FILED

2020 AUG 19 PM 5:08

WAKE CO., C.S.C.

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20-CVS-5035
NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et. al, Plaintiffs, NORTH CAROLINA STATE BOARD OF ELECTIONS, et. al, Defendants.	**ORDER DENYING PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER CAME ON TO BE HEARD before the Court during the August 6, 2020, Session of Superior Court, Wake County. All adverse parties to this action received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, arguments, briefs of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following:

Findings of Fact

1. The ExpressVote is a ballot-marking device ("BMD"), manufactured by Election Systems & Software ("ES&S"). Buell Aff. ¶¶ 25, 62.

2. Voters operate the ExpressVote by making their selection using the device's touch screen or keypad. Appel Aff. ¶ 21 n. 3. The ExpressVote then prints out a ballot summary card which reflects the voter's choices in two ways: a human unreadable barcode and a text summary of the voter's selections. *Id.* ¶¶ 34-35; Buell Aff. ¶¶ 4, 27-29.

3. The barcode, not the text summary, is scanned when tabulating the voter's selection. Appel Aff. ¶ 34; Buell Aff. ¶ 4.

4. On August 23, 2019, the State Board of Elections ("State Board") certified the ExpressVote for in-person voting in North Carolina. Bell Aff. ¶¶ 6-7.

5. Plaintiff NC NAACP publicly opposed certification of the ExpressVote and made its position know at State Board meetings, testimony to Congress, and in correspondence with the Governor. *See* Bell Supp. Aff. ¶¶ 3-4 & Ex. 11; Cox Aff., Ex. 2; Spearman Aff. ¶ 3 & Exs. A at 3-4, B.

6. The U.S. Election Assistance Commission has certified the ExpressVote for use in federal elections, pursuant to the Help America Vote Act of 2002 ("HAVA"), 52 USC §§ 20962, 20971. Bell Aff. ¶ 8.

7. To earn this certification, the ExpressVote had to produce zero errors in one and one half million marked selections. Baumert Aff. ¶ 8.

8. The ExpressVote has been certified in 39 states and the District of Columbia. Baumert Aff. ¶ 10. There are over 90,000 units in use across various jurisdictions. *Id.* at ¶ 11.

9. According to ES&S there have been no reports of the ExpressVote producing a mismatch between the barcode and the text summary on the ballot summary card. *Id.* at ¶ 38.

10. Over the fall and winter of 2019, 21 Defendant county boards of election adopted the ExpressVote for use in elections. Bell Aff. ¶ 9 & Ex. 3. Some counties intend to use the ExpressVote for all in-person voting, while others will use it in a limited capacity, such as providing an accessible option for voters with disabilities. *Id.*

11. All Defendant counties have used the ExpressVote in two elections: fall 2019 municipal elections and March 2020 primaries. Bell Aff. ¶¶ 12-13.

12. Ballots cast using the ExpressVote were audited after both elections and revealed no tabulation errors. *Id.* at ¶¶ 12, 22.

13. Plaintiffs filed this lawsuit on April 17, 2020. The State Board was served on May 15, 2020 with service on the 21 county boards of election ("Defendant counties") occurring on that date or later. Defendants filed motions to dismiss under Rules 12(b)(1), (2), and (6) on July 1, 2020. Plaintiffs then filed for a preliminary injunction on July 22, 2020.

14. Plaintiffs argue in their motion for a preliminary injunction that ExpressVote's barcode system violates the Free Elections Clause of the North Carolina Constitution because a voter cannot verify that the selection contained in the barcode is accurate. Plaintiffs further allege concerns over the security of the ExpressVote with respect to hacking and that use of the ExpressVote would put voters at greater risk of contracting COVID-19 in their polling place.

Conclusions of Law

Sovereign Immunity

1. Sovereign immunity precludes the exercise of personal jurisdiction over the state or its agencies. *Can Am S., LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (2014).

2. However, "[A]n aggrieved person has a direct claim under the North Carolina Constitution for violation of his or her constitutional rights when no adequate state law remedy exists." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992).

3. Defendants argue that Plaintiff should have pursued an administrative remedy under the Administrative Procedure Act. "As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Swan Beach Corolla, LLC v. County of Currituck*, 234 N.C. App. 617, 622, 760 S.E.2d 302, 307 (2014) (quoting *Presnell v. Pell*, 298

N.C. 715, 721, 260 S.E.2d 611, 615 (1979)). The court is deprived of subject matter jurisdiction when a plaintiff fails to exhaust administrative remedies. *Justice for Animals, Inc. v. Robeson County*, 164 N.C. App. 366,369, 595 S.E.2d 773, 775 (2004). "Nevertheless, a party need not exhaust an administrative remedy where the remedy is inadequate.'" *Swan*, 234 N.C. App. at 622, 760 S.E.2d at 307 (quoting *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002)). A plaintiff must plead facts justifying the avoidance of administrative procedures in the complaint. *Id.*

4. "Generally, constitutional claims are not subject to administrative remedies, so failure to pursue such remedies is not fatal to those claims." *Swan*, 234 N.C. App. at 622-23, 760 S.E.2d at 308; S*ee Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1988); *Hardy ex rel. Hardy v. Beaufort County Bd. of Educ.*, 200 N.C. App. 403, 409, 683 S.E.2d 774, 779 (2009). "[W]hen there is a clash between [the Declaration of Rights of the N.C. Constitution] and sovereign immunity, the constitutional rights must prevail." *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 339, 678 S.E.2d 351, 355 (2009) (quoting *Corum*, 330 N.C. at 786, 413 S.E.2d at 292).

5. This action is not a "contested case" under the meaning of the APA. Further, an action seeking judicial review of any decision of the State Board of Elections is required to be brought in Wake County Superior Court. N.C.G.S. § 163-22(*l*). Therefore, Plaintiffs are properly pursuing a state law remedy and this Court has jurisdiction.

6. Even if the judicial review provided for in N.C.G.S. § 163-22(*l*) was not an adequate state law remedy in this case, jurisdiction would still be proper under *Corum*. The contested case provisions of the APA do not provide a path for Plaintiffs to make a claim in this case, and they have plead facts justifying their avoidance of administrative procedures in their

complaint. Plaintiffs' Compl. ¶¶ 145-47. It follows that Plaintiffs would have no adequate state law remedy and this Court may exercise personal jurisdiction over Defendants.

Standing

7. "[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, our state's standing jurisprudence is broader than federal law." *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) (quotation marks omitted). At a minimum, a plaintiff in a North Carolina court has standing to sue when it would have standing to sue in federal court.

8. The North Carolina Supreme Court has broadly interpreted Article I, § 18 to mean that "[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm." *Mangum v. Raleigh Bd. Of Adjustments*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). The "gist of the question of standing" under North Carolina law is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006) (quoting *Stanley v. Dept. of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). Although the North Carolina Supreme Court has "declined to set out specific criteria necessary to show standing in every case, [it] has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury. *Davis*, 811 S.E.2d at 727-28.

9. An association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests in seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the

relief requested requires the participation of individual members in the lawsuit." *River Birch Assoc. v. Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (quoting *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1997)).

10. Organizational standing may be asserted when there is an injury to an organization's ability to carry out its duties as a result of defendant's conduct and that injury is redressable by the relief sought. *Indian Rock Ass'n, Inc. v. Ball*, 167 N.C. App. 648, 651, 606 S.E.2d 179, 181 (2004).

11. Individual plaintiffs have standing because the inability to verify the accuracy of one's vote while casting it is a legally cognizable injury and an injunction preventing the use of the ExpressVote is a means by which the court can remedy that injury.

12. Plaintiff NAACP has satisfied the requirements for associational standing. It has members in all 21 defendant counties and has demonstrated a legally cognizable injury and means by which that injury can be remedied, which gives its members standing to sue in their own right. The interest in constitutionally protected free elections which it seeks to protect are germane to its purpose of protecting the political rights of its members and removing impediments to voting. Finally, this action does not require the participation of individual members.

13. Plaintiff NAACP has also satisfied the requirements for organizational standing. It has been injured by having to divert resources to address the adoption of the ExpressVote by the State Board and Defendant counties. This diversion of resources comes in the form of emergency livestreamed meetings with computer scientists and election administrators as well as advocacy efforts before the State Board and the U.S. House of Representatives.

Preliminary Injunction

14. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-760 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "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 injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

15. The North Carolina Constitution, in the Declaration of Rights, Article I § 10, declares that "[a]ll elections shall be free."

16. The North Carolina Supreme Court has recognized the importance of voting rights in our democracy. "Our government is founded on the will of the people. Their will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875).

17. The North Carolina Supreme Court has further opined that "all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will." *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E.2d 638, 638 (1897).

18. Here, because much of the injury alleged by Plaintiffs' is highly speculative, the Plaintiffs are unlikely to succeed on the merits. The ExpressVote has had no recorded tabulation errors and no incidents of hacks or data breaches. Furthermore, the evidence presented does not establish that the use of ExpressVote in a polling place will increase a voter's likelihood of contracting COVID-19 as Defendants have promulgated guidelines to alleviate this risk. Bell Aff. ¶ 30 & Ex. 10; Bell Supp. Aff. Ex. 12 at 6-10.

19. The only non-speculative allegation presented is the ExpressVote's use of a barcode for vote verification and tabulation. Plaintiffs' ability to express themselves with their vote may be harmed by the inability to verify their selection. The ExpressVote uses a barcode in addition to text on the printout. The barcode, which is unreadable to a human, is what is read by the tabulator. A voter, then, has no way of knowing if the vote cast matches what is recorded in the barcode and ultimately counted by the tabulator. It is therefore conceivable that some level of irreparable injury will occur if the ExpressVote is used.

20. Plaintiffs request that Defendant counties be ordered to adopt paper ballots as the primary method of voting for the 2020 general election and that they replace the ExpressVote with accessible, non-barcode voting machines. However, nine Defendant counties have not used paper ballots for standard in-person voting since the early 2000's. Bell 2d Supp. Aff. ¶ 10. Prior to adopting the ExpressVote, eighteen Defendant counties were using an earlier model of touch screen voting machine. *Id.* at ¶ 7. In order to restore the status quo, Defendant counties would be required to re-adopt outdated voting machines which left no paper trail for post-election audits.

Dickerson Supp. Aff. ¶ 22. These machines would be out of compliance with current voting machine requirements. N.C.G.S. § 163-165.7(a). Thus, issuing a preliminary injunction which truly restored the status quo would put Defendant counties in violation of state law.

21. This Court must also consider the feasibility of requiring the 21 Defendant counties to switch to entirely new voting systems before the 2020 general election, in which early voting begins on October 15, 2020. *Pender Cty. V. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007); *Reynolds v. Simms*, 377 U.S. 533, 585 (1964). The Purcell principle counsels against issuing an injunction so close to an election. *Purcell v. Gonzalez*, 549 U.S. 1, 4-5, 127 S. Ct. 5, 7 (2006) ("Court order effecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."). Even if Defendant counties were able to source an adequate number of paper ballots, they would still be required to secure machines compliant with the HAVA to provide for voters with disabilities. Defendants contend that a switch to new voting systems is not merely impractical, but impossible. *See* Bell 2d. Supp. Aff. ¶¶ 2-13; Dickerson Supp. Aff. ¶¶ 12-24. Issuance of a preliminary injunction would create considerable risk that Defendant counties would be unable to perform their duties, as well as cause confusion about the particulars of how voting would take place. The combination of these factors could have the effect of disenfranchising many voters in Defendant counties.

22. After considering the harm Plaintiffs will suffer and comparing it to the harm a preliminary injunction would do to Defendants, the equities weigh in favor of denying Plaintiffs' request for a preliminary injunction.

Laches

23. Laches is an equitable defense which may apply to bar injunctive relief. *See Roberts v. Madison Cty. Realtors Ass'n, Inc.*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996); *Moore v. Silver Valley Min. Co.*, 104 N.C. 534, 546, 10 S.E. 679, 683 (1889). It is applicable where a plaintiff unreasonably delays filing for relief, and the delay "worked to the disadvantage, injury, or prejudice of the person seeking to invoke the doctrine." *Fairley v. Holder*, 185 N.C. App. 130, 132-33, 647 S.E.2d 675, 678 (2007). "[T]he delay necessary to constitute laches depends upon the facts and circumstances of each case . . . ." *Id.* Such delay is "quite relevant to the balancing of the parties potential harms," because "an application for preliminary injunction is based upon an urgent need for the protection of a Plaintiff's rights, [and] a long delay in seeking relief indicates that speedy action is not required." *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989).

24. Plaintiffs publicly opposed certification of the ExpressVote but neglected to file this action until eight months after the ExpressVote was certified and did not file their motion for a preliminary injunction until eleven months had elapsed. During this delay the ExpressVote had been purchased by twenty-one Defendant counties and used in two elections. Granting the injunction now would injure Defendants by requiring them to devote substantial resources to switch to a different voting system, which may be impossible to implement in time for the election.

25. Accordingly, the doctrine of laches should bar Plaintiffs' injunction.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's motion for a preliminary injunction is hereby DENIED.

20 CVS 5035

SO ORDERED, this 19th day of August, 2020.

Rebecca W. Holt

Rebecca W. Holt
Superior Court Judge Presiding

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission and by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

Elizabeth Haddix
Mark Dorosin
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
PO Box 956
Carrboro, NC 27520
ehaddix@lawyerscommittee.org
mdorosin@lawyerscommittee.org
Counsel for Plaintiffs

Ezra D. Rosenberg*
Bradley S. Phillips*
John Powers*
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1500 K Street NW, 9th Floor
Washington, DC 2005
erosenberg@lawyerscommittee.org
bphillips@lawyerscommittee.org
jpowers@lawyerscommittee.org
Counsel for Plaintiffs

Moe Keshavarzi*
Bridget Russell*
Emerson Luke*
SHEPPARD MULLIN RICHTER & HAMPTON LLP
333 South Hope Street, 43rd Floor
Los Angeles, CA 90071-1422
mkeshavarzi@sheppardmullin.com
brussell@sheppardmullin.com
Counsel for Plaintiffs

Courtney Hostetler*
Ronald Fein*
John Bonifaz*
Ben Clements*
FREE SPEECH FOR PEOPLE
1320 Centre Street, # 405
Newton, MA 02459
chostetler@freespeechforpeople.org
rfein@freespeechforpeople.org
jbonifaz@freespeechforpeople.org
bclements@freespeechforpeople.org
Counsel for Plaintiffs

Paul M. Cox
NC DEPARTMENT OF JUSTICE
PO Box 629
Raleigh, NC 27602
pcox@ncdoj.gov
Counsel for Defendants

*Admitted pro hac vice

This the 19th day of August 2020.

Kellie Z. Myers
Trial Court Administrator – 10th Judicial District
kellie.z.myers@nccourts.org