ANN. § 24.2-709(B) (LEXIS through the 2021 Reg. Sess. and Spec. Sess. I of the Gen. Assemb.); WASH. REV. CODE § 29A.40.091(4) (2021); W. VA. CODE § 3-3-5(g)(2) (2021). In addition, Kentucky, Massachusetts, Michigan, New Jersey, Pennsylvania, and Wisconsin extended their deadlines. See Ky. Exec. Order No. 2020-688 (Aug. 14, 2020), <https://www.sos.ky.gov/elections/Documents/2020GeneralElection/EO-GeneralElection.pdf> [https://perma.cc/PC9B-K9NT]; Massachusetts, *Important Election Updates*, *supra* note 76; Michigan Press Release, *supra* note 76; N.J. Exec. Order No. 177 (2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-177.pdf> [https://perma.cc/Z2HX-HA49]; Pa. Democratic Party v. Boockvar, 238 A.3d 345, 371, 386 (Pa. 2020), *cert. denied sub nom.* Republican Party of Pa. v. Degraffenreid, 141 S. Ct. 732, 732 (2020) (mem.); Wisconsin, *COVID-19 Information*, *supra* note 76. For just over a month, Georgia also extended its deadline after a district court order mandated that it do so. New Ga. Project v. Raffensperger, 484 F. Supp. 3d 1265, 1307 (N.D. Ga. 2020). However, the Eleventh Circuit eventually reversed after it granted the appellants' motion to stay the injunction pending appeal. New Ga. Project v. Raffensperger, 976 F.3d 1278, 1284 (11th Cir. 2020). This same string of events occurred in Minnesota and Wisconsin. See Carson v. Simon, 494 F. Supp. 3d 589, 592 (D. Minn.), *rev'd*, 978 F.3d 1051, 1062–63 (8th Cir. 2020) (per curiam); Democratic Nat'l Comm. v. Bostelmann, 488 F. Supp. 3d 776, 783–84 (W.D. Wis.), *application to vacate stay denied sub nom.* Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.).

89. See *Voting by Mail in Texas? What You Need To Know About Mail-In Ballots*, AUSTIN AM.-STATESMAN (Oct. 7, 2020, 11:11 AM), <https://www.statesman.com/story/news/politics/elections/state/2020/10/07/voting-by-mail-in-texas-what-you-need-to-know-about-mail-in-ballots/42732259/> [https://perma.cc/2VCN-L92G].

per county.⁹⁰ Even if a state did relax its voting laws, their actions were often challenged in court—sometimes successfully,⁹¹ sometimes not.⁹² Regardless of the outcome, litigation created vast confusion among voters, who were unsure of what was and was not permitted.⁹³ And, while North Carolina implemented a few reforms, it did not effect as much change as many other states.⁹⁴ While this may not be evident when viewing the 2020 voter turnout data as a whole, it becomes clear when the numbers are broken down by demographic group.⁹⁵ For example, Black voter turnout between eighteen- and twenty-five-year-olds decreased by twelve percent compared to 2012, and Black turnout between twenty-six- and forty-year-old voters decreased by eight percent during this same period.⁹⁶ These numbers are stark when considering that turnout among these age groups across all races *increased* by five percent.⁹⁷ North Carolina clearly could, and should, have done more to lift voting barriers.

90. Proclamation by the Governor of the State of Texas 3 (Oct. 1, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_Nov_3_general_election_IMAGE_10-01-2020.pdf [<https://perma.cc/77FJ-EM88>].

91. See, e.g., *Democratic Nat'l Comm.*, 141 S. Ct. at 28 (denying application to vacate stay, thereby preventing the absentee ballot deadline extension from going into effect); *Carson*, 978 F.3d at 1062–63 (preventing the absentee ballot deadline extension from going into effect); *New Ga. Project*, 976 F.3d at 1284 (granting motion to stay injunction pending appeal, thereby preventing the absentee ballot deadline extension from going into effect).

92. See, e.g., *Republican Party of Pa.*, 141 S. Ct. at 732 (denying certiorari, thereby allowing the absentee ballot deadline extension to remain in effect); *Moore v. Circosta*, 494 F. Supp. 3d 289, 331 (M.D.N.C.), *injunctive relief denied*, 141 S. Ct. 46, 46 (2020) (mem.) (denying application for injunctive relief, thereby allowing the absentee ballot deadline extension to remain in effect).

93. See Yelena Dzhanova, *Election Officials Fear Voting Changes Will Confuse Voters in November*, CNBC (July 11, 2020, 9:15 AM), <https://www.cnbc.com/2020/07/11/election-officials-fear-changes-could-confuse-voters-in-november.html> [<https://perma.cc/LD94-6JMD>]; see also David Larsen, *NC's 2020 Election Defined by Legal Battles over Absentee Ballot Rules*, N. ST. J. (Nov. 3, 2020), <https://nsjonline.com/article/2020/11/ncs-2020-election-defined-by-legal-battles-over-absentee-ballot-rules/> [<https://perma.cc/7GFB-Z57Z>] (“[T]he battle over the rules governing the 2020 election was decided less than a week before Election Day . . .”).

94. For example, North Carolina voting rights advocates urged the state to implement more expansive reforms—many of which other states had successfully executed—including:

eliminating the requirement that absentee voters have their ballot return envelope signed by a witness . . . ; generally easing voter assistance rules for absentee ballots; dramatically expanding voter registration opportunities . . . ; allowing county boards much more flexibility in setting early-voting hours; guaranteeing access to personal protective equipment and “contactless” ballot drop boxes for voters; [and] including pre-paid postage for ballots to be returned by mail.

Schofield, *supra* note 80.

95. See Yanqi Xu, *Monday Numbers: A Closer Look at Some Surprising Facts About 2020 Voter Turnout*, NC POL'Y WATCH (Feb. 1, 2021), <http://www.ncpolicywatch.com/2021/02/01/monday-numbers-a-closer-look-at-some-surprising-facts-about-2020-voter-turnout/> [<https://perma.cc/5HHH-UGFN>].

96. *Id.*

97. *Id.*

II. VOTING RIGHTS CASES IN NORTH CAROLINA'S STATE AND FEDERAL COURTS DURING COVID-19

Over the past decade, North Carolina's courts have heard decisive voting rights cases. In 2016, the Fourth Circuit struck down the General Assembly's "monster" voting rights bill,⁹⁸ including its voter ID law, as intentionally racially discriminatory—the decision that provided the "surgical precision" quote.⁹⁹ That same year, the U.S. District Court for the Middle District of North Carolina invalidated the General Assembly's redistricting plan as an unconstitutional racial gerrymander.¹⁰⁰ However, North Carolina courts, both federal and state, have never been as consistently flooded with voting rights cases as they were in the months leading up to November 3, 2020.¹⁰¹ A few of the cases, in particular, provide insight into how the courts balanced voting rights and COVID-19 concerns,¹⁰² including *Moore v. Circosta*,¹⁰³ *Democracy North Carolina v. North Carolina State Board of Elections*,¹⁰⁴ *Taliaferro v. North Carolina State Board of Elections*,¹⁰⁵ and *North Carolina Alliance for Retired Americans v. North Carolina*.¹⁰⁶ Before these cases are analyzed, though, it is helpful to consider the requirements for bringing a successful challenge to an election law.

A. Constitutional and Statutory Framework for Voting Rights Cases

Voting rights challenges are most commonly brought under the Equal Protection Clause of the Fourteenth Amendment and the VRA.¹⁰⁷ In constitutional cases, the Equal Protection Clause can be invoked to assert vote

98. Wan, *supra* note 18.

99. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 214–15 (4th Cir. 2016), *cert. denied sub nom.* North Carolina v. N.C. State Conf. of NAACP, 137 S. Ct. 1399 (2017).

100. Covington v. North Carolina, 316 F.R.D. 117, 177 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 2211 (2017) (mem.).

101. See *Voting Rights Litigation Tracker 2020*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/court-cases/voting-rights-litigation-tracker-2020#North%20Carolina> [<https://perma.cc/VA94-M5SH>] (July 8, 2021).

102. North Carolina courts heard more voting rights cases than just these few mentioned, but the others were either consolidated or did not proceed far enough in the litigation process to be relevant.

103. 494 F. Supp. 3d 289 (M.D.N.C.), *injunctive relief denied*, 141 S. Ct. 46 (2020) (mem.).

104. 476 F. Supp. 3d 158 (M.D.N.C.), *reconsideration denied*, No. 1:20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 30, 2020).

105. 489 F. Supp. 3d 433 (E.D.N.C. 2020).

106. No. 20-CVS-8881, 2020 WL 10758664 (N.C. Super. Ct.), *motion for stay denied*, 848 S.E.2d 496 (N.C. 2020) (mem.).

107. See *Introduction to Federal Voting Rights Law*, U.S. DEP'T JUST., <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> [<https://perma.cc/5DXZ-969W>] (Aug. 18, 2018) (explaining that voting rights claims can be brought under the Equal Protection Clause of the Fourteenth Amendment); see also *Voting Section*, U.S. DEP'T JUST., <https://www.justice.gov/crt/voting-section> [<https://perma.cc/9CZ3-92D8>] (showing that most voting rights claims are brought under the VRA).

dilution¹⁰⁸ or arbitrary and disparate treatment.¹⁰⁹ A court must first consider whether the Equal Protection Clause's standing requirement is satisfied.¹¹⁰ This requirement will always be met when plaintiffs are "voters who allege facts showing disadvantage to themselves as individuals."¹¹¹ A court must then consider the plaintiff's likelihood of success on the merits¹¹² and the irreparable harm caused absent relief.¹¹³ Finally, a court must decide whether the plaintiff successfully demonstrated "that the balance of equities tips in his favor."¹¹⁴

The VRA provides the statutory framework for voting rights cases. In 1965, Congress finally acknowledged that the Reconstruction Amendments and Civil Rights Acts were inadequate to realize the full enfranchisement of Black voters.¹¹⁵ Therefore, the VRA was officially signed into law and has long been hailed as "a signature achievement of the civil rights movement."¹¹⁶ Sections 2 and 5 proved the most impactful and were most frequently used.¹¹⁷ Section 2 provides a broad prohibition against voting laws that "deny or abridge" the right to vote "on account of race or color" or language-minority status.¹¹⁸ Section 5, long considered "the heart of the Act,"¹¹⁹ took a more proactive approach, requiring "covered" jurisdictions with a history of racially discriminatory voting practices to "preclear" election changes in the U.S. District Court for the District of Columbia or with the Attorney General of the United States.¹²⁰ An election change could only go into effect after it was granted this "preclearance."¹²¹

However, in *Shelby County v. Holder*,¹²² the Court effectively rendered Section 5 of the VRA defunct¹²³ and plaintiffs were left with Section 2 as the

108. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

109. *Baker v. Carr*, 369 U.S. 186, 208 (1962).

110. *Id.* at 204.

111. *Id.* at 206.

112. *Moore v. Circosta*, 494 F. Supp. 3d 289, 314 (M.D.N.C. 2020).

113. *Id.* at 321.

114. *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

115. See Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 704–05 (2009).

116. Myrna Pérez & Tim Lau, *How To Restore and Strengthen the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Jan. 28, 2021), <https://www.brennancenter.org/our-work/research-reports/how-to-restore-and-strengthen-voting-rights-act> [<https://perma.cc/FN79-CQFA>].

117. See *Key Provisions of the Voting Rights Act of 1965*, LEAGUE WOMEN VOTERS, <https://www.yourvoteyourvoicemn.org/key-provisions-voting-rights-act-1965> [<https://perma.cc/VXE3-KHYI>].

118. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. §§ 10301(a), 10303(f)(1)).

119. Fuentes-Rohwer, *supra* note 115, at 705 (citation omitted).

120. Voting Rights Act § 5, 79 Stat. at 439 (codified at 52 U.S.C. § 10304(a)), *invalidated* by *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

121. *Shelby Cnty.*, 570 U.S. at 537.

122. 570 U.S. 529 (2013).

123. *Id.* at 557.

only viable means to challenge election laws.¹²⁴ Although Section 2 allows disparate impact liability for the challenged law for vote dilution claims,¹²⁵ the Supreme Court held this year that Section 2 requires a different standard for vote denial claims.¹²⁶ The Court has heard far more vote dilution cases,¹²⁷ thereby creating a jurisprudential framework on which potential litigants can rely. To successfully bring a vote dilution claim, plaintiffs must show that the law has a racially disparate impact and that the impact interacts with “social and historical conditions.”¹²⁸ When conducting this analysis, courts must consider the “Senate Factors,”¹²⁹ which were created to assist in the disparate impact analysis.¹³⁰

124. *Id.*; see also Voting Rights Act § 2, 79 Stat. at 437.

125. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2163 (2015) (“[P]laintiffs must establish . . . that the challenged election law, procedure, or practice has a racially disparate impact on the minority’s opportunity to participate in the political process (in vote denial cases) or to elect representatives of its choice (in vote dilution cases) . . .”). In 1982, the Court inserted a discriminatory purpose requirement into Section 2. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). However, that same year, in direct response to the Court’s decision, Congress amended Section 2 to explicitly reject a proof of racially discriminatory purpose requirement, thereby creating a “results test.” *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

126. Compare *Thornburg*, 478 U.S. at 44–45 (explaining relevant factors for a Section 2 vote dilution claim), with *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338–40 (2021) (explaining relevant considerations for a Section 2 vote denial claim). Section 2 of the VRA prohibits both vote denial and vote dilution. See 52 U.S.C. § 10301(a). Vote denial occurs when an eligible voter is denied access to the ballot box or prevented from having their vote properly counted. See *Brnovich*, 141 S. Ct. at 2333 (characterizing denial to vote as “time, place, or manner voting rules”). Vote dilution, on the other hand, refers to when the strength or effectiveness of a person’s vote is diminished or diluted. See *Thornburg*, 478 U.S. at 47 (“The essence of a [Section] 2 [vote dilution] claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”).

127. Brief for Nicholas Stephanopoulos as Amici Curiae Supporting Neither Party at 1, *Brnovich*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258).

128. Elmendorf & Spencer, *supra* note 125, at 2155.

129. Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 648–49 (2006) (“The Senate Report identified several factors, known as ‘the Senate Factors,’ for courts to use when assessing whether a particular practice or procedure results in prohibited discrimination in violation of Section 2.”).

130. See *Thornburg*, 478 U.S. at 44–45. The Senate Factors include the following: (1) “the history of official voting-related discrimination in the State or political subdivision;” (2) “the extent to which voting in the elections of the State or political subdivision is racially polarized;” (3) “the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;” (4) “the exclusion of members of the minority group from candidate slating processes;” (5) “the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;” (6) “the use of overt or subtle racial appeals in political campaigns;” and (7) “the extent to which members of the minority group have been

The Court heard its first vote denial case in 2021.¹³¹ In an opinion that was expected to make Section 2 claims more difficult to bring,¹³² the Court determined that the Senate Factors were more suited to vote dilution claims.¹³³ Instead, the Court outlined “guideposts” for future cases.¹³⁴ While it emphasized that it was not “announc[ing] a test to govern all VRA [Section] 2 claims,”¹³⁵ the Court asserted that five factors should be considered: (1) the size of the burden imposed by the law; (2) how the challenged law compares to voting practices in 1982; (3) the size of the disparate impact; (4) the state’s entire voting system; and (5) the state’s reason for passing the law.¹³⁶

One other case is also repeatedly called upon in voting rights cases brought in the context of approaching elections. In 2006, the Court created what became known as the *Purcell* principle,¹³⁷ which advises that jurisdictions should not change election rules and procedures when an election is “imminen[t].”¹³⁸ The Court explained that this principle would prevent “voter confusion” and disincentivizing voting.¹³⁹ The *Purcell* principle is often invoked when challenging a voting law prior to an election.¹⁴⁰

All of these constitutional and statutory schemes were called upon in the cases heard by North Carolina’s state and federal courts leading up to the 2020 presidential election—just with a COVID-19 angle. The following sections analyze those cases.

B. Moore v. Circosta

In *Moore v. Circosta*, the plaintiffs—Republican legislators, candidates, organizations, and individuals—challenged several absentee ballot changes issued by the NCSBE and General Assembly in anticipation of increased

elected to public office in the jurisdiction.” *Id.* at 44–45 (citing S. REP. No. 97-417, at 28–29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 206–07).

131. *Brnovich*, 141 S. Ct. at 2333.

132. See Amy Howe, *Court Upholds Arizona Voting Restrictions, Limits Cases Under Voting Rights Act*, SCOTUSBLOG (July 1, 2021, 12:56 PM), <https://www.scotusblog.com/2021/07/court-upholds-arizona-voting-restrictions-limits-cases-under-voting-rights-act/> [<https://perma.cc/N8CV-8E4G>].

133. *Brnovich*, 141 S. Ct. at 2340.

134. *Id.* at 2336.

135. *Id.*

136. See *id.* at 2338–40.

137. *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (mem.) (Kavanaugh, J., concurring) (“This Court has repeatedly emphasized that federal courts ordinarily should not alter state election laws in the period close to an election—a principle often referred to as the *Purcell* principle.” (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam))).

138. See *Purcell*, 549 U.S. at 5–6.

139. *Id.* at 4–5.

140. See *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/> [<https://perma.cc/8LTW-3JST>].

absentee ballot usage.¹⁴¹ Specifically, the plaintiffs claimed that the following changes unconstitutionally violated the Equal Protection Clause¹⁴² of the Fourteenth Amendment: (1) the ability to cure ballots without a witness signature; (2) the deadline extension for absentee ballots; (3) the anonymous delivery of ballots to unmanned drop boxes; and (4) the counting of ballots that were not postmarked.¹⁴³ Plaintiffs sought preliminary injunctions to halt the administration of these changes because they “guarantee that voters will be treated arbitrarily under the ever-changing voting regimes.”¹⁴⁴

In its ruling, the U.S. District Court for the Middle District of North Carolina emphasized “that an Equal Protection violation occurs where there is both arbitrary and disparate treatment” of voters.¹⁴⁵ With this legal framework in mind, the court individually addressed each election change and found that the plaintiffs succeeded on their first two claims.¹⁴⁶ First, the plaintiffs demonstrated a likelihood of success on the merits in terms of the ability to cure ballots without a witness signature.¹⁴⁷ The court believed the change was arbitrary because it altered a statutory requirement¹⁴⁸ and resulted in disparate treatment because there would be voters who cast their ballots without a witness regardless of whether they knew about the NCSBE’s change.¹⁴⁹ Second, the court found that the plaintiffs demonstrated a likelihood of success on the merits regarding the deadline extension for absentee ballots.¹⁵⁰ The court found that the change was arbitrary because it repudiated a statutorily mandated deadline¹⁵¹ and because the change disparately impacted voters who returned their ballots before the General Assembly’s deadline, while others returned their ballots several days after the same deadline.¹⁵²

However, the court found that the plaintiffs unsuccessfully pleaded their last two challenges.¹⁵³ First, the plaintiffs failed to establish a claim for arbitrary

141. See *Moore v. Circosta*, 494 F. Supp. 3d 289, 297, 315 (M.D.N.C.), *injunctive relief denied*, 141 S. Ct. 46 (2020) (mem.).

142. Plaintiffs also brought claims under the Electors Clause and the Elections Clause of the Constitution, *id.* at 322–23, but they are less relevant for this Recent Development’s purposes.

143. *Id.* at 314.

144. *Id.* In other words, “other voters who vote by mail will be subjected to a different standard than that to which Plaintiffs . . . were subjected when they cast their ballots by mail,” *id.*, because the NCSBE’s revised order was issued on September 22, well into the early voting period, *see id.* at 300. Plaintiffs also brought a vote dilution claim, but the court denied standing. *Id.* at 313.

145. *Id.* at 315 (citing *Bush v. Gore*, 531 U.S. 98, 105 (2000) (per curiam)).

146. See *id.* at 316–19.

147. See *id.* at 316–18.

148. *Id.* at 317.

149. *Id.* at 318.

150. *Id.*

151. *Id.* at 318–19.

152. *Id.*

153. See *id.* at 319–21.

and disparate treatment of voters based on the anonymous delivery of ballots to unmanned drop boxes.¹⁵⁴ The NCSBE's changes specifically prohibited absentee ballots from being left in unmanned drop boxes and further prohibited ballots from being deposited in drop boxes intended for other business purposes.¹⁵⁵ The court recognized other restrictions to absentee ballot collection as well, such as only allowing a voter's near relative or legal guardian to deliver or return an absentee ballot.¹⁵⁶ Second, the plaintiffs failed to establish a claim based on the counting of ballots that were not postmarked.¹⁵⁷ The court held that the NCSBE's policy was not arbitrary—even though it allowed the acceptance of postmarked ballots, ballots listed in BallotTrax, and ballots using other tracking services—because the General Assembly provided no definition of “postmark.”¹⁵⁸

The court also determined that the plaintiffs demonstrated a likelihood of irreparable injury on their first two claims,¹⁵⁹ as is required to grant a preliminary injunction.¹⁶⁰ However, setting the merits of the case aside, the court refused to tip the balance of equities in the plaintiffs' favor because of the *Purcell* principle.¹⁶¹ The court concluded that “in the middle of an election, less than a month before Election Day itself, this court cannot cause ‘judicially created confusion’ by changing election rules.”¹⁶² Therefore, the court refused to issue preliminary injunctions—even though the plaintiffs proved the first two claims—because the balance of equities weighed heavily against it.¹⁶³

The plaintiffs appealed the district court's ruling, but the Supreme Court denied their application for injunctive relief.¹⁶⁴ Chief Justice Roberts rejected the application but provided no supplemental opinion.¹⁶⁵ Justice Thomas acknowledged in his dissent that he would have granted the application,¹⁶⁶ and Justices Gorsuch and Alito dissented on the basis that the NCSBE did not have the power to “rewrite the election code.”¹⁶⁷

154. *Id.* at 319.

155. *Id.*

156. *Id.*

157. *Id.* at 320.

158. *Id.* at 320–21.

159. *See id.* at 321.

160. *Id.* at 305.

161. *See id.* at 321–22.

162. *Id.* at 322 (quoting *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam)).

163. *Id.*

164. *Moore v. Circosta*, 141 S. Ct. 46, 46 (2020) (mem.).

165. *Id.*

166. *Id.* (Thomas, J., dissenting).

167. *Id.* at 46–47 (Gorsuch, J., dissenting).

C. Democracy North Carolina v. North Carolina State Board of Elections

In *Democracy North Carolina v. North Carolina State Board of Elections*, plaintiffs Democracy North Carolina and the League of Women Voters of North Carolina argued that sections of the North Carolina General Statutes¹⁶⁸ and portions of House Bill 1169 (“H.B. 1169”)¹⁶⁹—passed by the General Assembly in the wake of COVID-19 and in anticipation of the November 3, 2020, election—violated the U.S. Constitution and federal law.¹⁷⁰ In particular, the plaintiffs raised issues with (1) the voter registration deadline; (2) restrictions on absentee ballot requests, completion, and delivery; and (3) polling place hour restrictions.¹⁷¹ The plaintiffs brought these claims under the Fourteenth Amendment, the Americans with Disabilities Act (“ADA”), the Rehabilitation Act (“RA”), and the VRA.¹⁷²

The U.S. District Court for the Western District of North Carolina first addressed the constitutionality of H.B. 1169’s one-witness absentee ballot requirement.¹⁷³ After balancing the plaintiffs’ burden of identifying a witness and the state’s interest in preventing voter fraud,¹⁷⁴ the court found “that even high-risk voters can comply with the One-Witness Requirement in a relatively low-risk way.”¹⁷⁵ Thus, the plaintiffs did not demonstrate a likelihood of success.¹⁷⁶ Second, the court considered the requirement that a voter present a form of identification when requesting an absentee ballot.¹⁷⁷ The court rejected the plaintiffs’ complaint after finding that the state’s interests in an identification requirement outweighed the plaintiffs’ “modest” burden.¹⁷⁸

168. Plaintiffs challenged the following statutory provisions of the North Carolina General Statutes: sections 163-82.6(d), .20(g)–(h), which created a twenty-five day voter registration deadline; section 163-230.2(a), which required that absentee ballot requests be made using a form created by the NCSBE; section 163-230.2(a)(4), (f), which outlined the acceptable forms of voter identification that voters must submit with their absentee ballot request forms; sections 163-226.3(a)(4)–(6), (e)(4), -231(a)–(b)(1), which restricted the assistance available to “people in returning absentee ballot requests, in marking and completing absentee ballots, and submitting absentee ballots”; and section 163-227.6(c), which mandated uniform precinct hours. 476 F. Supp. 3d 158, 173–74 (M.D.N.C.), *reconsideration denied*, No. 20CV457, 2020 WL 6591396 (M.D.N.C. Sept. 20, 2020).

169. Plaintiffs challenged the following provisions of H.B. 1169: (1) the amendment to the witness requirement rule under section 163-231(a); and (2) the amendment “requiring poll workers to come from the county in which they serve” under section 163-42(b). *Id.* at 173, 177, 179.

170. *Id.* at 171, 173.

171. *Id.* at 172–79.

172. *Id.* at 192. Plaintiffs also brought claims under the First Amendment, *id.* at 222–25, but they are less relevant for this Recent Development’s purposes.

173. *Id.* at 193–208.

174. *See id.* at 196–207.

175. *Id.* at 207.

176. *Id.* at 207–08.

177. *Id.* at 208–09.

178. *Id.*

Additionally, the court noted that the U.S. Supreme Court had recently upheld a similar requirement.¹⁷⁹ Third, the court ruled that the plaintiffs lacked standing to challenge absentee ballot requests, assistance, and delivery because they were not directly impacted by the laws.¹⁸⁰ Fourth, the court found that the burden imposed on voters by the twenty-five-day voter registration deadline was only “modest at best” and “justified by the State’s interest in ‘ensuring orderly, fair, and efficient [election] procedures.’”¹⁸¹ Fifth, the court determined that any burden resulting from H.B. 1169’s requirement that poll workers reside in the county in which they work was far too “speculative.”¹⁸² Sixth, the court ruled that the uniform hours requirement for polling places did not create a burden when considered alongside the increased early voting period.¹⁸³ Seventh, and finally, the court found “that the possibility of contracting COVID-19 [wa]s not sufficient to establish a violation of bodily integrity” under the unconstitutional conditions doctrine of the Fourteenth Amendment.¹⁸⁴

The plaintiffs also made several affirmative requests, including expanding online voter registration and supplying absentee ballot drop boxes,¹⁸⁵ but the court claimed that “it is not the court’s role to rewrite North Carolina’s election law,” particularly when the suggested procedures “threaten to take the state into uncharted waters.”¹⁸⁶ In sum, the court rejected all of the plaintiffs’ substantive Fourteenth Amendment challenges and requests.¹⁸⁷ However, the court found that the plaintiffs brought a successful procedural claim under the Due Process Clause of the Fourteenth Amendment by arguing that the state provided no notice or opportunity to cure absentee ballot request forms or absentee ballots.¹⁸⁸ Therefore, the court issued an injunction prohibiting the

179. *See id.* at 208 (“[T]he State’s interest with respect to [residency and identification requirements during COVID-19] has been recognized by the United States Supreme Court . . .” (citing *Democratic Nat’l Comm. v. Bostelmann*, 447 F. Supp. 3d 757, 768 (W.D. Wis. 2020))). In the seminal voter ID case, the U.S. Supreme Court upheld Indiana’s voter ID law, in large part because of the state’s interest in preventing voter fraud. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–97 (2008).

180. *Democracy N.C.*, 476 F. Supp. 3d at 209; *see also Baker v. Carr*, 369 U.S. 186, 206 (1962) (“[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue.”). For more information regarding the standing requirements for challenging voting laws, *see supra* notes 110–11 and accompanying text.

181. *Democracy N.C.*, 476 F. Supp. 3d at 212 (quoting *Pisano v. Strach*, 743 F.3d 927, 937 (4th Cir. 2014)).

182. *Id.* at 215.

183. *Id.* at 217.

184. *Id.* at 222.

185. *Id.* at 217–18.

186. *Id.* (quoting *Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020)).

187. *See id.* at 218–22.

188. *See id.* at 225–29.

NCSBE from rejecting these materials without due process—in other words, without notice and an opportunity to cure.¹⁸⁹

Turning to the statutory complaints, one of the plaintiffs, a blind individual, alleged that the North Carolina election statute violated the ADA, RA, and VRA by prohibiting nursing home employees from helping him complete his ballot, which prevented him from voting.¹⁹⁰ The court agreed that this provision violated statutory law¹⁹¹ because “but for his blindness, Plaintiff . . . would be able to fill out an absentee ballot on his own.”¹⁹² However, the court rejected the plaintiff’s argument that the one-witness absentee ballot requirement violated the ADA and RA because “the court cannot say that any difficulty he may have in procuring a witness [wa]s due to his disability, but instead [wa]s because he reside[d] in a locked-down nursing home.”¹⁹³

The court concluded its analysis by finding that the plaintiffs demonstrated a likelihood of irreparable injury with their ADA, RA, VRA, and procedural due process claims¹⁹⁴ and that the balance of equities and public interest tipped in their favor.¹⁹⁵ Although the court considered virtues of electoral integrity, constitutional rights, stability, and consistency, it nonetheless held that “the infringement of the fundamental right to vote poses a far greater risk.”¹⁹⁶

D. *Taliaferro v. North Carolina State Board of Elections*

Similar to one of the claims brought in *Democracy North Carolina*, in *Taliaferro v. North Carolina State Board of Elections*, individual and organizational plaintiffs challenged North Carolina’s absentee ballot program for discriminating against the visually impaired, in violation of the ADA and RA.¹⁹⁷ The program required that voters fill out a paper ballot and return it, but provided “no alternatives for North Carolina voters who are blind or have low vision,” like they would have when voting in person.¹⁹⁸ Since North Carolina’s military and overseas voters already had the option to vote electronically, the plaintiffs contended that allowing them to utilize an electronic portal was feasible.¹⁹⁹

189. *See id.* at 229.

190. *Id.* at 188, 229.

191. *See id.* at 233, 236.

192. *See id.* at 232–33, 236.

193. *Id.* at 233.

194. *Id.* at 237.

195. *Id.*

196. *See id.*

197. *See Taliaferro v. N.C. State Bd. of Elections*, 489 F. Supp. 3d 433, 435 (E.D.N.C. 2020).

198. *See id.*

199. *See id.* at 436.

In a shorter opinion, the U.S. District Court for the Eastern District of North Carolina found that the plaintiffs demonstrated a likelihood of success on the merits of their claims,²⁰⁰ indicated irreparable harm,²⁰¹ and showed that the public interest and balance of the equities tipped in their favor.²⁰² Therefore, the court ordered that blind and low-vision voters be granted access to an electronic portal.²⁰³

E. North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections

In *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*, the plaintiffs challenged the state's failure to provide accessible in-person voting opportunities as well as several absentee voting restrictions and procedures, alleging that they "w[ould] unduly burden or deny the franchise to countless voters."²⁰⁴ Specifically, the plaintiffs objected to seven procedures: (1) limitations on the number of days and hours of early voting; (2) witness requirements for absentee ballots; (3) failure to provide prepaid postage for absentee request forms and ballots; (4) laws rejecting absentee ballots that were timely postmarked but delivered more than three days after the election; (5) some counties' failure to provide notice and an opportunity to cure absentee ballot deficiencies; (6) laws prohibiting assistance for voters when completing absentee ballots; and (7) laws restricting assistance when delivering absentee ballots.²⁰⁵ The plaintiffs requested declaratory and injunctive relief.²⁰⁶

Just over one month later, both parties submitted a Joint Motion for Entry of a Consent Judgment after "substantial good-faith negotiations."²⁰⁷ The

200. See *id.* at 437. This consideration was "not seriously in dispute." *Id.* Plaintiffs easily met the four requirements necessary to show that they were likely to succeed on the merits of their claims: "(1) he or she is an individual with a disability; (2) who is qualified to benefit from a government service, program, or activity; (3) that the defendant running the program is a covered entity under the statute; and (4) that the plaintiff was denied the benefits of the service, program, activity, or was otherwise discriminated against, on the basis of his or her disability." *Id.* (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)).

201. *Id.* at 438. Plaintiffs demonstrated irreparable harm to their "right to cast a private or secret ballot." *Id.* (citing *Withers v. Bd. of Comm'rs of Harnett Cnty.*, 196 N.C. 535, 535, 146 S.E. 225, 225-26 (1929)).

202. *Id.* at 438-40. The court determined that "the hardship experienced by plaintiffs in having to surrender their right to vote privately and independently when casting an absentee ballot" outweighed "making an accommodation in sufficient time to allow plaintiffs to vote by absentee ballot privately and independently." *Id.* at 439.

203. *Id.* at 440.

204. Complaint at 2, N.C. All. for Retired Ams. v. N.C. State Bd. of Elections, No. 20-CVS-8881, 2020 WL 10758664 (N.C. Super. Ct.), *stay denied sub nom.* *Berger v. N.C. State Bd. of Elections*, 141 S. Ct. 658 (2020) (mem.).

205. *Id.* at 2-3.

206. *Id.* at 38-40.

207. Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment at 3, N.C. All. for Retired Ams., 2020 WL 10758664, at *1.

Consent Judgment outlined three overarching agreed-to remedies.²⁰⁸ First, all absentee ballots postmarked by Election Day were to be counted if received up to nine days after the election.²⁰⁹ Second, voters who submitted absentee ballots with deficiencies were to be given notice and an opportunity to cure.²¹⁰ Third, county boards were to designate absentee ballot drop-off stations at all early voting locations and county board offices.²¹¹ The Superior Court of Wake County granted the Joint Motion for Entry of Consent Judgement.²¹²

III. VOTING RIGHTS IN NORTH CAROLINA IN 2020 AND BEYOND

In an election marred by legal battles, North Carolina was under national pressure to get things right.²¹³ And, to a great extent, it did. Overall, the NCSBE issued changes that made it easier for people to vote during the COVID-19 pandemic.²¹⁴ Voters had greater flexibility and time to vote prior to Election Day, ensuring that their votes did not come at the expense of their health. North Carolinians were also able to conduct more business online,²¹⁵ protecting their health and providing a test run for administering elections using modern technology. Their right to vote was not burdened by post office delays,²¹⁶ and they had greater opportunity to ensure that their ballots would be counted through notice and the opportunity to cure.²¹⁷ The General Assembly

208. Stipulation and Consent Judgment at 14–16, *N.C. All. for Retired Ams.*, 2020 WL 10758664, at *1.

209. *See id.* at 14–15; *see also* Memorandum 2020-22 from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to County Boards of Elections Regarding Return Deadline for Mailed Civilian Absentee Ballots in 2020 (Sept. 22, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-22_Deadline%20for%20Mailed%20Absentee%20Ballots.pdf [<https://perma.cc/E8X7-XW44>].

210. *See* Stipulation and Consent Judgment, *supra* note 208, at 15, 2020 WL 10758664, at *1; *see also* Memorandum 2020-19, *supra* note 60.

211. Stipulation and Consent Judgment, *supra* note 208, at 15–16, 2020 WL 10758664, at *1; *see also* Memorandum 2020-23 from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to County Boards of Elections Regarding In-Person Return of Absentee Ballots (Sept. 22, 2020), https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-23_In%20Person%20Return%20of%20Absentee%20Ballots.pdf [<https://perma.cc/U67H-JGWQ>].

212. Findings of Fact and Conclusions of Law Supporting October 2, 2020 Order Granting Joint Motion for Entry of Consent Judgment, *supra* note 43, at 10.

213. *See* Kevin Breuninger, *Here's Why Swing-State North Carolina Is 'Smack in the Middle' of the 2020 Election*, CNBC, <https://www.cnbc.com/2020/10/20/2020-election-north-carolina-swing-state.html> [<https://perma.cc/V4L4-UWH6>] (Oct. 20, 2020, 2:27 PM) (“Most paths to the White House go through North Carolina.”). *But see* Donald Trump Won in North Carolina., POLITICO, <https://www.politico.com/2020-election/results/north-carolina/> [<https://perma.cc/2897-M2J8>] (Jan. 6, 2021, 4:41 PM) (showing that the path to the White House did not go through North Carolina in 2020, though it was still an important swing state).

214. *See* Schofield, *supra* note 80; *see also* Robertson, *supra* note 53.

215. *See supra* notes 45–49, 69 and accompanying text.

216. *See supra* notes 56–59 and accompanying text.

217. *See supra* notes 60–66 and accompanying text.

also eased its absentee ballot witness requirements,²¹⁸ ensuring these requirements would not compromise social distancing to a significant extent.

The courts were also fairly receptive to statutory claims since they granted relief under the ADA, RA, and VRA—all of which protected frequently burdened and disenfranchised voters.²¹⁹ Additionally, the *Moore*, *Democracy North Carolina*, and *North Carolina Alliance for Retired Americans* courts eased vote-by-mail restrictions, including upholding the deadline extension to receive absentee ballots²²⁰ and requiring notice and an opportunity to cure absentee ballots with deficiencies.²²¹ The *Moore* court also rejected two equal protection claims that sought to overturn pro-voting rights procedures.²²²

However, not every barrier was lifted.²²³ For one, voters who are often left behind—in this case, voters with disabilities²²⁴ and voters of color²²⁵—were left behind once again.²²⁶ The NCSBE also failed to implement changes that proved most helpful to these voters, such as declining to mail absentee ballot

218. See *supra* note 67 and accompanying text.

219. See *supra* notes 190–96 and accompanying text.

220. See *supra* notes 150–52 and accompanying text.

221. See *supra* notes 188–89, 210 and accompanying text.

222. See *supra* notes 153–58 and accompanying text.

223. For insights on how easy voting should be—and whether every barrier *should* be lifted—see various works by Professors Ellen D. Katz, *Election Law's Lochnerian Turn*, 94 B.U. L. REV. 697, 697 (2014) (“The electoral process undeniably falls well short of our aspirations, but it strikes me that we should look to the Supreme Court for an accounting before blaming the Constitution for the deeply unsatisfactory condition in which we find ourselves.”); Richard H. Pildes, *What Kind of Right Is ‘the Right To Vote’?*, 93 VA. L. REV. 45, 45 (2007) (“The right to vote is a deceptively complex legal and moral right. Perhaps because the right is considered a ‘fundamental’ constitutional right, or the foundational right of democratic self-governance, or the right ‘preservative of all [other] rights,’ it is tempting to assume the right to vote has an essential core concept that is relatively obvious and widely shared.” (first citing *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964), then citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886))); Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 188 (2020) (“The right to vote is fundamental . . .” (citing *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1863 (2018) (Sotomayor, J., dissenting))); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1538 (2015) (“[T]he Court has treated the right to vote as the linchpin of political power.”); and Rick L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 98 (2009) (“So despite the longstanding democratic ideals of this nation, one cannot constitutionally enforce a ‘right to vote.’”).

224. Sarah Katz, *The Era of Easier Voting for Disabled People Is Over*, ATLANTIC (Aug. 25, 2021), <https://www.theatlantic.com/politics/archive/2021/08/people-disabilities-vote/619834/> [<https://perma.cc/6F6P-L2PB> (dark archive)] (“It’s long been difficult for Americans with disabilities to vote.”).

225. Jesse L. Jackson & David Daley, *Voter Suppression Is Still One of the Greatest Obstacles to a More Just America*, TIME (June 12, 2020, 11:16 AM), <https://time.com/5852837/voter-suppression-obstacles-just-america/> [<https://perma.cc/35GT-97MP> (dark archive)] (“Our faith that this system is working for everyone has been tested by a decade of voter suppression and rule rigging that looks all too familiar to those who have spent their lives fighting schemes that keep the same few in power.”).

226. Voters with disabilities had to file suit in *Taliaferro* and *Democracy North Carolina* to protect their right to vote. See *supra* notes 190, 197 and accompanying text. While voters of color did not make affirmative voter suppression claims, the types of voting practices that were challenged disproportionately burden them. See *supra* notes 9–14 and accompanying text.

applications to active voters and provide prepaid postage for absentee ballots.²²⁷ The General Assembly should have completely removed its witness absentee ballot requirement.

The courts chipped away at pro-voting rights policies, as well. In *Moore*, the court accepted challengers' arguments that the ability to cure ballots without a witness signature and the deadline extension for absentee ballots was constitutionally suspect.²²⁸ Thus, the court overturned two pro-voting rights procedures on the merits²²⁹—though the *Purcell* principle kept the court from implementing its findings.²³⁰ And all equal protection challenges that would make it easier to vote were rejected in *Democracy North Carolina*.²³¹ The court was far more concerned with the will of the General Assembly and electoral integrity than with the health, safety, and rights of voters.²³²

The Southern Coalition for Social Justice, a preeminent voting rights advocacy organization based in North Carolina, issued a similar summary about North Carolina's 2020 efforts, stating, “[w]hile our collaborative efforts won many victories that helped ensure more voters were able to access ballots and have their voices counted, there remains a continuous onslaught on voting rights that requires constant vigilance and vigorous challenges to safeguard the right to vote for millions of Americans moving forward.”²³³ Upon consideration, North Carolina did just enough to quell voting rights concerns.

Unfortunately, it appears that North Carolina's pro-voting rights changes during 2020 may be a blip in history—a response to a once-in-a-lifetime pandemic, but not here to stay. Less than one month after Election Day, the Fourth Circuit dealt a blow to voting rights. The court upheld the General

227. VOTING RIGHTS LAB, A TALE OF TWO DEMOCRACIES: HOW THE 2021 WAVE OF STATE VOTING LAWS CREATED A NEW AMERICAN FAULT LINE 8 (2021), <https://votingrightslab.org/wp-content/uploads/2021/06/Voting-Rights-Lab-A-Tale-of-Two-Democracies.pdf> [<https://perma.cc/UV/P5-J87V>] (“Some states enacted legislation to make absentee voting more convenient and accessible by . . . paying for return postage on completed absentee ballots.”). *But see* Elaine Kamarck, Yousef Ibreak, Amanda Powers & Chris Stewart, *Is It Getting Easier To Vote by Mail?*, BROOKINGS INST. (Sept. 2, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/02/is-it-getting-easier-to-vote-by-mail/> [<https://perma.cc/W882-XTUH>] (explaining that several states across the United States have made voting via absentee ballot accessible, including by not requiring an absentee voter to provide an excuse); *see also supra* Section I.A.

228. *See supra* notes 146–52 and accompanying text.

229. *See supra* notes 146–52 and accompanying text.

230. *See supra* notes 161–63 and accompanying text.

231. *See supra* notes 173–87 and accompanying text.

232. *See supra* notes 173–87 and accompanying text.

233. Tazeen Dhanani, *Statement on Election Protection Litigation Brought During the 2020 Elections*, S. COAL. FOR SOC. JUST. (Dec. 22, 2020), <https://southerncoalition.org/statement-on-election-protection-litigation-brought-during-the-2020-elections/> [<https://perma.cc/KPV2-GLXD>].

Assembly's 2018 voter ID law,²³⁴ finding in part that it was not enacted with racially discriminatory intent²³⁵—even though many of the same legislators involved in the unconstitutional 2013 voter ID law drafted and voted in favor of this law.²³⁶ This was a considerable setback for voters of color.²³⁷

In the wave of suppressive voting laws sweeping the country in 2021²³⁸—many of which “would roll back advances in access to the ballot that states put into place temporarily due to the pandemic”²³⁹—the North Carolina General Assembly introduced two such bills. Senate Bill 326 (“S.B. 326”), the Election Day Integrity Act, would require that absentee ballots arrive by 7:30 p.m. on Election Day,²⁴⁰ rather than be postmarked by Election Day and arrive within three days of the election, as the current law permits. Senate Bill 725 (“S.B. 725”) would ban county boards of election from receiving money from private donors or nonprofit grants to assist with funding shortfalls.²⁴¹ Both bills are currently in committee, and the General Assembly is still in session. S.B. 326

234. Even though they were explicitly sanctioned by the Supreme Court in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), voter ID laws result in racially disparate impacts, just as other voting restrictions do. Advocates “claim that these laws impose little burden because everyone has the requisite ID,” but “the reality is that millions of Americans don’t, and they are disproportionately people of color.” Johnson & Feldman, *supra* note 10. There is an added layer of nuance when these laws permit the use of some forms of IDs and not others. For example, Texas voters can present a handgun license at the voting booth, but not a student ID. *Required Identification for Voting in Person*, VOTETEXAS.GOV, <https://www.votetexas.gov/mobile/id-faqs.htm> [<https://perma.cc/584N-9AZG>]; Ed Espinoza, *Texas Voter ID Law Allows Gun Licenses, Not Student ID's*, PROGRESS TEX. (May 25, 2017), <https://progresstexas.org/blog/stricken-texas-voter-id-law-allowed-gun-licenses-not-student-id> [<https://perma.cc/M6EX-5B78>].

235. N.C. State Conf. of the NAACP v. Raymond, 981 F.3d 295, 298 (4th Cir. 2020).

236. N.C. State Conf. of the NAACP v. Cooper, 430 F. Supp. 3d 15, 35 (M.D.N.C. 2019) (“[T]he same key legislators who championed H.B. 589 [in 2011] were the driving force behind S.B. 824’s passage just a few years later [in 2018]—they need not have had racial data in hand to still have it in mind.”), *rev’d sub nom. Raymond*, 981 F.3d at 298.

237. See Rob Schofield, *Voting Rights Advocates Respond to Latest Voter ID Ruling*, NC POL’Y WATCH (Dec. 3, 2020), <http://pulse.ncpolicywatch.org/2020/12/03/voting-rights-advocates-respond-to-latest-voter-id-ruling/#sthash.JEWJ3uHi.dpbs> [<https://perma.cc/L4RG-LMGT>].

238. *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUST. (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021> [<https://perma.cc/2BH4-ZHBZ>].

239. Eliza Sweren-Becker & Hannah Klain, *The Fight for Voting Rights in 2021*, BRENNAN CTR. FOR JUST. (Feb. 24, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/fight-voting-rights-2021> [<https://perma.cc/AK6N-XMSZ>].

240. Election Day Integrity Act, S.B. 326, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

241. See Prohibit Private Money in Elections Admin., S.B. 725, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021). In 2020, North Carolina and its counties received more than \$4.6 million “to help pay bonuses to election workers, send mailers and buy pens for voting booths.” Charles Duncan, *Three GOP-Sponsored Bills Could Change Elections Law in N.C. Here’s What They Say*, SPECTRUM NEWS 1 (June 28, 2021, 4:15 PM), <https://spectrumlocalnews.com/nc/charlotte/news/2021/06/28/three-gop-sponsored-bills-could-change-elections-law-in-n-c--here-s-what-they-say> [<https://perma.cc/M78Q-NMPW>].

and S.B. 725 are evidence of further means by which legislators seek to subtly suppress the vote using racially neutral restrictions.²⁴²

In the ongoing fight for voting rights, North Carolina should not backtrack. The NCSBE and General Assembly should keep in place the expansive policies implemented during the 2020 election—and more. With a majority of Americans favoring vote by mail,²⁴³ it is likely that future elections will continue to see high absentee ballot turnout. If our voting preferences are going to change, our laws and procedures should as well. Absentee ballot applications should be mailed to every active voter, postage should come prepaid, ballot drop boxes should be widely used, early voting should be expanded, no-excuse absentee voting should be universal, and signature match and witness requirement laws should be prohibited. If laws like these are enacted—with the support and will of the people—courts cannot be concerned about subverting the legislative process, as they were in 2020. Simultaneously, easing these restrictions will remove barriers at the polls that disproportionately burden voters of color and voters with disabilities.²⁴⁴

CONCLUSION

The intersection of the COVID-19 pandemic and the 2020 election emphasized the disparities, barriers, and outdated election laws upon which our nation relies. We should take this opportunity to improve our democratic institutions—not shy away and disparage them. Courts and legislatures have a significant role to play moving forward. Nationwide, state legislatures must repudiate the onslaught of suppressive voting laws, including in North

242. The following excerpt perfectly illustrates the cumulative suppressive effect of subtle voting restrictions:

As Justice Kagan points out [in her *Brnovich* dissent], in modern times, one of the “subtle” ways to accomplish discrimination “is to impose ‘inconveniences,’ especially a collection of them, differentially affecting members of one race.” In state after state, in the name of so-called “election integrity,” legislatures have sliced away at each of the methods of voting available, sometimes through a series of cumulative changes to policy and other times through omnibus bills that make a number of changes across the system. They shave away access to mail voting by shortening the timeframe to request a ballot, limiting the methods for returning one, or imposing stricter signature requirements. They cut back on in-person voting by limiting early voting hours or requiring strict photo ID to vote. They trim voters from the rolls through laws that make faulty purges more likely or by limiting same-day registration. While any one change might appear minor at first blush, the end result is death by a thousand cuts.

Written Statement of Sean Morales-Doyle, *supra* note 14, at 6 (footnotes omitted).

243. See Gomez & Jones, *supra* note 55.

244. See Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355> [http://perma.cc/K5JC-CFRJ (dark archive)].

Carolina. But that alone is not enough—Congress must also pass expansive voting rights legislation to offer voters as many protections as possible.²⁴⁵ Finally, courts must give significant credence to these pieces of legislation using the Elections Clause²⁴⁶ and protect the right to vote with all the constitutional authority they can muster.

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245. The congressional voting rights landscape is ever changing, but Congress must take action on the bills before it. See Freedom to Vote Act, S. 2747, 117th Cong. (2021); For the People Act, H.R. 1, 117th Cong. (as passed in House, Mar. 3, 2021); John R. Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong. (as passed in House, Aug. 24, 2021); Protecting Our Democracy Act, H.R. 8363, 116th Cong. (2020).

246. See generally Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, WASH. L. REV. (forthcoming 2021) (“The historical record of the Elections Clause—at the nation’s founding, in early Congresses, and in the courts—demonstrates that Congress and states have the power to deliver on the promise of free and fair elections that the Framers intended.”).

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