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Rowan E. Conybeare

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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 2006 marked a decisive shift in the voting rights landscape that has only intensified. In the preceding decade, some of the most
consequential Supreme Court decisions have considered challenges to the VRA; the topic has dominated organizing efforts and the news media; and millions of dollars have poured into lobbying efforts. In the most contentious legislation pending in the United States, Congress seeks to expand voting rights protections and overhaul election administration. More voting rights bills—both restrictive and expansive—have been introduced at the state level than in decades. This resurgence comes, in part, from the evolution of schemes of voter suppression from overt to covert. Seemingly race-neutral time, place, and manner restrictions have grown in popularity, as explicitly racist barriers to

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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).


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).


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. However, it has become clear that subtle voter suppression tactics still achieve racially disparate impacts.

Voter identification (“ID”) laws, gerrymandered redistricting plans, and voter roll purges often garner the greatest attention for their disproportionate burden on voters of color. 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. 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. Any one of these practices “might appear minor,” but, when compounded and implemented, “the end result is death by a thousand cuts.”

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.


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

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15. See infra notes 16–26 and accompanying text.
23. 139 S. Ct. 2484 (2019).
NAACP v. McCrory provided the oft-quoted declaration that the state’s voting rights omnibus bill was crafted “with almost surgical precision” to target African Americans.

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. 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, modifications to signature match laws, and bans on no-excuse absentee voting, ballot drop boxes, and third-party ballot collection. Unsurprisingly, all of these measures had racial implications. 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.
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).
lawsuits challenging legislative and administrative changes in 2020 than in the previous decade.\textsuperscript{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,\textsuperscript{35} the guidelines were challenged in state court, federal district court, and the Fourth Circuit, with one case reaching the Supreme Court.\textsuperscript{36} Compared to other states, these cases garnered even greater attention because of North Carolina’s lengthy history of racially discriminatory voter suppression tactics\textsuperscript{37} and its status as a battleground state.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{35} See infra Section I.A.

\textsuperscript{36} See infra Part II.

\textsuperscript{37} Martha Waggoner, “Sordid History” Cited as Judge Blocks NC’s Voter ID Law, AP NEWS (Dec. 31, 2019), https://apnews.com/article/562a2b86f046c8ae95b1113cd1259e93 [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.”).

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.

40. 2020 State Primary Election Dates, supra note 39.
41. Id.
42. Id.
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

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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.”).
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.
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 required—the NCSBE worked to make the process easier for voters. 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. In an election expected to be held largely by mail, these were incredibly important and necessary changes. 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. 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. In an election plagued by postal service delays—particularly in battleground states like North Carolina—this was a crucial change to prevent thousands of voters from being disenfranchised.

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

See 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/ (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.”).
The NCSBE also issued a memo regarding deficiencies in absentee ballots, in compliance with multiple court orders. First, the memo forbade county boards of election from conducting signature verification. 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. Second, the memo directed county boards to review envelopes every business day “to ensure that voters have every opportunity to correct deficiencies.” If there were curable deficiencies, it was required that the voter be contacted within one business day by mail and, if possible, by email or phone.

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, because a pandemic that required social distancing created a barrier for some voters with respect to witness requirements. 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. Just like conducting voter registration processes online, this change

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.
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].
offered greater access to voters,\textsuperscript{70} including those assisted by MATs,\textsuperscript{71} than the original written request process would have.\textsuperscript{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.\textsuperscript{73} However, voters were not required to wear masks in the polling place.\textsuperscript{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.\textsuperscript{75} For example, thirty states and the District of Columbia made changes to increase absentee ballot

\textsuperscript{70} See supra notes 45–47 and accompanying text.
\textsuperscript{71} See supra notes 48–49 and accompanying text.
\textsuperscript{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

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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


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 POLY WATCH (July 21, 2020), http://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 . . . .”)
Twenty-two states paid for absentee ballot postage.\(^\text{83}\) Ten states and the District of Columbia mailed ballots directly to all registered or active voters,\(^\text{84}\) and two


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


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/i793027ebeafae8e524e6d6cc3edd4f47 [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 eligibility ⁸⁹ and only provided one ballot drop box...
per county. Even if a state did relax its voting laws, their actions were often challenged in court—sometimes successfully, sometimes not. Regardless of the outcome, litigation created vast confusion among voters, who were unsure of what was and was not permitted. And, while North Carolina implemented a few reforms, it did not effect as much change as many other states. 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. 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. These numbers are stark when considering that turnout among these age groups across all races increased by five percent. North Carolina clearly could, and should, have done more to lift voting barriers.


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).


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.


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, including its voter ID law, as intentionally racially discriminatory—the decision that provided the “surgical precision” quote. 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. 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. A few of the cases, in particular, provide insight into how the courts balanced voting rights and COVID-19 concerns, including Moore v. Circosta, Democracy North Carolina v. North Carolina State Board of Elections, Taliaferro v. North Carolina State Board of Elections, and North Carolina Alliance for Retired Americans v. North Carolina. 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. In constitutional cases, the Equal Protection Clause can be invoked to assert vote

98. Wan, supra note 18.
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.).
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dilution or arbitrary and disparate treatment. A court must first consider whether the Equal Protection Clause’s standing requirement is satisfied. This requirement will always be met when plaintiffs are “voters who allege facts showing disadvantage to themselves as individuals.” A court must then consider the plaintiff's likelihood of success on the merits and the irreparable harm caused absent relief. Finally, a court must decide whether the plaintiff successfully demonstrated “that the balance of equities tips in his favor.”

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. Therefore, the VRA was officially signed into law and has long been hailed as “a signature achievement of the civil rights movement.” Sections 2 and 5 proved the most impactful and were most frequently used. 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. Section 5, long considered “the heart of the Act,” 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. An election change could only go into effect after it was granted this “preclearance.”

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

110. Id. at 204.
111. Id. at 206.
113. Id. at 321.
119. Fuentes-Rohwer, supra note 115, at 705 (citation omitted).
121. Shelby Cnty., 570 U.S. at 537.
123. Id. at 557.
only viable means to challenge election laws.\textsuperscript{124} Although Section 2 allows disparate impact liability for the challenged law for vote dilution claims,\textsuperscript{125} the Supreme Court held this year that Section 2 requires a different standard for vote denial claims.\textsuperscript{126} The Court has heard far more vote dilution cases,\textsuperscript{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.”\textsuperscript{128} When conducting this analysis, courts must consider the “Senate Factors,”\textsuperscript{129} which were created to assist in the disparate impact analysis.\textsuperscript{130}

\textsuperscript{124} Id.; see also Voting Rights Act § 2, 79 Stat. at 437.

\textsuperscript{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).

\textsuperscript{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 of 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.”).

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

\textsuperscript{128} Elmendorf & Spencer, supra note 125, at 2155.


\textsuperscript{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
DID HISTORY REPEAT ITSELF?

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

\(^{131}\) Brnovich, 141 S. Ct. at 2333.


\(^{133}\) 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.

absentee ballot usage.\textsuperscript{141} Specifically, the plaintiffs claimed that the following changes unconstitutionally violated the Equal Protection Clause\textsuperscript{142} 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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{146} First, the plaintiffs demonstrated a likelihood of success on the merits in terms of the ability to cure ballots without a witness signature.\textsuperscript{147} The court believed the change was arbitrary because it altered a statutory requirement\textsuperscript{148} 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.\textsuperscript{149} Second, the court found that the plaintiffs demonstrated a likelihood of success on the merits regarding the deadline extension for absentee ballots.\textsuperscript{150} The court found that the change was arbitrary because it repudiated a statutorily mandated deadline\textsuperscript{151} 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.\textsuperscript{152}

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

\begin{footnotesize}
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\item 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.).
\item 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.
\item 143. Id. at 314.
\item 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.
\item 145. Id. at 315 (citing Bush v. Gore, 531 U.S. 98, 105 (2000) (per curiam)).
\item 146. See id. at 316–19.
\item 147. See id. at 316–18.
\item 148. Id. at 317.
\item 149. Id. at 318.
\item 150. Id.
\item 151. Id. at 318–19.
\item 152. Id.
\item 153. See id. at 319–21.
\end{itemize}
\end{footnotesize}
and disparate treatment of voters based on the anonymous delivery of ballots to unmanned drop boxes. 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. 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. Second, the plaintiffs failed to establish a claim based on the counting of ballots that were not postmarked. 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.”

The court also determined that the plaintiffs demonstrated a likelihood of irreparable injury on their first two claims, as is required to grant a preliminary injunction. 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. 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.” 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.

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

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.
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 Statutes\(^{168}\) 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.\(^{178}\)

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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 6591366 (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. 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. 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.” 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.” 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. Seventh, and finally, the court found “that the possibility of contracting COVID-19 was not sufficient to establish a violation of bodily integrity” under the unconstitutional conditions doctrine of the Fourteenth Amendment.

The plaintiffs also made several affirmative requests, including expanding online voter registration and supplying absentee ballot drop boxes, 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 unchartered waters.” In sum, the court rejected all of the plaintiffs’ substantive Fourteenth Amendment challenges and requests. 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. 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.


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 disab[ility], 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.
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, indicated irreparable harm, and showed that the public interest and balance of the equities tipped in their favor. Therefore, the court ordered that blind and low-vision voters be granted access to an electronic portal.

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 “would unduly burden or deny the franchise to countless voters.” 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. The plaintiffs requested declaratory and injunctive relief.

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

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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.


205. Id. at 2–3.

206. Id. at 38–40.

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

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. 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. 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, 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, and they had greater opportunity to ensure that their ballots would be counted through notice and the opportunity to cure. The General Assembly

210. See Stipulation and Consent Judgment, supra note 208, at 15, 2020 WL 10758664, at *1; see also Memorandum 2020–19, supra note 60.
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, 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. 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 ballots and requiring notice and an opportunity to cure absentee ballots with deficiencies. The Moore court also rejected two equal protection claims that sought to overturn pro-voting rights procedures.

However, not every barrier was lifted. For one, voters who are often left behind—in this case, voters with disabilities and voters of color—were left behind once again. 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."); 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.'").
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/ ("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


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.

Assembly’s 2018 voter ID law,\(^{234}\) finding in part that it was not enacted with racially discriminatory intent\(^ {235}\)—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 2021\(^{238}\)—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

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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/S8N4-9AZG]; Ed Espinoza, Texas Voter ID Law Allows Gun Licenses, Not Student ID’s, PROGRESS TEX. (May 25, 2017), https://progressatx.org/blog/stricken-texas-voter-id-allowed-gun-licenses-not-student-id [https://perma.cc/M6EX-5B78].


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.


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.

Carolina. But that alone is not enough—Congress must also pass expansive voting rights legislation to offer voters as many protections as possible.\(^\text{245}\)

Finally, courts must give significant credence to these pieces of legislation using the Elections Clause\(^\text{246}\) and protect the right to vote with all the constitutional authority they can muster.

**Rowan E. Conybeare**

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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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