

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

NORTH CAROLINA STATE)
CONFERENCE OF THE NAACP, et al.,)

Plaintiffs,)

v.)

Case No.: 1:13-CV-658

PATRICK LLOYD MCCRORY, in his)
official capacity as the Governor of)
North Carolina, et al.,)

Defendants.)

LEAGUE OF WOMEN VOTERS OF)
NORTH CAROLINA, et al.,)

Plaintiffs,)

and)

LOUIS M. DUKE, et al.,)

Plaintiffs-Intervenors,)

Case No.: 1:13-CV-660

v.)

THE STATE OF NORTH CAROLINA, et al.,)

Defendants.)

UNITED STATES OF AMERICA,)

Plaintiffs,)

v.)

Case No.: 1:13-CV-861

THE STATE OF NORTH CAROLINA, et al,)

Defendants.)

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO ENFORCE INJUNCTION

As parties to the injunction, the Duke Intervenor-Plaintiffs (“Plaintiffs”) respectfully move for an emergency order enforcing this Court’s July 29, 2016 judgment and permanent injunction against the North Carolina State Board of Elections (“SBOE”), and requiring SBOE to modify the early vote plans for Mecklenburg, New Hanover, Nash, Guilford, and Forsyth Counties to comply with the injunction and the decision in *NAACP, et al. v. McCrory, et al.*, Nos. 16-1468, 16-1469, 16-1474, 16-1529, 2016 WL 4053033 (4th Cir. July 29, 2016).¹ Early voting begins on October 20; thus, it is essential that this motion be resolved as expeditiously as possible. Thus, Plaintiffs respectfully request that the Court issue a ruling without oral argument and by October 7. To the extent the Court deems it necessary to issue an order of contempt to grant the requested relief, Plaintiffs move for an order to show cause. In support, Plaintiffs state as follows.

FACTS

On July 29, 2016, the Fourth Circuit held that several provisions of Session Law (“SL”) 2013-381 were enacted with discriminatory intent and must be enjoined. The elimination of the first week of early voting, a Sunday of early voting, and same-day registration (“SDR”) played a central role in its finding that the challenged provisions “target[ed] African Americans with almost surgical precision.” *McCrory*, 2016 WL 4053033, at *1. The court noted that the legislators who enacted SL 2013-381 received data showing that “African Americans disproportionately used early voting in both 2008 and 2012” and “disproportionately used the first seven days of early voting”; that “SL

¹ “A party that obtains a judgment in its favor acquires a ‘judicially cognizable’ interest in ensuring compliance with that judgment.” *Salazar v. Buono*, 559 U.S. 700, 712 (2010).

2013-381 ... eliminated one of two ‘souls-to-the-polls’ Sundays in which African-American churches provided transportation to voters”; and that “[t]he legislature’s racial data demonstrated that, as the district court found, ‘it is indisputable that African American voters disproportionately used [SDR].’” *Id.* at *3. The court further held that efforts to reduce a racial group’s access to voting for partisan reasons—or, more generally, to restrict access to voting for partisan gain—are impermissible. The court described one of the State’s justifications—“its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise”—as “as close to a smoking gun as we are likely to see in modern times.” *Id.* at *11; *accord id.* at *10 (“politics as usual” cannot be accepted where it “translates into race-based discrimination”). And, it twice emphasized that voting access cannot be restricted for partisan gain. *Id.* at *8 (“Nor ... can legislatures restrict access to the franchise based on the desire to benefit a certain political party.”); *id.* at *11 n.6 (“[S]tate legislators also cannot impermissibly dilute or deny the votes of opponent political parties”). On the same day, this Court issued a permanent injunction effectuating the Fourth Circuit’s decision. *See* 13-660 Dkt. No. 445.

On August 4, SBOE Executive Director Kim Strach issued Numbered Memo 2016-11, informing the County Boards of Elections (“CBOEs”) of the procedures they should follow with respect to early voting to effectuate the injunction. *See* Ex. 2.² Director Strach wrote that because all county plans that had been submitted to SBOE on or before July 29, 2016, “were drawn against the backdrop of now-void criteria,” SBOE

² Unless otherwise noted, all citations to exhibits herein refer to exhibits to the Declaration of Amanda R. Callais, filed concurrently with this motion and brief and in support thereof.

was revoking all approvals. *Id.* at 1. In submitting new plans, CBOEs were “not [] required to have additional sites” beyond the CBOE office, nor were they “required to have any additional sites open the same number of hours and days,” but CBOEs were “*strongly encourage[d]* to be mindful of expected turnout and historical use of ... early voting in” their counties, and noted that “[s]tatewide historical data indicates that roughly **56% of all voters this election** will use” early voting. *Id.* at 1-2 (emphases in original). Director Strach gave CBOEs five options: (1) extend the hours in the county’s original 10-day plan to the entire 17-day period (which SBOE recommended, consistent with the goal of “mak[ing] every effort to provide ample voting opportunities”); (2) keep the county’s original 10-day plan and add early voting at the CBOE office or an alternative site for the rest of early voting; (3) adopt an entirely new plan; (4) adopt a new plan for the CBOE office or alternative site, but with extended and/or weekend hours; or (5) not take any action, in which case early voting would be limited to the CBOE office during regular business hours and on the last Saturday until 1 p.m. *Id.* at 2. This last option has become known as “Option E.”

Notwithstanding SBOE’s warnings, many Republican members of CBOEs proposed drastic reductions in early voting options. On the same day SBOE’s memo was sent, the Republican members of the Guilford CBOE proposed a reduction in early voting sites of more than 50%, eliminating weekend early voting, and eliminating sites upon which African-American and young voters heavily relied. *See infra* section I, E. The following day, the private plaintiffs in this case sent a letter to the SBOE and Director Strach explaining, among other things, that the proposed reductions to early voting in Guilford County “can only be interpreted as intentional action taken to suppress voting this November, particularly among young voters and voters of color.” Ex. 3 at 2.

On August 17, bombshell emails sent by Dallas Woodhouse, the Executive Director of the North Carolina Republican Party, came to light. In an email sent to Republican officials across North Carolina, Woodhouse encouraged recipients to “call your republican election board members and remind them that as partisan republican appointees they have [a] duty to consider republican points of view.” Ex. 4; Ex. 5. Woodhouse emphasized that, pursuant to SBOE’s direction, “counties only need to offer early voting at one single early voting site”; “[t]here is no requirement to be open on the weekends except for the last Saturday (until noon)”; “[i]f counties do not re-submit an early voting plan, the county will default to the one required site and no more,” encouraging default to Option E; “[m]any of our folks are angry and are opposed to Sunday voting”; and “[n]o group of people are entitled to their own early voting site, including college students.” Ex. 4. He added, “We believe [SDR] is ripe with voter fraud, or the opportunity to commit it. [SDR] is only available during early voting. We are under no obligation to offer more opportunities for voter fraud.” *Id.* In an email sent to Republican CBOE members and other Republican Party members on August 14, 2016, Woodhouse wrote, “Our Republican Board members should feel empowered to make legal changes to early voting plans, that are supported by Republicans” and that “Republicans can and should make party line changes to early voting.” Ex. 6.³

Even after the emails became public, Republican members on several CBOEs *continued* to press for plans that restricted access to early voting just as ways Woodhouse urged. A number of CBOEs either selected the statutory minimum hours for early voting or failed to take any action thus defaulting to Option E. *See, e.g.*, Ex. 7 at 377:21-378:10

³ When interviewed, Woodhouse did not appear to dispute the emails’ authenticity. On the contrary, he responded in part by noting that he is “an unabashed partisan.” *See* Ex. 6.

(Watauga); *id.* at 481:15-483:8 (Northampton). The New Hanover, Hoke, Pitt, Craven, Forsyth, and Richmond CBOEs all voted to eliminate Sunday voting. *Id.* at 60:14-19, 62:17-18 (Craven); *id.* at 132:20-133:11 (Hoke); *id.* at 160:3-161:22 (Richmond); *id.* at 234:4-11 (New Hanover); *id.* at 431:4-16, 434:10-435:3 (Pitt); Decl. of F. El-Amin (“El-Amin Decl.”) ¶¶ 3-4, 9 (Forsyth). The Wake, Mecklenburg, and Nash CBOEs voted to limit early voting during the first week to the CBOE office. Ex. 7 at 260:13-25 (Wake); *id.* at 275:18-21 (Nash); *id.* at 320:11-21 (Mecklenburg). On September 6, the private plaintiffs in this case sent a letter to the SBOE members and Director raising concerns about these and other early voting plans in light of the Fourth Circuit opinion. *See* Ex. 8.

On September 8, SBOE held a hearing (the “September 8 hearing”) in which it considered all 34 contested early voting plans. *See* Ex. 7 at 2-5. In many cases, SBOE rejected the majority plan, accepting the minority plan or a modified plan. *See* Ex. 9.⁴ In some cases, however, SBOE upheld plans or aspects of plans that impermissibly restrict access to early voting (and thus SDR). In Nash County, SBOE refused to open a site in predominantly African-American Rocky Mount during the first week of early voting even though Rocky Mount is the largest city in Nash and had a first-week site in 2012. *See infra* § I, A. In New Hanover County, SBOE refused to reinstate Sunday voting, which was extremely popular among African Americans and offered in the March 2016 primary. *See infra* § I, B. And SBOE permitted Mecklenburg County to cut afternoon voting on the final day of early voting, though it offered those hours in 2008 and 2012; that day has historically been the most utilized in Mecklenburg, particularly by African Americans; and there were long lines to vote that day in 2012. *See infra* § I, C.

⁴ Hyphenated plan names indicate a majority plan.

On September 21, counsel for Duke Intervenors and NAACP Plaintiffs wrote the SBOE and Director Strach to request that SBOE examine the unanimous plans for Guilford, Forsyth, and Granville Counties. *See* Ex. 10. Their letter explained that Guilford County reduced the number of first-week early voting sites from 16 in 2012 to just one. *Id.* at 1-2. It noted that the Forsyth Plan eliminated Sunday early voting; offered only one site for the first week (despite long lines in 2012, when only one site was open); and eliminated the site at Winston-Salem State University (“WSSU”), a historically black university. *Id.* at 2-3. On September 23, Director Strach responded that, “[a]dministrative approval” for the plans had been issued; “[s]ubstantive modifications to unanimous [plans] is inconsistent with [SBOE’s] longstanding practice”; and SBOE “disagrees that the [plans] are violative of the Fourth Circuit’s decision.” Ex. 11.

ARGUMENT

I. The Challenged Plans Are Inconsistent with *McCrorry* and the Injunction

“[O]nce a plaintiff has established the violation of a constitutional or statutory right in the civil rights area, ... court[s] ha[ve] broad and flexible equitable powers to fashion a remedy that will fully correct past wrongs.” *McCrorry*, 2016 WL 4053033, at *22. And “once a court rules that an official act purposefully discriminates, the ‘racial discrimination [must] be eliminated root and branch.’” *Id.* (quoting *Green v. Cty. Sch. Bd of New Kent Cty., VA.*, 391 U.S. 430, 437-39 (1968)). To be sure, *McCrorry* made clear that its “injunction d[id] not freeze North Carolina election law in place,” nor did it prevent the General Assembly from acting if it finds that “legitimate justifications counsel modifications of its election laws.” *Id.* at 24. But the court was clear: “legitimate justifications do not include a desire to suppress African American voting strength.” *Id.*

The challenged plans are blatant attempts to make an end run around *McCrorry* and this Court's injunction. They seek, at least in part, to accomplish on a county-by-county basis what the Fourth Circuit barred the General Assembly from doing through SL 2013-381: suppressing African-American voting strength by limiting access to early voting and SDR without legitimate justification. To "fully correct" and "eliminate[] root and branch" the State's racially discriminatory effort to suppress the vote of African Americans, the Court should order these plans be modified as set forth below.

A. Nash County

In 2012, Nash County had three sites open for the entire 17-day early voting period. Ex. 12 at 32. One was in Rocky Mount, *id.*, which is the largest city and home to 56% of the African-American voters in the county. Decl. of A. Bryant ("Bryant Decl.") ¶¶ 3, 6; Ex. 13 at 3; Ex. 14. In comparison, the total African-American citizen voting age population in Nash is 38%. Ex. 1 ¶ 9 (Rodden Decl.). Over 90% of all registered voters in Rocky Mount are African American and they use early voting in Nash in large numbers: in 2012, over 43% of African-American voters in Nash voted in the first week of early voting, and over 71% of African Americans voted early. Ex. 15; Ex 7 at 288:3-5; Ex. 13 at 3. In 2014, moreover, 58.87% of all early votes cast at the Rocky Mount site were cast by African Americans, while African Americans made up only 39.53% of all early voting ballots cast at any site in Nash. Ex. 13 at 3; Ex. 16; Ex. 17. Approximately 45% of those African-American early voters were from Rocky Mount. *See* Ex. 16; Ex. 17; Ex. 39.

On August 18, the Nash CBOE met to adopt a 17-day plan, and "the most contentious issue was whether or not to open an early voting site in Rocky Mount during the first seven days of the early voting period." Decl. of M. Thompson ("Thompson

Decl.”) ¶ 7. Although the minority member, Kelly Shore, presented a plan that included a first-week early voting site at Braswell Memorial Library in Rocky Mount, *see* Ex. 13 at 1-2, and argued it was necessary to comport with the Fourth Circuit’s decision, the majority voted 2-1 to limit first-week early voting to business hours at the Agricultural Center in Nashville, *see* Ex. 7 at 278:11 - 22, a city that is “lightly populated and predominantly white.” Thompson Decl. ¶ 7; *see also* Ex. 1, Attach. B (Nash Cnty. Map).

The Agricultural Center plainly underserves the African-American voters who make up a disproportionately large share of the first-week early voters in Nash. African Americans are 20% less likely than whites in Nash County to live within five miles of the Agriculture Center. Ex. 1, Attach. B (Nash Cnty. Map). And the Agriculture Center is eight to ten miles from Rocky Mount and difficult to reach with public transportation. *See* Bryant Decl. ¶ 6; Thompson Decl. ¶ 9. Indeed, “a significant number of voters in [Rocky Mount], especially in the downtown areas, lack transportation, and many of those voters cannot afford the cost of traveling outside the city limits to vote,” Ex. 13 at 2; *see also* Bryant Decl. ¶¶ 3-4, 6; Thompson Decl. ¶¶ 9-10, meaning that, as a practical matter, the majority plan does not offer first-week early voting to many voters in Rocky Mount.

And failing to offer first-week early voting in Rocky Mount is sure to result in long lines during the last 10 days of early voting. As the minority member of the Nash CBOE explained to SBOE:

[T]he numbers in Nash County for the 2012 general election show the heaviest turnouts for early voting being at the very beginning of and very end of the 17-day early voting period, with as many as over 215 people voting per hour on the first day of the 17-day period, and 39.9% of early voting occurring within the first seven (7) days []. A single site in [Rocky Mount], particularly a site with VERY limited space allotted to [] conduct early voting, is simply not equipped to handle this kind of demand within a 10-day

period. Long lines and extensive wait times are expected at the [Rocky Mount site], and extending the early voting time period in Rocky Mount to 17 days . . . is crucial in helping to alleviate some of the backlog anticipated at the Rocky Mount one-stop site.

Ex. 13 at 2-3; *see also* Bryant Decl. ¶¶ 8-9; Thompson Decl. ¶¶ 9-10.

SBOE was well aware of these issues when it considered the proposed plans for Nash at the September 8 hearing, *see* Ex. 7 at 280:16-282:12, 286:14-288:21; Ex. 13; Ex. 8; Ex. 18, yet it approved the majority plan. *See* Ex. 9; Ex. 38. In rejecting the use of the Rocky Mount site during the first week of early voting, the *only* rationale SBOE provided was that opening a site at that location would create a *partisan advantage* given that the majority of Rocky Mount voters—who are overwhelmingly African American—voted straight ticket for Democrats in 2012. Ex. 7 at 285:2–289:14.

Nash’s early voting plan is a direct effort to circumvent *McCrorry* and this Court’s injunction. The plan puts first-week early voting and SDR out of reach for many (and a disproportionately large share) of Nash’s African-American voters. *See McCrorry*, 2016 WL 4053033, at *1, *3 (discussing disproportionate African-American use of the first seven days of early voting and SDR). Moreover, SBOE ratified that plan, rather than open an early voting site in Rocky Mount, based on a justification condemned in *McCrorry*: the partisan impact of access to voting for Rocky Mount’s predominantly African-American residents. *See id.* at *8, 11 & n.6. As a result, the Court should find Nash’s plan violates *McCrorry* and the injunction, and order SBOE to require a site at Braswell Memorial Library in Rocky Mount during the first week of early voting.

B. New Hanover County

New Hanover County’s early voting plan also violates *McCrorry* and the injunction. In the March 2016 primary, New Hanover offered Sunday early voting and it

was used extensively, particularly by African-American voters. *See* Ex. 19; Ex. 20 ¶ 15; Decl. of T. Pollard (“Pollard Decl.”) ¶ 6; Decl. of R. Poole (“Poole Decl.”) ¶ 5; *see also* Decl. of D. Maxwell (“Maxwell Decl.”) ¶ 8. Sunday voting had the second highest per-hour turnout of any day during early voting, with over 76.5 votes cast per hour. Ex. 7 at 237:24-238:1; Ex. 20 ¶ 14; Pollard Decl. ¶ 5; Ex. 21. Although African Americans account for only 13% of registered voters in New Hanover, they made up 44% of Sunday voters. Ex. 7 at 238:2-6; Ex. 20 ¶ 15; Pollard Decl. ¶ 5; Ex. 19. Twelve percent of African-American early voters, as compared to just 2.5% of whites, voted on Sunday. Ex. 7 at 238:7-10; Ex. 20 ¶ 15; Pollard Decl. ¶ 5; Ex. 19. Yet, New Hanover eliminated Sunday voting for the 2016 general election, over the objection of the county’s voters.

The CBOE met on August 18 to select a 17-day early voting plan, and over 3/4 of the people in attendance spoke in favor of expanded early voting hours. Ex. 20 ¶ 1. The minority member, Thomas Pollard, advocated for a plan that encompassed evening and weekend hours, including Sunday voting. Ex. 20 ¶ 8, 14-17; Pollard Decl. ¶ 4. As Pollard informed the other CBOE members (and later SBOE), such a plan would account not only for the hours that were available in 2012 but also for increases in the county’s population, *see* Pollard Decl. ¶ 10 (approximately 2,300 more voters on roles than 2012, with numbers expected to increase), as well as the loss of straight-ticket voting and the corresponding increase in time it will take to cast a ballot, *id.* ¶ 11. Such a plan would also recognize the county’s “demonstrable record of disproportionate use of Sunday voting by African-American voters.” Ex. 7 at 238:20-22;⁵ *see also* Ex.20 ¶¶ 1-17; Pollard Declaration ¶ 6; Poole Decl. ¶ 5; *see also* Maxwell Decl. ¶ 8. New Hanover also had long

⁵ The statement was by counsel speaking on Pollard’s behalf at the September 8 hearing.

lines on Election Day in 2012, indicating that a more robust early voting program is necessary to avoid similar problems. Poole Decl. ¶¶ 9; Ex. 7 at 243:17-23.

Nevertheless, the CBOE's majority members adopted a plan without any evening, weekend, or Sunday voting, a decision justified solely on the grounds that it matched the hours available in 2012. Ex. 20 ¶ 1; Ex. 7 at 236:5-12; Pollard Decl. ¶ 8; Poole Decl. ¶ 8. Although SBOE subsequently extended early voting until 7 p.m. on the Thursday and Friday before Election Day, it did not reinstate Sunday early voting. *see* Ex. 9 at 5.

There is no plausible nondiscriminatory explanation for offering Sunday early voting during the March 2016 primary, but not during the general election. Neither the New Hanover CBOE nor SBOE offered any substantive reason for this decision; they simply said that Sunday voting was not offered in 2012. *See* Poole Decl. ¶ 9. This lack of substantive justification is revealing: in its consideration of other counties, SBOE emphasized that, in light of *McCrory*, a sufficient justification must be offered for excluding Sunday voting from early voting plans. *See* Ex. 7 at 453:8-19 (explaining SBOE was “going to need something more in the record” to justify eliminating Sunday voting); *see also id.* 434:10–435:3, 436:10-14 (same). Further, one of the justifications provided to SBOE for the failure to include evening hours in the early voting plan—the high cost per hour of voting later in the evening, *id.* at 248:19–250:6—weighs in *favor* of having Sunday early voting, as Sunday was the second most cost effective day per voter in New Hanover. *Id.* at 250:10-19; *cf. McCrory*, 2016 WL 4053033, at *1 (“[T]he asserted justifications cannot and do not conceal the State’s true motivation.”).

McCrory identified the elimination of a Sunday of early voting as one of the ways in which the State targeted African-American voters. 2016 WL 4053033, at *3. And as illustrated by the statistics above, eliminating Sunday voting is a highly effective means

of targeting African Americans in New Hanover specifically. The evidence powerfully demonstrates that New Hanover's plan resulted, at least in part, from an effort to suppress African-American voting in a way that *McCrory* specifically identified as problematic. The Court should accordingly order New Hanover to offer Sunday early voting.

C. Mecklenburg County

Mecklenburg County's plan is impermissible as well. At its August 15 meeting, the Mecklenburg CBOE was unable to reach a unanimous vote; three contested plans (one majority and two minority plans) were sent to SBOE for review. Ex. 22 at 1, 5; Decl. of J. Whitley ("Whitley Decl.") ¶ 7. The majority plan proposed a drastic 238-hour cut to early voting as compared to the 2012 election and the elimination of afternoon voting (1 p.m. to 5 p.m.) on the Saturday before Election Day—the last day of early voting and the most popular early voting day in the County. *See* Ex. 22 at 1; Ex. 23; Whitley Decl. ¶ 8.

The Mecklenburg CBOE's majority plan was so restrictive that SBOE counsel said that it "mirrors so closely some of the terms that the Fourth Circuit used" in *McCrory* that accepting it without solid justification would be "risky." Ex. 7 at 348:20-349:10. SBOE member Joshua Malcolm said that, given the demand for early voting in Mecklenburg, as well as the history of long lines in 2012, "something just doesn't add up." *Id.* at 347:24-348:3. Put simply, the majority plan for Mecklenburg was blatantly discriminatory.

To its credit, SBOE eliminated most of the discriminatory aspects of Mecklenburg County's majority plan; but it ratified the elimination of afternoon voting on the last day of early voting, and based on historical turnout, the result is certain to suppress voting. Mecklenburg has offered afternoon voting on the last day of early voting since at least

2008. *See* Ex. 22 at 1-2; Ex. 7 at 354:1-8. In 2012, all of the 22 available early voting sites were open from 10:00 a.m. to 5:00 p.m. Ex. 22 at 1-2. And the last day of early voting has consistently been the busiest; in 2012, 20,954 people—or 136 voters per site, per hour—voted on that Saturday, and voters waited in line for up to two or three hours after the polls had closed. Ex. 23; Ex. 22 at 2; Ex. 7 at 354:1-2. If the turnout this year matches 2012, each early voting site will need to attempt to accommodate 238 voters per hour, Ex. 22 at 2—far more than the number of voters that resulted in hours-long lines in 2012. Moreover, the number of registered voters in Mecklenburg has grown by over 35,000 (or over 4%) since 2012. Ex. 22 at 1; *see also* Whitley Decl. ¶¶ 9-12 (discussing additional burden of voter confusion). Mecklenburg County thus needs to prepare for an *increase* in voters.

And the elimination of afternoon hours on the last day of early voting will burden African-American voters disproportionately. As the CBOE’s minority member explained, “a large majority of African-American voters relied on early voting in Mecklenburg County during the 2012 general election. 70% of African-Americans who cast a ballot in the November 2012 election did so during early voting.” Ex. 22 at 2. The last day of early voting has been especially popular among African Americans: in 2012, 47.2% of all voters who cast ballots on the last day of early voting in Mecklenburg were African American; by comparison, whites accounted for 42.5% of such voters. *Id.* This is true even though total African American citizen voting age population in Mecklenburg is only 32.3%. Ex. 1 ¶ 9 (Rodden Decl.).

Thus, the majority voted for an obviously discriminatory plan, and SBOE ratified an aspect of that plan that eliminates popular voting opportunities previously afforded to voters; is highly likely to cause extremely long lines; and will burden African Americans

by a significantly disparate margin. As SBOE member Malcom (who opposed the plan) put it, this is “the poster child of what not to do.” Ex. 7 at Tr. 370:9-12. Pursuant to *McCrory* and the injunction, the Court should order SBOE to require early voting in Mecklenburg on the afternoon of the Saturday before Election Day.

D. Forsyth County

Forsyth County’s plan violates *McCrory* and the injunction. The Forsyth CBOE held two meetings to adopt a 17-day early voting plan, with the final vote coming on August 11. El-Amin Decl. ¶¶ 3-4. From the beginning, the majority members advanced a plan that restricted early voting by eliminating Sunday voting, limiting voting during the first week to only one location, and eliminating the early voting site on the campus of the historically African-American WSSU. *Id.* ¶¶ 3-4. Community members packed the August 11th meeting, and over 25 people spoke—the vast majority in favor of all of the early voting options promoted by the minority member, and for access to early voting at WSSU. *Id.* at ¶¶ 5-7. The majority members provided no justification for their proposed restrictions on early voting. *Id.* ¶ 8. To avoid an entirely restrictive plan, the minority member proposed various compromise measures that might ease some of the burdens imposed by the majority plan. *Id.* ¶ 9. While the majority repeatedly refused any Sunday voting or additional locations during the first week, they eventually relented to open two sites in minority neighborhoods (though not on campus or even within walking distance of WSSU) offered by the minority member after he indicated he would not approve a plan without more minority sites. *Id.* at ¶ 9. The minority also secured a commitment to consider placing a site on WSSU’s campus on Election Day. *Id.* at ¶ 9. Ultimately, rather than risk that the majority would adopt an even more restrictive plan, and in the hopes that he would at least be able to secure an accessible Election Day voting site for WSSU,

the minority member agreed to the plan without Sunday voting.⁶ *Id.* at ¶¶ 9, 10; Ex. 24. Although Plaintiffs raised concerns about Forsyth County’s plan with SBOE on multiple occasions, *see* Ex. 10; Ex. 8; Ex. 3; *see also* Ex. 18, SBOE refused to take any remedial action, and instead approved the county’s early voting plan.⁷

For four reasons, this Court should find that Forsyth County’s compromise plan is deficient. *First*, the plan’s elimination of early voting on Sundays is impermissible. *McCrory* specifically identified the elimination of a Sunday of early voting as one of the ways in which the State targeted African-American voters. 2016 WL 4053033, at *3; *see also* Ex. 7 at 451:25-453:24 (elimination of Sunday voting without justification out of line with *McCrory*). Indeed, *approximately 60%* of Sunday voters in Forsyth in 2012

⁶ Since that meeting, the Forsyth majority has refused to adopt an Election Day site on WSSU, meaning that the predominately African American WSSU campus will remain without any accessible voting locations for the entire 2016 voting period. *Id.* at ¶¶ 9, 10.

⁷ Pursuant to N.C. Stat. § 163-227.2 (g), early voting sites chosen by unanimous vote of a CBOE “*must be approved by [SBOE]* as part of a Plan for Implementation approved by both the [CBOE] and by [SBOE].” *Id.* (emphasis added). Further, N.C. Stat. § 163-22 (c), in ascribing SBOE’s duties and powers, states that as part of its duties, SBOE “*shall compel observance of the requirements of the election laws by county boards of elections and other election officers.... [SBOE] shall have the right to hear and act on complaints arising by petition or otherwise, on the failure or neglect of a [CBOE] to comply with any part of the election laws imposing duties upon such a board.*” *Id.* (emphasis added). This same statute grants full removal power over board members, again indicating that SBOE—no matter what its historical practice is—has power over the CBOEs and, in particular, the power to modify or instruct them to modify unanimous early voting plans that do not comport with law. Further, under the Court’s injunction, SBOE has responsibility to ensure that all entities “acting in active concert or participation with them” abide by the injunction. No. 13-660, Dkt. No. 445, at 3. Thus, when SBOE became aware that the unanimous plans did not comply with *McCrory*, not only was it within SBOE’s power to modify those plans, it was its *legal responsibility* to stop such discriminatory plans from being approved or implemented.

were African American. *See* Ex. 25; *see also* Decl. of L. Sutton (“Sutton Decl.”) ¶¶ 4-8; Decl. of W. Bass (“Bass Decl.”) ¶ 4.

Second, there will be only one site—the County Government Center—open during the first week of early voting. In 2012, Forsyth had one site open during the first three days, with six additional sites open for the next two days, and 18,542 residents voted during the first week of early voting. Ex. 26. Significantly, the single site open for the first three days of early voting in 2012 was insufficient: the disproportionately African-American voters who turned out had to wait in long lines to vote, including two-hour lines at Government Center on the first day of early voting, when only 1,551 votes were cast. Decl. of G. Mitchell (“Mitchell Decl.”) ¶¶ 2-5 (African-American woman waited in line over two hours to vote); *see also* Ex. 25 (majority of voters on first three days of early voting were African Americans); Ex. 27.

If there are as many first-week early voters in Forsyth this year as in 2012, there will be approximately 3,000 voters per day—roughly *twice* the number that overwhelmed the Government Center in 2012. Ex. 26; *see also* El-Amin Decl. ¶ 6; Mitchell Decl. ¶¶ 5-7; *see also* Ex. 27; *see also* Ex. 7 at 259:12-275:9 (requiring more than one site for Wake County in first week). Yet the majority members of the CBOE provided no reason for restricting first-week early voting to a single site. El-Amin Decl. ¶ 8.

Third, the plan is deficient because it eliminates early voting at the Anderson Center at WSSU, a historically black college. *Id.* ¶¶ 9-10; Decl. of J. Johnson (“Johnson Decl.”) ¶¶ 9-10; Ex. 28. This site was not only available for use but thousands of voters expressly requested that it be used for early voting, and there is no plausible

nondiscriminatory explanation for not offering early voting at this location. *See* El-Amin Decl. ¶ 7; Johnson Decl. ¶¶ 5, 8; *see also* Ex. 29.⁸

Fourth, the aggressive effort by the CBOE’s majority members to limit early voting can only be explained as an attempt to suppress voting. The majority’s original proposal not only would have cut the Anderson Center site, but would not have replaced it with *any* sites in areas with large minority populations. And, the majority members steadfastly refused to agree to Sunday voting. The final compromise plan removed some of the troubling aspects of the majority’s original proposal. But many problematic aspects remain, and any compromise plan in which impermissible considerations played a role—as they clearly did here—is invalid. *See McCrory*, 2016 WL 4053033, at *6 (“Challengers need not show that discriminatory purpose was the ‘sole[.]’ or even a ‘primary’ motive for the legislation, just that it was ‘a motivating factor.’”).

Forsyth’s plan is directly at odds with *McCrory* and the injunction. The Court should require that voting be offered at multiple sites during the first week of early voting, on Sundays, and at the Anderson Center site.

⁸ Forsyth’s plan purports to make up for the loss of Anderson Center through the addition of two locations in areas with large minority populations (the Sprague Center and St. Paul’s Methodist Church). But while the addition of these sites improves upon the plan originally proposed by the CBOE’s majority, it does not offset the impact from the loss of the Anderson Center site. El-Amin Decl. ¶ 10; Johnson Decl. ¶¶ 5-7. The new locations are not within walking distance for many WSSU students, and they do not provide the same level of accessibility as Anderson Center. El-Amin Decl. ¶¶ 7, 9-10; Johnson Decl. ¶¶ 5-7; Ex. 1, Attach. D - F (WSSU EV Maps). *Cf.* Ex. 30. This is also true for the Reynolds Park Recreation Center, which was proffered during the adoption of the original ten-day plan as a WSSU alternative. Johnson Decl. ¶¶ 5-7; Ex. 1, Attach. D - F (WSSU EV Maps).

E. Guilford County

On August 4, the Guilford CBOE convened an emergency meeting to discuss implementation of a 17-day early voting plan. Decl. of M. Slone (“Slone Decl.”) ¶ 4; Decl. of T. A. Spearman (“Spearman Decl.”) ¶ 4. Rather than make voting more accessible to voters, the CBOE’s majority proposed reducing the number of early voting sites from 25 to 12; eliminating all Sunday voting; and eliminating the use of key voting sites for African-American and young voters. Slone Decl. ¶ 4; Spearman Decl. ¶4; *see also* Ex. 31. They did not provide any rationale for this extreme proposal, which would have burdened the voting rights of a huge number of voters: over 351,441 registered voters reside in Guilford County, 121,091 of whom are African American. Ex. 32. And in 2012, over 61,000 Guilford residents voted early. Ex. 35.

On August 8, the Guilford CBOE met to select an early voting plan, and the meeting was packed. Slone Decl. ¶ 4; Spearman Decl. ¶ 5; *see also* Ex. 34. Community leaders requested the opportunity to speak on the record, but the chair denied their requests, opting instead for negotiations among CBOE members in a private huddle away from the public. Spearman Decl. ¶¶ 6, 7; *see also* Ex. 34. The result was a compromise, which provides for only one site (at the Old Courthouse) during the first seven days of early voting, and 25 sites for the last ten days. Ex. 33. Plaintiffs brought concerns about this plan to SBOE’s attention, *see* Ex. 10; Ex. 8; Ex. 3; *see also* Ex. 18, but SBOE approved it, Ex. 11.

While the compromise plan is an improvement over the initial majority proposal, it was infected by the majority’s effort to suppress voting and serious problems remain. *See McCrory*, 2016 WL 4053033, at *6. The decision to have only one site during the first seven days of early voting is otherwise inexplicable: in 2012, Guilford County had

16 sites open during the first week, including sites at locations which were heavily used by African-American voters. Ex. 12; see Ex. 1, Attach. C (Guilford EV Map). A total of 60,732 residents of the county voted during the first week of early voting. Ex. 35. And African Americans accounted for 50% of early voters in Guilford County, as compared to 35% of all voters in the county and 20% of all voters statewide. See Ex. 10 at 1; Ex. 36; Ex.37. The Old Courthouse cannot plausibly handle anywhere near the number of voters who turned out for the first week in 2012. If first-week turnout is as high this year as it was in 2012, Guilford will have to process 12,090 voters per day—or approximately 268 voters per hour. The nearly certain result, even if far fewer voters turn out during the first week, will be long lines that make voting more burdensome and decrease confidence in the election system. See Slone Decl. ¶ 7; Spearman Decl. ¶¶ 9, 10; Ex. 10 at 1, 2.

Given this data, as well as the fact that *McCrory* identified the elimination of the first week of early voting as one of the ways in which the State targeted African Americans with SL 2013-381, Guilford's early voting plan cannot stand. Indeed, SBOE recognized that a similar plan—Wake County's majority plan—was unacceptable under *McCrory*. See Ex. 7 at 259:12-275:9 (finding Wake County's proposal for a single site during the first 7 days unacceptable under *McCrory* where approximately 10,000 voters were expected to vote each day and the CBOE office would not be able to process those voters without long lines). The Court should therefore order that additional sites be opened for the first week of early voting in Guilford County.

II. REQUEST FOR ORDER TO SHOW CAUSE⁹

To establish civil contempt, a movant must show by clear and convincing evidence: “(1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) . . . the decree was in the movant’s ‘favor’; (3) . . . the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive) of such violations; and (4) . . . that [the] movant suffered harm as a result.” *JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc.*, 359 F.3d 699, 705 (4th Cir. 2004). Each of these elements are present here: this Court entered a permanent injunction in Plaintiffs’ favor; SBOE had knowledge of the injunction; its actions in approving the aforementioned early vote plans violate *McCrorry* and the injunction; and these actions harm Plaintiffs as well as thousands of North Carolina’s voters—and African Americans particularly because, absent relief, they will be forced to vote in a system infected with discriminatory intent and be represented by officials elected under such an unconstitutional system. Thus, a finding of contempt is warranted.

CONCLUSION

Plaintiffs respectfully request that the Court enter an order requiring SBOE to comply with the injunction by modifying the Nash, New Hanover, Mecklenburg, Guilford, and Forsyth County plans in accordance with the argument set out above and the proposed order included herewith. Given that early voting in North Carolina begins on October 20, 2016, it is essential that this motion be resolved as expeditiously as possible. Thus, Plaintiffs respectfully request a ruling by October 7.

⁹ Plaintiffs request an order to show cause out of an abundance of caution, to the extent that it is procedurally required for this Court to enforce its injunction.

Dated: October 1, 2016

Respectfully submitted,

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**appearing pursuant to Local Rule 83.1(d)*

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2016, I electronically filed the foregoing **DUKE INTERVENOR PLAINTIFFS' MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO ENFORCE THE INJUNCTION**, using the CM/ECF system in case numbers 1:13-cv-658, 1:13-cv-660, and 1:13-cv-861, which will send notification of such filing to all counsel of record.

/s/ Edwin M. Speas, Jr.
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