

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. _____

NORTH CAROLINA)
DEMOCRATIC PARTY,)

Plaintiff)

v.)

KIM STRACH, in her official)
capacity as the Executive Director)
of the North Carolina State Board)
of Elections)

Defendant)

**MOTION FOR TEMPORARY
RESTRAINING ORDER AND ORDER TO
SHOW CAUSE WHY PRELIMINARY
INJUNCTION SHOULD NOT ISSUE**

Plaintiff, the North Carolina Democratic Party (“NCDP”), hereby moves the Court for an order requiring the Defendant, Kim Strach, in her capacity as the Executive Director of the North Carolina State Board of Elections, to extend the voter registration deadline from October 14, 2016 to October 19, 2016, pursuant to Rule 65 of the North Carolina Rule of Civil Procedure. In support of this Motion, Plaintiff NCDP shows the Court:

I. NATURE OF THE CASE

In the absence of relief from this Court, there is little question that thousands (and quite possibly tens of thousands) of North Carolinians will be disenfranchised.

As Hurricane Matthew continued its rampage up the eastern seaboard last weekend, leaving a wake of devastation behind it, the State of North Carolina found itself in the storm’s crosshairs. As the storm tore through North Carolina, it shut down major stretches of Interstates 95 and 40 and other roads and killed at least 22 people. To date, more than 2,000 people have been rescued from flooded areas of North Carolina, including nearly 100 air rescues by the U.S.

Coast Guard. On October 12, 2016, Governor McCrory reported that more than 300,000 North Carolinians were still without power, and 3,800 were in shelters. President Obama has signed a federal disaster declaration for 31 North Carolina counties, a number that has risen along with the state's floodwaters.

In the face of this ongoing crisis, Governor McCrory has ordered residents to evacuate in no uncertain terms, telling residents: "We've had too many deaths. Get out!" Vast numbers of people have heeded the Governor's warnings, and affected areas shut down and became impassable. Many North Carolinians in the Eastern and Coastal regions—which include many of the State's most impoverished citizens as well as a disproportionate number of African-Americans—continue to face emergency conditions, including ongoing dangerous flooding.

Unfortunately, the State has not taken appropriate and necessary action to protect the fundamental right to vote of those North Carolinians most severely affected by the hurricane. Voter registration in North Carolina is scheduled to end on Friday, October 14. In 2012, roughly 72,000 North Carolinians registered to vote in the week prior to the registration deadline. On October 13, 2016, Plaintiff formally requested that the State of North Carolina extend the voter registration deadline until October 19, 2016, to allow those affected by the hurricane to register after floodwaters recede and they have a fair opportunity to turn their attention from ensuring their personal safety to exercising their franchise. But the State has failed to extend the voter deadline, even for a few days. Thus, the State has forced North Carolinians to choose between their safety and their right to vote. By contrast, other states impacted by the hurricane are protecting the right to vote by extending registration deadlines. And where other states have not acted, the courts have. Just two days ago, the Northern District of Florida entered an injunction extending Florida's registration deadline from October 11, 2016, to October 18, 2016.

The State's refusal to extend the voter registration deadline does not promote any state interest—let alone one that justifies certain disenfranchisement of thousands of North Carolinians. Moreover, the State's failure to extend the deadline will disproportionately and unfairly burden the rights of North Carolinians with the most to lose: those already devastated by Hurricane Matthew. Failure to extend the deadline will also disproportionately affect members of North Carolina's African-American community. Simply put, North Carolinians who have borne the brunt of Hurricane Matthew should not also be forced to forfeit their voting rights. The Court should therefore order Defendant to extend the voter registration process during the pendency of this litigation, at least until October 19, 2016.

II. STATEMENT OF FACTS

A. North Carolina's Voter Registration Deadline Is October 14

North Carolinians must complete a Voter Registration Application and deliver it, either in person, facsimile, or by mail, to the County Board of Elections. N.C. Gen. Stat. § 163-82.6. The deadline for delivering voter registration forms for the upcoming general election is Friday, October 14. *See id.* § 163-82.6(c).

Completed registration applications that are submitted in person (or by facsimile) must be delivered no later than 5:00 p.m. on the registration deadline. *See id.* Applications delivered by mail are considered delivered as of the date they are postmarked, if a clear postmark is present on the mailing envelope. *See id.* If no clear postmark is present, then the application may be accepted no later than 20 days before the election. *See id.*

In 2013, the North Carolina General Assembly passed an omnibus bill, SL 2013–381, imposing various voting restrictions, which included the elimination of same-day registration during an early voting period. In *N.C. State Conference of NAACP v. McCrory*, the Fourth Circuit held that “race constituted a but-for cause of SL 2013–381, in violation of the

Constitutional and statutory prohibitions on intentional discrimination.” 831 F.3d 204, 238 (4th Cir. July 29, 2016). Accordingly, North Carolina has been ordered to restore “same day” registration during an early voting period commencing on October 20, 2016. A citizen cannot, however, utilize this registration alternative unless (a) he or she is physically able to make it to an early voting location and (b) can present the requisite proof of residence. N.C. Stat. § 163-82.6A(b)(2). By contrast, submission of North Carolina’s regular voter registration form can be done from home, and requires only attestation of residence under penalty of perjury, but not documentary proof thereof. See *id.* §§ 163-82.6; 163-82.6A(b)(1).

Interest in an impending election reaches its zenith as Election Day approaches. Thus, North Carolina typically sees a surge in voter registration in the days leading up to the voter registration deadline. Indeed, in 2012 (the last presidential election year), roughly 72,000 North Carolinians registered to vote in the nine days in October prior to the registration deadline. See Declaration of Marc E. Elias (“Elias Decl.”), ¶ 3. During the last week of voter registration in 2012, 29.7% of registrations submitted came from African-Americans, constituting a 32% increase in the last week relative to the composition of the electorate. See *id.*

B. Hurricane Matthew—the Largest Hurricane to Hit North Carolina in Years—Strikes Days Before the Registration Deadline¹

After claiming nearly 900 lives in Haiti and the Caribbean and devastating Florida, Hurricane Matthew took aim for North Carolina. On October 6, 2016, Governor McCrory

¹ Mark Price, *NC hurricane death toll rises to 20; tens of thousands lack power*, Charlotte Observer (Oct. 12, 2016), <http://www.charlotteobserver.com/news/local/article107678022.html> (last visited Oct. 13, 2016); WBTB staff & Associated Press, *Gov. McCrory: 14 storm-related deaths in NC following Matthew, 3 still missing*, CBS North Carolina (Oct. 11, 2016), <http://wspa.com/2016/10/11/north-carolina-gov-mccrory-to-update-storm-status/> (last visited October 13, 2016).

declared a state of emergency in all 100 counties in North Carolina.² On Saturday October 8, the hurricane tore through eastern and central North Carolina with up to 86-mile-per-hour winds and over 18-inches of rainfall in many areas.³ President Obama has signed a federal disaster declaration for 31 North Carolina counties, a number that has risen along with the state's floodwaters.⁴

Major stretches of Interstates 95 and 40 and other roads have been shut down, and thus far the storm has killed at least 22 people.⁵ On October 12, 2016, Governor McCrory reported that more than 300,000 North Carolinians were still without power, and 3,800 were in shelters.⁶ To date, more than 2,000 people have been rescued from flooded areas of North Carolina, including nearly 100 air rescues by the U.S. Coast Guard.⁷

The devastation in Eastern and Central North Carolina is far from over. Rivers have continued to rise all week and flooding continues to destroy homes and apartments throughout the area as local rivers overflow.⁸ On Wednesday October 12, Governor McCrory ordered more residents to evacuate—this time in Moore and Lenoir Counties, and the towns of Lumberton,

² See Office of Patrick McCrory, Governor McCrory Declares State of Emergency for All 100 North Carolina Counties (Oct. 6, 2016), <https://governor.nc.gov/press-release/governor-mccrory-declares-state-emergency-all-100-north-carolina-counties>.

³ Mark Price, *NC hurricane death toll rises to 20; tens of thousands lack power*, Charlotte Observer (Oct. 12, 2016), <http://www.charlotteobserver.com/news/local/article107678022.html> (last visited Oct. 13, 2016).

⁴ *Matthew flood rescues continue as water rises in N.C.*, CBS News (Oct. 11, 2016), <http://www.cbsnews.com/news/matthew-flood-rescues-continue-as-water-rises-in-n-c/> (last visited Oct. 13, 2016) (hereinafter "CBS News").

⁵ See Emily Shapiro, *North Carolina's Storm-Related Death Toll Climbs to 22*, ABC News (Oct. 13, 2016, 5:14 PM), <http://abcnews.go.com/US/north-carolinas-death-toll-plateaus-flooding-evacuations/story?id=42775580> (last visited Oct. 13, 2016) (hereinafter "Shapiro, ABC News").

⁶ See John Bacon, *Blue Skies in N.C.—but the worst flooding is yet to come*, USA Today, (Oct. 12, 2016) <http://www.usatoday.com/story/news/nation/2016/10/12/despite-blue-skies-nc-death-toll-matthew-rises/91939664/> (last visited Oct. 13, 2016) (hereinafter "Bacon, USA Today").

⁷ See CBS News.

⁸ See generally Bacon, USA Today.

Princeville, Kinston, Vass, and Goldsboro.⁹ Other counties where floodwaters are expected to peak on Thursday and Friday have also been ordered to evacuate, including Edgecombe, Pitt, Bladen, Wayne counties. Shapiro, ABC News. To residents who have refused to evacuate, Governor McCrory insisted in a press conference on Tuesday, October 11, “We’ve had too many deaths. Get out!”¹⁰

As of Thursday, October 13, 2016, “the state is still reeling from fatalities, severe flooding, displaced residents and transportation problems.”¹¹ Thousands of residents remained in shelters. *Id.* And floodwaters continue to rise in some areas.¹² Interstate 95, a major throughway, remains closed from Lumberton to Fayetteville. Likewise, Interstate-40, near Newton Grove, and U.S. 70 in Kinston also remain closed.¹³ Road conditions are dangerously unpredictable given the rising floodwaters. Two drivers—one in Cumberland County and another in Wilson County—died when their vehicles were submerged by rushing floodwaters along US-301 and Hwy-51.¹⁴

In anticipation of Hurricane Matthew, affected areas were shut down, and conditions remain far from normal in the Coastal and Eastern parts of the State. As of Thursday, October 13, Plaintiff’s understanding is that some Board of County Commissioners offices continued to

⁹ See ABC News Channel 11 WTVD, *McCrory: 20 Storm-Related Deaths in NC After Matthew*, ABC WTVD (Oct. 13, 2016), <http://abc11.com/weather/mccrory-20-storm-related-deaths-in-nc-after-matthew/1535987/> (last visited Oct. 13, 2016), hereinafter “ABC News Channel 11”).

¹⁰ *See id.*

¹¹ Shapiro, ABC News.

¹² *Id.*

¹³ *Id.*

¹⁴ ABC News Channel 11.

lack running water and access to the Internet. The U.S. Postal Services has closed numerous post offices throughout North Carolina due to a lack of road access.¹⁵

C. Defendant Refuse to Modestly Extend the Voter Registration Deadline to Allow North Carolinians to Register Once the Storm and Its Aftermath Have Passed

Pursuant to N.C. Gen. Stat. § 163-27.1, Defendant Strach, as “chief State elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by . . . [a] natural disaster [or] . . . [e]xtremely inclement weather.”

On October 12, 2016, in recognition of the toll taken by Hurricane Matthew and the continuing emergency conditions in many parts of the State, Defendant Strach sent Memo 2016-19 to the County Boards of Election regarding the “aftermath of Hurricane Matthew.” *See* Elias Decl., Ex. C. Defendant Strach explained that many post offices were closed, resulting in interrupted pick up and delivery in those areas. *Id.* Accordingly, Strach directed local election officials to accept voter registration forms that had been (a) mailed; (b) dated by the voter on or before October 14; and (c) received on or before 5:00 p.m. on October 19, regardless of whether the mail was postmarked timely on or before October 14. *Id.*

While this action was welcome, it did North Carolinians little practical good. Many North Carolinians have been displaced or otherwise unable to obtain a voter registration form since Matthew hit on Saturday. Any would-be voters in the storm-affected areas will have to make their way through the extensive flooding and damage caused by the storm in order to register by the October 14 deadline.

Accordingly, on Thursday, October 13, Plaintiff, in addition several community organizations including the North Carolina State Conference of the NAACP, asked the State to

¹⁵ *See* United States Postal Service, *Is my Post Office Open? Hurricane Matthew*, (last updated Oct. 12, 2016), http://about.usps.com/news/service-alerts/resident-open.htm#toggle_hur (last visited Oct. 13, 2016); *see also* Elias Decl., Ex. D.

modestly extend the voter registration deadline. *See* Elias Decl., Exs. E-F. The State has taken no action in response to this request. Under these extraordinary circumstances, Defendant's refusal to extend the voter registration deadline violates the fundamental voting rights of North Carolinians.

Unfortunately, this is not the first time that the courts have been asked to intervene because the State of North Carolina has disenfranchised North Carolinians or implemented election laws that burden African Americans' right to vote in particular. *See, e.g., N. C. State Conference of NAACP*, 831 F.3d at 214 (explaining how "the legislature requested data on the use, by race, of a number of voting practices" and then enacted legislation that "restricted voting and registration in five different ways, all of which disproportionately affected African Americans").

III. ARGUMENT

A. Standard for Preliminary Injunctive Relief

Preliminary injunctive relief should be issued "(1) if a plaintiff is able to show likelihood of success on the merits of [its] case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued." *TSG Finishing, LLC v. Bollinger*, 238 N.C. App. 586, 590 (2014) (emphasis in original); *see also United Tel. Co. of Carolinas, Inc. v. Universal Plastics, Inc.*, 287 N.C. 232, 236 (1975). The court, in exercising its discretion in determining whether to issue an injunction, "should engage in a balancing process weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if the injunction is granted." *Williams v. Greene*, 36 N.C. App. 80, 86 (1978). "In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Id.*

B. Plaintiff Is Likely To Succeed On The Merits of Its Claims.

1. Defendant' Actions Impose A Severe Burden on The Right To Vote Without Advancing Any State Interest.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Accordingly, election laws burdening that fundamental right are subject to searching judicial scrutiny.

In *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court laid out a “flexible standard” to resolve constitutional challenges to state election laws that burden voting rights. *See Anderson*, 460 U.S. at 789. “A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Burdick*, 504 U.S. at 433-34 (quotation marks and citation omitted). When a regulation subjects the right to vote to a “severe” restriction, the restriction “must be narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 280 (1992). Less severe burdens remain subject to balancing. But “[h]owever slight” the burden on the right to vote “may appear,” “it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (plurality) (quoting *Norman*, 502 U.S. at 288-89).

Here, if the October 14 voter registration deadline is not extended, then thousands and potentially tens of thousands of North Carolinians will be completely disenfranchised. Many were required to evacuate ahead of Hurricane Matthew, numerous government offices where

they *could* register were closed, and postal service has been suspended in many areas. Thus, many North Carolinians who would have registered to vote this week were unable to do so. And, by the time many affected residents return to their homes and pick their way through storm-ravaged streets to election offices or post offices, it will be too late for them to register under the current deadline.

“[T]he basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many[.]” *League of Women Voters of N.C. v. N. Carolina* (“*LOWV*”), 769 F.3d 224, 244 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015). As a result, courts routinely hold that laws precluding citizens from voting impose severe burdens on core constitutional rights.

Just two days ago, the Northern District of Florida entered a temporary restraining order and then a preliminary injunction extending Florida’s registration deadline until October 18, 2016, to mitigate the impact of Hurricane Matthew. The court found that in the circumstances presented, the existing registration deadline constituted a “severe burden” that the State could not justify. *See* Elias Decl., Ex. A at 10-11. Indeed, the court found that it was “wholly irrational” for the State of Florida to refuse to extend the voter registration deadline when it allowed *elections themselves* to be suspended or moved due to unseen emergencies. *See id.* at 12 (citing Fla. Stat. § 101.733). And the court found that all other relevant factors—including the harm to the Plaintiff (the Florida Democratic Party) and the public interest—counseled strongly in favor of injunctive relief. *Id.* at 12-14. And given that Hurricane Matthew struck some parts of the State more heavily than others, the court concluded it would be “grossly inappropriate” if residents in areas spared by the storm could register later than those in storm-afflicted parts. *Id.* at 14-15. Accordingly, the court temporarily enjoined enforcement of the registration deadline. *See id.* at 15-16. After a hearing, the court then extended the registration deadline by one week, to October 18. *See generally* Elias Decl., Ex. B.

Many other courts have taken similar action where state election laws imposed an undue burden on the fundamental right to vote. For example, in *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), the Sixth Circuit found a “severe” burden where unreliable punch card ballots and optical scan systems resulted in thousands of uncounted votes. *Id.* at 661-62. Similarly, in 2006, a federal district court enjoined state officials in Ohio from enforcing amendments to the Ohio Elections Code. *See Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 709 (N.D. Ohio 2006). The amendments imposed several requirements upon civic organizations that encouraged Ohio citizens to “get out and vote” and assisted new voters in the registration process. *Id.* at 698.¹⁶

The court granted plaintiff’s requested injunction, holding that the requirements created “barriers” to registration that were “problematic from a constitutional standpoint,” because they differentiated between voter registration workers without a rational basis and were “not a uniform and nondiscriminatory attempt to protect the integrity of the electoral process.” *Id.* at 703-04, 709. In so holding, the court specifically noted that “historically, the primary focus of voter registration drives has been low- and moderate-income, minority, and other disenfranchised communities, as well as the disabled.” *Id.* at 699.

More recently, in *Northeastern Ohio Coalition for the Homeless v. Husted* (“*NEOCH*”), 696 F.3d 580 (6th Cir. 2012), the court held that disqualification of thousands of Ohio provisional ballots because they were cast in the correct polling location but wrong precinct in

¹⁶ Specifically, before any person compensated for providing assistance to voters could provide such assistance, he or she was required to pre-register with the Secretary of State, complete an online training, and submit a “sworn affirmation” that such pre-registration and training were completed. *Id.* at 699. Additionally, any person who registered another person to vote was required to personally return the voter’s registration card, either by putting it in the mail himself or herself or delivering it to the Secretary of State or an Ohio elections office. *See id.* at 702. Anyone who was “compensated” for registering voter was required to identify his or her name, address, and employer name on the voter’s registration form. *See id.* Voter registration workers who failed to comply were subject to felony criminal charges and penalties. *See id.* at 705.

multiple-precinct polling locations constituted a “substantial” burden on provisional voters. *See id.* at 597. The court reached that conclusion even though such ballots historically constituted less than 0.248% of all votes cast. *See id.* at 593.

Lastly, in *One Wisconsin Institute, Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222 (W.D. Wis. July 29, 2016), the court found a severe burden where about 100 otherwise qualified voters were disenfranchised because of Wisconsin’s voter identification law. *See id.* at *2.

Here, just as the Northern District of Florida found with regard to Florida’s registration deadline, Defendant’s refusal to extend North Carolina’s October 14 voter registration deadline will result in the disenfranchisement of many voters, and the imposition of tremendous and unnecessary burdens for others. This sort of denial of the right to vote plainly amounts to a severe burden on the franchise. *See, e.g.*, Elias Decl., Ex. C at 10 (noting that Florida’s registration deadline “would categorically deny the right to vote to those individuals” who had not registered prior to Hurricane Matthew); *see also Ayers-Schaffner v. DiStefano*, 860 F. Supp. 918, 921 (D.R.I.), *aff’d*, 37 F.3d 726 (1st Cir. 1994) (“A complete denial of the right to vote is a restriction of the severest kind.”); *see also NEOCH*, 696 F.3d at 585-87 (“summary” and “automatic” nature of disqualification of right-place, wrong-precinct ballots suggests burden on right to vote is “substantial”).

Given the likelihood of total disenfranchisement for thousands of North Carolinians, Defendant must come forward with an interest that is “sufficiently weighty” to justify enforcing the October 14 deadline, and show that the October 14 deadline is narrowly drawn to further that interest. *Norman*, 502 U.S. at 288-89; *see also* Elias Decl., Ex. C at 10-12 (determining that Florida’s voter registration deadline could not be enforced regardless of the level of scrutiny applied).

First, Hurricane Matthew unexpectedly wiped out the last week of registration, when tens of thousands of people usually register. *See* Elias Decl. ¶ 3. As described above, many parts of the state continue to experience severe complications from the storm. And the areas of the state most heavily affected are among the poorest in the state.¹⁷ As a result, the North Carolinians who are bearing the brunt of the storm are among those with the fewest resources who are least well equipped to surmount additional administrative burdens to registering to vote. The suggestion that North Carolinians living in storm-affected areas should be punished because a natural disaster prevented them (but not other North Carolinians) from taking full advantage of the voter registration period is both offensive and illogical. So, too, is any suggestion that it is more important to avoid any administrative burdens an extension would entail for election officials than to ensure that all North Carolinians have the same opportunity to exercise their fundamental right to vote.

Second, to the extent Defendant argues in opposition to this motion that the availability of same day registration during early voting obviates the need to extend the registration deadline, she is incorrect. A North Carolinian who seeks to register during early voting must travel in person to an early voting site—in their county of residence—and submit documentary proof of residence, neither of which is required of those registering before the October 14 deadline. Accordingly, this registration option is far less accessible to voters who have difficulty traveling (whether as a result of age, infirmity, or lack of access to transportation), or who lack ready access to required forms of proof of residence.

¹⁷ *See* Chico Harlan & Angela Fritz, *Flooding from hurricane hits lower-income North Carolina residents hard*, Washington Post (Oct. 11, 2016), https://www.washingtonpost.com/national/flooding-from-hurricane-hits-lower-income-north-carolina-residents-hard/2016/10/11/05efb218-8feb-11e6-9c85-ac42097b8cc0_story.html.

These barriers have been heightened by the ongoing and catastrophic flooding resulting from Hurricane Matthew. At this point, it remains entirely unclear when many evacuees will be able to return to their homes, and it is likely that many voters will return home only to find that any “proof of residency” they may have has been destroyed. It is doubtful that residents grabbed registration-related documents as they fled rising floodwaters. As one resident explained, she and her daughter had just fifteen minutes to evacuate their home, leaving nearly everything behind.¹⁸ Further, those displaced to different counties will likely be unable to visit an early voting location in their county of residence, as is required to cast an early voting ballot under N.C. Gen. Stat. § 163-82.6A(a). Further, significant transportation challenges exist due to the storm that will complicate or prevent in-person travel to early voting sites.¹⁹ Thus, in the circumstances presented, many North Carolinians will find it extraordinarily difficult—or even impossible—to secure the documentation they need and travel to an early voting site.

Third, any posited “administrative” burden is nominal and simply can and must give way in these circumstances. It cannot be disputed that North Carolina can easily process voter registration applications after October 14. The State continues to allow voters to register in person during the early voting period. Defendant Strach has instructed County Boards of Election to accept voter registration applications that arrive in the mail up to and including October 19. *See* Elias Decl., Ex. C. If the State will accept and process forms that it *receives* in

¹⁸ *See* CBS News & Associated Press, *North Carolina floods from Hurricane Matthew force residents to keep vigil on homes*, CBS News (Oct. 13, 2016), <http://www.cbsnews.com/news/north-carolina-floods-hurricane-matthew-force-residents-keep-vigil-homes/> (last visited Oct. 13, 2016).

¹⁹ If regular voter registration is extended, displaced voters could register and then use North Carolina’s absentee voting process to vote from their temporary residences. In a single mailing, displaced voters could register to vote and request an absentee ballot to be sent to their temporary residence. *See* N.C. Stat. § 163-82.6(a) (regular registration by mail); *id.* § 163-230.1(a) (request for absentee ballot). The absentee ballot could then be returned to the applicable county board of elections by mail, as well. *Id.* § 163-231(b).

the mail on October 19, it is simply irrational for the State to refuse to extend the voter registration deadline to allow North Carolinians to register *until* October 19. If the State Department of Revenue can waive tax-related deadlines for residents in the most severely affected areas,²⁰ surely the State could offer similar accommodations when it comes to citizens' fundamental right to vote.

Simply put, Defendant have not and cannot offer any valid reason for refusing to extend the registration deadline by three business days in these circumstances, let alone a reason sufficient to justify disenfranchising thousands of North Carolinians. Plaintiff is therefore likely to prevail on Count I of its Complaint.

C. Defendant' Actions Violate The Equal Protection Clause.

Hurricane Matthew did not affect the entirety of the State of North Carolina equally. While many North Carolina citizens living in the Eastern and Coastal regions were forced to evacuate, others were able to remain in their homes during the storm. North Carolinians' ability to access government services—including offices where they can register to vote or post offices where they can mail in registration forms—has depended on where in the state they live. Indeed, Plaintiff's understanding is that as of October 13 some election offices in the hardest hit areas remained without running water or access to the Internet. As a practical matter, that means that North Carolinians in the areas most heavily affected by the storm and its aftermath will be prevented from registering by October 14, while those who are fortunate enough to live further inland will not face the same impediments to meeting that deadline. It follows that the October 14 deadline, if not extended, will treat similarly situated voters differently by unfairly and arbitrarily favoring inland voters over coastal voters.

²⁰ North Carolina Department of Revenue, *NCDOR Provides Update Regarding Effect of Hurricane Matthew* (Oct. 12, 2016), <http://www.dor.state.nc.us/press/2016/hurricanemathew101216.html> (last visited Oct. 13, 2016).

Defendant's refusal to extend the October 14 deadline therefore violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. As the Supreme Court has explained, "[t]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, *by later arbitrary and disparate treatment, value one person's vote over that of another.*" *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (emphasis added). But that is precisely what Defendant propose to do here: enforce the October 11 deadline throughout the entire State, without regard to a massive storm that makes the deadline unreasonable in some areas, thereby resulting in "arbitrary and disparate treatment" of similarly situated voters based on nothing more than the happenstance of their residences.

Here again, Plaintiff's claim is evaluated under the flexible standard of the *Anderson-Burdick* test. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *4 (6th Cir. Aug. 23, 2016). The State's refusal to extend the voter registration deadline to account for the destruction wrought by Hurricane Matthew will result in the disenfranchisement of thousands of voters. That severe burden on the fundamental right to vote cannot be justified by the administrative inconvenience (assuming any such inconvenience even exists) of extending the October 14 deadline to October 19. As the Northern District of Florida held in extending Florida's voter registration deadline:

Hurricane Matthew's effects are not circumscribed to one region of the state. It affected jobs, families, and more across the state. It would be grossly inappropriate, for example, to hold that aspiring eligible voters in Jacksonville could register later than those in Pensacola. Therefore, this Order holds that Florida's current statutory framework is unconstitutional. That unconstitutionality is not limited to those in the areas most affected by Hurricane Matthew. It extends to the entire State of Florida.

Elias Decl., Ex. B at 14-15.

Plaintiff is therefore likely to prevail on Count II of its Complaint.

D. Defendant' Actions Violate The Voting Rights Act.

Section 2 of the Voting Rights Act prohibits any State or political subdivision from imposing an electoral practice that results in a denial or abridgement of a citizen's right to vote on account of race or color. *N. Carolina State Conference of NAACP*, 831 F.3d at 215. "[T]he critical question in a Section 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986). Under Section 2, as amended in 1982, a violation can be shown without proving discriminatory intent. *N. Carolina State Conference of NAACP*, 831 F.3d at 221.

Here, the areas affected by Hurricane Matthew include substantial populations of minority voters, including African Americans. *See Elias Decl., Ex. E.* African-American voters in North Carolina are disproportionately likely to register in the days immediately preceding the registration deadline. *Elias Decl.* ¶ 3. Given the ongoing effects of discrimination, there remain significant and continuing disparities between these minority voters and other members of the electorate, including disparities in socioeconomic conditions and access to transportation. Those disparities, in turn, mean that minority voters in storm-affected areas will have more difficulty overcoming the barriers to registration caused by Hurricane Matthew relative to other members of the electorate.

Courts determining whether a law impermissibly denies or abridges the right to vote under Section 2 look to the "totality of circumstances." 52 U.S.C. § 10301. In particular, the Supreme Court has found that the Section 2 analysis should be guided by the so-called Senate Factors. *See Gingles*, 478 U.S. at 37-38. Those factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the

minority group to register, to vote, or otherwise to participate in the democratic process;

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 unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction. . . .

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. (quoting S. Rep. No. 97-417, at 28-29 (1982)) (quotation marks omitted). Those factors weigh in favor of Plaintiff in this case.

Indeed, earlier this year, the Fourth Circuit struck down various voting restrictions imposed by the State of North Carolina, finding that the State *intentionally* discriminated against African American voters by adopting such restrictions. *See generally N. Carolina State Conference of NAACP*, 831 F.3d at 223. In reaching that conclusion, the Fourth Circuit described the State's "long history of race discrimination generally and race-based vote suppression in particular," and noted numerous "instances since the 1980s in which the North

Carolina legislature has attempted to suppress and dilute the voting rights of African Americans.” *Id.*

Thus, the history of official discrimination in North Carolina (factor 1) is well documented, as is racial polarization in voting patterns (factor 2). *See, e.g., id.; see also id.* at 225 (“[R]acially polarized voting between African Americans and whites remains prevalent in North Carolina”). Similarly well-documented are the socioeconomic disparities affecting Florida’s minority voters. *See, e.g., League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (noting how “history of official discrimination against blacks has resulted in current socioeconomic disparities with whites.”), cert. denied, 135 S. Ct. 1735 (2015). Moreover, the State has displayed a dismissive attitude towards African-American voters in storm-affected areas, including by ignoring the NAACP’s entreaties to extend the voter registration deadline, *see Elias Decl., Ex. E*, thereby revealing a “significant lack of responsiveness” (factor 8). African-American citizens have been and will be disproportionately affected by the storm given the historical disparities above. And the fact that minority voters tend to register at higher rates closer to the voter registration deadline will only magnify these disenfranchising effects.

Nevertheless, Defendant have not extended the voter registration deadline, even modestly, to accommodate minorities affected by the storm. Their excuse for that inaction—in essence, that everyone should have registered at least one week *before* the actual deadline—is “tenuous” at best (factor 9).

While Section 2 cases can be fact intensive, Plaintiff here is likely to succeed on the merits. Unless enjoined, Defendant’ actions will disproportionately affect African American voters, stripping them of their ability to participate in the upcoming election. Plaintiff is therefore likely to prevail on Count III of its Complaint.

E. Plaintiff Satisfies The Other Preliminary Injunction Factors.

1. An Injunction Is Necessary to Avoid Irreparable Harm.

There is no genuine dispute that the harm threatened here is irreparable. If North Carolina voters are prevented from registering as a result of Hurricane Matthew and Defendant refuse to extend the registration deadline, there is no way to cure that disenfranchisement. “[O]nce the election occurs, there can be no do-over and no redress.” *LOWV*, 769 F.3d at 247. Thus, courts have long recognized that when an “abridgment to the voters’ constitutional right to vote” is imminent, “irreparable harm is presumed and no further showing of injury need be made.” *Touchston v. McDermott*, 234 F.3d 1133, 1158-59 (11th Cir. 2000); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (“*OFA*”) (abridgement of right to vote constitutes irreparable harm); *Council of Alt. Political Parties v. Hooks*, 121 F.3d 876 (3d Cir. 1997) (same); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (same).

In short, “[i]t is unquestionable that Plaintiff and its members would suffer irreparable injury if a temporary restraining order is not granted.” Elias Decl., Ex. C at 12-13 (entering restraining order extending Florida’s voter registration deadline).

2. The Balance of Hardships Weighs in Favor of an Injunction.

It is equally clear that the balance of hardships favors Plaintiff and weighs in favor of issuing emergency injunctive relief. Beyond administrative inconvenience, it is difficult to see how Defendant would suffer any harm if they were required to continue accepting registration applications through October 19.

On the other side of the ledger, if the deadline is not extended, then thousands of voters in a critical swing state risk total disenfranchisement in a hotly contested election. Under those circumstances, equity plainly favors Plaintiff. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) (stating “administrative convenience” cannot justify the deprivation of a constitutional right); *see*

also Elias Decl., Ex. C at 13 (“[T]he balance of hardships favors Plaintiff. This case pits the fundamental right to vote against administrative convenience.”).

Defendant may argue that Plaintiff is understating the burdens of extending the deadline. But that argument is belied by the facts. North Carolina itself has previously utilized the emergency powers granted to the chief State elections official. In 1999, following Hurricane Floyd, former Executive Director of the North Carolina State Board of Elections, Gary Bartlett, used these emergency powers to delay the elections in certain counties affected by the storm.

Many other states have adjusted election and voter registration procedures in analogous circumstances. For example, in 2005, in the wake of Hurricane Katrina, Governor Blanco of Louisiana used executive powers to postpone several elections (and their respective qualifying periods). See La. Exec. Order No. KBB 2005-36, *available at* <http://www.doa.louisiana.gov/osr/other/kbb06-02.htm>.

More recently, in 2012, Hurricane Sandy struck the Mid-Atlantic coast days before the general election. To preserve the rights of voters affected by Hurricane Sandy, New Jersey, New York, and Connecticut postponed deadlines and took other common-sense measures to prevent disenfranchisement.²¹

²¹ In New Jersey, by executive order, any voter who was displaced was designated an “overseas voter” and permitted to submit a mail-in ballot. Directive Regarding Email Voting and Mail-in Ballots for Displaced Voters, *available at* <http://nj.gov/state/elections/2012-results/directive-email-voting.pdf>. The order also extended the deadline for those mail-in ballots. *Id.* In Connecticut, the October 30 voter registration deadline was postponed until November 1, a mere five days before the general election. In New York, any voter registered in a federally-declared disaster was allowed to vote by affidavit at any poll site in New York. *Governor Cuomo Signs Executive Order to Facilitate Voting for New Yorkers Who Were Affected by Hurricane Sandy*, New York State (Nov. 5, 2012), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-facilitate-voting-new-yorkers-who-were-affected-hurricane> (last visited Oct. 8, 2016).

In this very election, South Carolina and Florida—either voluntarily or subject to court order—have extended their voter registration deadlines to address the effect of Hurricane Matthew. There is no good reason why North Carolina cannot and should not follow suit.

3. An Injunction Is in The Public Interest

The public has a paramount interest in elections where every eligible resident may cast an effective vote. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005); *see also LOWV*, 769 F.3d at 248 (“[t]he public has a ‘strong interest in exercising the fundamental political right to vote.’” (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006))); *OFA*, 697 F.3d at 437 (“The public interest . . . favors permitting as many qualified voters to vote as possible.”). The affected voters are those whose lives have already been interrupted (or worse) by Hurricane Matthew. Under the circumstances, an injunction allowing these voters to participate in the upcoming election would only promote the public interest. In reaching that conclusion two days ago, the Northern District of Florida found:

These voters have already had their lives (and, quite possibly, their homes) turned upside down by Hurricane Matthew. They deserve a break, especially one that is mandated by the United States Constitution. Ensuring that they can exercise their constitutional right to vote thus promotes the public interest.

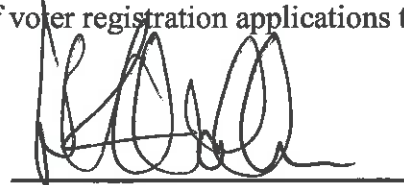
See Elias Decl., Ex. C at 14. As discussed above, other states have made significant efforts in the wake of Hurricane Matthew and other natural disasters to ensure that their citizens are able to vote. Their actions make clear that the modest relief sought here serves the public interest.

IV. CONCLUSION

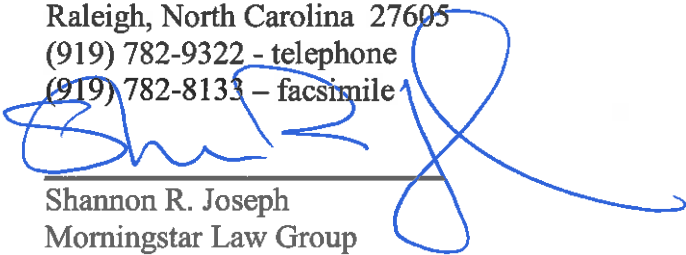
For the reasons stated herein, Plaintiff respectfully requests that the Court enter a temporary restraining order requiring Defendant, their officers, employees, and agents, all persons acting in active concert or participation with the Defendant, or under any Defendant’s

supervision, direction, or control, and all other persons within the scope of Federal Rule of Civil Procedure 65, to extend the deadline for delivery of voter registration applications to October 19.

This the 14th day of October, 2016.



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