STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WAKE	20 CVS 5035

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al., Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., Defendants,	)	**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

COME NOW PLAINTIFFS, by and through the undersigned counsel, and in support of their Motion for Preliminary Injunction, show the Court:

I. INTRODUCTION

In November, millions of North Carolina voters will go to polls. Voters in twenty-one counties, including the Plaintiffs and the members of the North Carolina NAACP, will be required to use an ExpressVote ballot-marking device if they want to vote in person. These electronic voting machines are unreliable, vulnerable to hacking, programming error, and malfunction, tabulate voters' choices based on a barcode that voters cannot read or verify, and use software that is already past its end-of-life date. The machines will be handled by dozens if not hundreds of other voters and require extensive disinfection by poll workers after each use, during a pandemic that has already taken the lives of more than 2,000 North Carolinians and is likely to grow worse in the fall. Meanwhile, voters in other North Carolina counties will be able to cast their votes using hand-

marked paper ballots or other systems that do not pose the security, reliability, and verifiability problems and health risks inherent in the ExpressVote.

Plaintiffs are North Carolina voters and the North Carolina NAACP, who seek to preserve the right to vote in free elections, a right that is "one of the most cherished rights in our system of government." *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009). They seek the same protections and rights that are already afforded to most North Carolina voters. Plaintiffs and similarly situated voters face a difficult choice if they want to vote in person. Some of these voters will stay home and not vote. Others will risk their lives to try to vote. Neither outcome provides voters with the free elections to which they are entitled under North Carolina's Constitution. Nor do they provide Plaintiffs with equal protection under the laws, given that other North Carolina voters will have safe, secure voting options. Finally, the case law is clear that voters who prefer to vote in person not be forced to vote by mail if they do not want to do so.

The Motion for Preliminary Injunction seeks to protect the constitutional rights of Plaintiffs and similarly situated North Carolina citizens to vote and have their ballots accurately counted. Unless injunctive relief is granted, voters in Defendant Counties will not have a constitutionally acceptable voting machine for the foreseeable future. The ExpressVote's vulnerabilities are demonstrated by overwhelming evidence, including the testimony of two of the country's leading cybersecurity experts and one of North Carolina's leading epidemiologists. Moreover, the feasibility of the Plaintiffs' proposed remedy is evident from the fact that every county already possesses and employs optical scanners that can be used to tabulate hand-marked paper ballots, and that these counties may avail themselves of constitutionally compliant accessible ballot-marking devices that do not employ barcodes and have already been certified by the North Carolina State Board of Elections.

Defendants have deprived voters of their constitutional rights by requiring them to vote on insecure, unreliable, and unverifiable voting machine, and—in counties that use the ExpressVote universally—by putting voters' lives and health at risk. Through this preliminary injunction motion, plaintiffs seek the same right afforded to voters in other counties in North Carolina: to cast their votes in a secure, reliable, verifiable, and safe manner.

II. FACTUAL BACKGROUND

A. Experts Agree That The ExpressVote Being Used By Some North Carolina Counties Are Insecure and Unreliable

The ExpressVote is a ballot-marking device ("BMD") manufactured by Election Systems & Software (ES&S). It is a computer that runs on Windows Embedded 7, a stripped-down operating system produced by Microsoft. Buell Aff. ¶ 25, 62. Microsoft will no longer support the operating system after the 2020 elections, and will no longer provide security and bug fixes to the public.[1] Voters make their selections using the ExpressVote's touchscreen or keypad. Appel Aff. ¶ 21 n. 3. The ExpressVote then prints a ballot summary card (not the entire ballot), which contains the voter's purported choices in two forms: a human-unreadable barcode, and a text summary of the voter's choices. *Id*. ¶¶ 34-35; Buell Aff. ¶¶ 4, 27-29. The tabulators read and tabulate only the information in the barcode. Appel Aff. ¶ 34; Buell Aff. ¶ 4.

America's foremost experts in election security agree that the ExpressVote suffers from vulnerabilities that threaten the integrity of elections. Dr. Duncan Buell is a Professor of Computer Science and Engineering at the University of South Carolina and has worked for years at the Center for Computing Sciences, a research center supporting the National Security Agency. Buell Aff. ¶¶ 9, 12-14. Dr. Buell has observed a number of critical security failures, errors, and vulnerabilities

[1] Tom Burt, *Extending free Windows 7 security updates to voting systems*, Microsoft, Sept. 20, 2019, *available at* https://blogs.microsoft.com/on-the-issues/2019/09/20/extending-free-windows-7-security-updates-to-voting-systems/ (last accessed Aug. 3, 2020).

across a number of software systems produced by ES&S, including the ExpressVote. *Id*. ¶¶ 18, 65-68. Dr. Andrew W. Appel is a Professor of Computer Science in the Department of Computer Science at Princeton University and has provided testimony to the U.S. House of Representatives on voting machine technology. Appel Aff. ¶¶ 3, 6. According to these experts, the ExpressVote (1) does not produce a voter-verifiable output, (2) is vulnerable to cyberattacks and hacking, and (3) lacks any means by which voters can reliably determine whether or not their selections were altered. Buell Aff. ¶ 3; Appel Aff. ¶ 12. Dr. Appel agrees with Dr. Buell that the ExpressVote is particularly susceptible to hackers' attacks because "the ExpressVote's vote-marking software can be replaced by fraudulent vote-stealing software that steals votes by recording different votes on the paper ballot than what the voter indicated on the touchscreen." Appel Aff. ¶ 21; *see also* Buell Aff. ¶¶ 30, 32.

B. Some Counties Transitioned From One Insecure System to Another

Some North Carolina counties have been using insecure voting machines manufactured by ES&S for a long time. In 2013, the North Carolina legislature voted to decertify the iVotronic, a direct-recording device ("DRE") system also manufactured by ES&S. The iVotronic, like the ExpressVote, was a flawed and insecure voting machine, similar to the DRE machines that a federal court in Georgia found to be unconstitutional in *Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019). The iVotronic produced unverifiable ballots, which made it impossible to detect errors. When the legislature voted to decertify the iVotronic in 2013, it set the decertification deadline for 2018, which it later extended to December 2019. Despite the long lead time, the North Carolina State Board of Elections ("SBE") moved slowly to test and certify other voting systems. By March 2019, ES&S had decided to discontinue production of the EVS 5.2.2.0

voting system for which it was seeking state certification. However, ES&S withheld this information from North Carolina officials during the certification process.[2]

The SBE certified the ES&S EVS 5.2.2.0 along with two other voting systems in August 2019. After receiving certification for the EVS 5.2.2.0, ES&S finally informed the SBE that it would discontinue production of EVS 5.2.2.0 and asked SBE to administratively certify another newer voting system, the EVS 5.2.4.0.[3] The EVS 5.2.4.0 included a modified version of the ExpressVote HW 2.1. The SBE complied; in December 2019, a few weeks before decertification of the iVotronic, the SBE approved the EVS 5.2.4.0 for use in North Carolina.[4] Between December 2019 and the March 2020 primary, twenty-one counties ("Defendant Counties") switched from the iVotronic to the ExpressVote—from one flawed, insecure, and unreliable ES&S voting machine to another.

C. The COVID-19 Pandemic in North Carolina

Coronavirus Disease 2019 (COVID-19) has upended the lives of many, if not all, Americans. The disease, caused by the novel coronavirus SARS-CoV-2,[5] has spread rapidly through the United States. Weber Aff. ¶¶ 26, 29, 35. More than 4.6 million cases have been reported in the country, and more than 154,000 people in the United States have died.[6] Approximately 2,000 of these deaths occurred in North Carolina, which has reported more than

[2] Jordan Wilkie, "Bait and Switch By Maker of Voting Systems for NC?" Carolina Public Press, Dec. 6, 2019, http://bit.ly/359DCL7.
[3] *Id.*
[4] Frank Taylor, "Divided NC Elections Board Approves Untested Upgrade to Voting System," Carolina Public Press, Dec. 16, 2019, https://bit.ly/30o7CCQ.
[5] World Health Organization, "Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It," https://bit.ly/3i3xAlN.
[6] CDC, "Cases in the U.S," https://bit.ly/2Z8mjIj (last accessed Aug. 3, 2020).

126,000 laboratory-confirmed coronavirus cases.[7] Many North Carolinians have lost weeks of work and racked up expensive hospital bills. Still others have passed the disease on to more vulnerable family members, neighbors, and essential workers in their communities.

The COVID-19 pandemic is nowhere near over. Dr. David J. Weber is a Physician and Professor in the Department of Epidemiology at University of North Carolina's Gilling School of Global Public Health and Professor of Medicine and Pediatrics in the University of North Carolina School of Medicine who served as an advisor to the World Health Organization ("WHO") to develop the "WHO's Guidance on Cleaning and Disinfection of Surfaces during the COVID-19 pandemic." Weber Aff. ¶¶ 9-12, 24. He concludes that "there will be a second wave of COVID-19 in Fall 2020, if not sooner," and "the situation is going to get worse from a public health perspective." Weber Aff. ¶ 7.[8] Over the summer, North Carolina has experienced a surge of new cases and fatalities. More than 12,000 cases were diagnosed over a seven-day period ending with August 3, 2020 alone.[9] North Carolina continues to have a substantial number of new COVID-19 cases each day. Weber Aff. ¶ 38.

Anyone of any age can experience severe, life-threatening, or fatal COVID-19 illness.[10] But the CDC has recognized that some people are at particularly high risk: people over the age of 65; the homeless; people who live in nursing homes and long-term care facilities; people with

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[7] North Carolina Department of Health and Human Services, https://covid19.ncdhhs.gov. Approximately 40,000 new cases have emerged in North Carolina, and approximately 500 people have died, since Dr. Weber submitted his affidavit in support of this motion. *See* Weber Aff. ¶ 62.

[8] *See also* Zack Budryk, "CDC Director Warns Second Wave of Coronavirus Might Be 'More Difficult,'" The Hill, Apr. 21, 2020, https://bit.ly/3eLlWtr; Audrey Cher, "WHO's Chief Scientist Says There's a 'Very Real Risk' of a Second Wave of Coronavirus as Economies Reopen," CNBC, June 9, 2020, https://cnb.cx/2MM8p97; Len Strazewski, "Harvard Epidemiologist: Beware COVID-19's Second Wave This Fall," Am. Medical Ass'n, May 8, 2020, https://bit.ly/36sTvh3.

[9] CDC, "United States COVID-19 Cases and Deaths by State," https://www.cdc.gov/covid-data-tracker/#cases (last accessed Aug. 3, 2020).

[10] Yale Medicine, "COVID-19 (Coronavirus Disease 2019), https://bit.ly/2A72ybG.

underlying medical conditions including cancer; chronic kidney disease; chronic obstructive pulmonary disease; people who are immunocompromised; obesity; serious heart conditions; sickle cell disease; and Type 2 diabetes. The CDC also recognizes that many other underlying medical conditions, including asthma, liver disease, pregnancy, and smoking, may also increase the risk of experiencing a serious COVID-19 illness.[11] *See* Weber Aff. ¶ 44. Traditionally, people who experience poverty—including housing or food insecurity—often have poor access to health care,[12] which make them more vulnerable to serious COVID-19 illness.

Black, Latino, and Native American people have been hit hard by the pandemic, contracting and dying from COVID-19 at disproportionate rates in North Carolina. Weber Aff. ¶¶ 39-43, 45. Although Black North Carolinians make up 22% of the state's population, they account for 31% of COVID-19 fatalities.[13] And though Latinx North Carolinians make up less than 10% of the state's population, they account for more than 40% of COVID-19 cases. Weber Aff. ¶ 45.[14] The disproportionate impact of COVID-19 has been stark, driven by "[l]ong-standing systemic health and social inequities." Weber Aff. ¶ 39. Indeed, in early June, Governor Roy Cooper signed Executive Order 143, which acknowledges and seeks to address the ways in which the pandemic has exacerbated social, environmental, economic, and health disparities in communities of color.[15]

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[11] CDC, "People Who Are At Higher Risk for Severe Illness," https://bit.ly/3hip2r4; CDC, "People Experiencing Homelessness," https://bit.ly/3f93L18.

[12] Margot Kushel et al., "Housing Instability and Food Insecurity as Barriers to Health Care Among Low-Income Americans," 21 J. Gen. Inter. Med. 71 (2006).

[13] U.S. Census Bureau, Quick Facts North Carolina, https://www.census.gov/quickfacts/NC; NC Dept. of Health and Human Services, Cases—Demographic Data, https://covid19.ncdhhs.gov/dashboard/cases (last accessed Aug. 3, 2020).

[14] U.S. Census Bureau, Quick Facts North Carolina, https://www.census.gov/quickfacts/NC; NC Dept. of Health and Human Services, Cases—Demographic Data, https://covid19.ncdhhs.gov/dashboard/cases (last accessed Aug. 3, 2020).

[15] Governor Roy Cooper, Executive Order No. 143, "Addressing the Disproportionate Impact of COVID-19 on Communities of Color," June 4, 2020, https://bit.ly/3eBJy44.

D. How COVID-19 Spreads in a Polling Place

The coronavirus disease spreads person-to-person, primarily through respiratory droplets. The CDC cautions "[T]he more closely a person interacts with others and the longer that interaction, the higher the risk of COVID-19 spread." Weber ¶ 28.[16] Outbreaks in closed-in spaces "demonstrate the infectiousness of SARS-CoV-2 and the possibility for transmission at both outside events and indoor congregate activities, such as a polling place where voting is occurring during an election." *Id.* ¶ 32. In fact, "the presence of multiple people at a polling location places [voters] at high risk for acquiring COVID-[1]9." *Id*. ¶ 68. The coronavirus "may survive on environmental surfaces such as the screen of an electronic voting machine for hours to days." *Id*. ¶ 33. Other coronaviruses have been found to survive for 4 to 5 days on glass surfaces.[17] Without frequent and thorough disinfection, there is a risk that the virus can be transmitted via repeatedly touched surfaces. Contagious people are not always symptomatic; it can incubate in infected persons for up to fourteen days. Infected individuals often transmit the virus before or soon after they begin to show symptoms, and prior to becoming seriously ill. *Id.* ¶¶ 29-31, 64. An election plagued by long lines, crowds, and machines that require hundreds or thousands of people to repeatedly touch the same surfaces is primed to facilitate the transmission of COVID-19, *see* Weber ¶ 59, and potentially to become a super-spreader event—where one or a few infected people spread the disease to a large number of others.[18]

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS AND, ABSENT A PRELIMINARY INJUNCTION, WILL SUFFER IRREPARABLE LOSS

[16] The CDC has estimated that approximately 15 minutes or longer in close contact with an infected individual with facilitate disease transmission. CDC, "Public Health Guidance For Community-Related Exposure," Jul. 31, 2020, https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html.

[17] G. Kampf et al., "Persistence of Coronaviruses on Inanimate Surfaces and Their Inactivation With Biocidal Agents," 104 J. of Hospital Infection 246 (Mar. 2020), https://bit.ly/3fnITn1.

[18] Christie Aschwanden, "How 'Superspreading' Events Drive Most COVID-19 Spread," Scientific American, June 23, 2020, https://bit.ly/2CMDacj.

A. The Applicable Legal Standard

Plaintiffs seek to enjoin Defendants from using the ExpressVote during the November 2020 general election and in subsequent elections. A preliminary injunction should be granted "(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. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983) (quoting *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701 (1977)). Issuance of a preliminary injunction 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 St. Christian Sch.*, 299 N.C. 352, 357 (1980). Preliminary relief "may be issued to restore a status, wrongfully disturbed." *Huggins v. Wake Cty. Bd. of Ed.*, 272 N.C. 33, 39 (1967).

B. Likelihood of Success on the Merits

The ExpressVote is a critically flawed voting machine that leaves voters who uses it unable to review or verify their choices and vulnerable to having their votes flipped or undercounted or diluted through inaccurate overcounting. Voters who hand-marked paper ballots or vote on other BMDs certified for use in North Carolina are not subject to these risks. Plaintiffs are likely to succeed in showing that voters who use the ExpressVote are denied the opportunity to vote in free elections and are denied equal protection of the laws. Now, during a pandemic that has cost thousands of lives in North Carolina, Plaintiffs' rights are even more threatened and in need of protection. Requiring voters to cast their ballots on the ExpressVote will force them to choose between their lives and health and their right to vote. Regardless of whether voters will choose to vote and risk their health or stay home and sacrifice their right to

vote, these voters will have lost their constitutional right to participate in elections on an equal basis with voters in other North Carolina counties.

1. Defendants Are Violating Plaintiffs' Right to Free Elections

Article I, Section 10 of the North Carolina Constitution requires that "[a]ll elections shall be free." N.C. Const., art. I, § 10. The right to participate in free elections and the right to vote is "enshrined in both our Federal and State Constitutions." *Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762; *see also* N.C. Const., art. VI, § 1 (providing that any naturalized person, 18 years of age or older, who meets constitutional qualifications is entitled to vote in North Carolina elections). Elections are free only when qualified citizens can cast votes for their candidates of choice and have those votes accurately counted. *See Curling*, 397 F. Supp. 3d at 1402-03 (finding that plaintiffs showed an "imminent risk of harm in the burdening or deprivation of [their] rights" due to the state's use of "unsecure, unreliable and grossly outdated technology that jeopardizes [voters] ability to cast votes that reliably and accurately will be counted"). The North Carolina Supreme Court has observed that '[n]o 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.'" *Blankenship*, 2363 N.C. at 522, 681 S.E.2d at 76 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). Through free elections, citizens use their vote, as their voice, to decide who will govern. In fact, "[t]he object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters." *Hill v. Skinner*, 169 N.C. 405, 86 S.E. 351, 356 (N.C. 1915) (quoting *Wilmington, O. & E. C. R. Co. v. Bd. of Comm'rs of Onslow Cnty*, 116 N.C. 563, 21 S.E. 205, 207 (N.C. 1985)).

In concluding that drawing district-election maps along partisan lines is unconstitutional, a three judge panel of this Court explained that: "[T]he Free Elections Clause of the North Carolina

Constitution guarantees that all elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the People and that is the fundamental right of North Carolina citizens, a compelling governmental interest, and a cornerstone of our democratic form of government." *Common Cause v. Lewis*, Judgment, 18-CVS-014001 at 8-9 (N.C. Super. Ct. Sept. 3, 2019). Further, the Court in *Lewis* concluded that this constitutional guarantee "provide[s] significant constraints against governmental conduct that . . . creates barriers to the free ascertainment and expression of the will of the People." *Id*. at 9.

Counties' use of the ExpressVote undermines free elections in at least three ways. First, the ExpressVote prints an unverifiable barcode. Even though the machine also prints a text summary, that summary is not read by the scanners. Appel Aff. ¶ 34-35 ("If the official vote on the ballot card is the barcode, then it is impossible for voters to verify that the official vote they cast is the vote they expressed."). Second, the ExpressVote's insecurities leave it vulnerable to being hacked and evidence indicates that efforts are ongoing to hack elections. Buell Aff. ¶ 33, 51, 53. Third, remedying errors in the recording of voters' choices is essentially impossible; hacks are unlikely to be discovered during an audit, voters do not review the human-readable text summaries consistently, and when they do, they can only uncover errors in the text summary part of their own ballot; they cannot uncover errors in other ballots or determine the root cause of the problem. *See* Appel Aff. ¶ 12 ("ballot cards marked by an ExpressVote voting machine are not reliably marked with the voters' intended votes, and thus do not provide a substantial defense against hacking; *and* ¶ 37 ("[O]utcome-changing errors in [the ExpressVote] BMD cannot be detected or corrected by any manual recount or audit of the ballot cards.").

A system that is prone to systemic errors and manipulations without being capable of correction because the actual recorded votes are barcodes cannot be said "to ascertain, fairly and

truthfully, the will of the people." *Hill*, 86 S.E. at 356. Those three critical vulnerabilities and shortcomings – as well as the appropriate legal framework – are discussed in more detail below.

a. Voters Cannot Read Barcodes So They Cannot Verify Their Ballot and Runs on Obsolete Software

The ExpressVote is not voter-verifiable because the barcode used to tabulate the voter's choices cannot be understood and thus verified by the voter. Buell Aff. ¶ 4. This is because the ExpressVote prints each selected choice for a contest in two forms: as a barcode (a pattern of vertical lines) and in human-readable block capital letters. Appel Aff. ¶ 34. Voters using the ExpressVote are expected to verify the human-readable printing on the paper ballot card, but the optical scanners that tabulate votes do not read that; the scanners read only the barcodes. *Id*. Because the barcode does not encode candidate and contest by name, but rather by x-y coordinate values, Buell Aff. ¶¶ 4, 27, voters cannot read the barcode or verify that their choices in the human-readable portion of the paper ballot card match the barcode. Appel Aff. ¶ 35; Buell Aff. ¶ 28. The text summary portion of the ballot is read only if the county audits the election or is required to do a hand-count in a contested election.

In addition to tabulating votes based on unverifiable barcodes, the ExpressVote machine has other fundamental flaws. It runs on an end-of-life, obsolete operating system. Buell Aff. ¶¶ 25, 62-63; Complaint ¶ 116. And ES&S has failed to follow acceptable software design and implementation practices, an issue that has plagued its voting systems. Buell Aff. ¶ 8.

b. The ExpressVote Is Dangerously Vulnerable to Cybersecurity Threats

Because the ExpressVote is a computer and the configuration of the ballot for the voter is done by a USB drive that is itself a computer, the ExpressVote can be hacked to change the votes represented by the barcode. Buell Aff. ¶ 5; Appel Aff. ¶¶ 13, 21. The threat of such hacking efforts is not theoretical; local and foreign actors have succeeded in infiltrating U.S. voting

systems. For example, in May 2020, Domenick Demuro pleaded guilty to accepting bribes to cast fraudulent ballots by adding ballots to increase vote totals on voting machines in his jurisdiction.[19] And in 2016, a hacker was able to obtain access to Alaska's election system ahead of the 2016 election.[20] U.S. elections remain at serious risk for widescale hacking by foreign actors.[21] The Department of Homeland Security and the FBI released a joint bulletin in 2019 announcing their determination that Russia had done reconnaissance and hacking efforts against state election networks, including that of North Carolina, in 2016. Buell Aff. ¶ 33. The "Mueller Report" also described the capability and efforts of Russia to interfere in the 2016 election, and there are ongoing reports that interference is planned for November 2020. *Id*. Systems throughout the U.S., including in North Carolina, remain vulnerable to hacks that can change votes, stuff ballot boxes, or trigger machine malfunctions that will shut down machines and delay voting. As Dr. Buell noted, "North Carolina should expect to be attacked." Buell Aff. ¶ 33.

i. Security Vulnerabilities of the ExpressVote

There are many ways to install fraudulent software in a computer. Appel Aff. ¶ 14. It can be done with physical access (by replacing a memory chip on the motherboard or inserting a cartridge or thumb-drive in a slot) or over a network. *Id*. Modern computer systems have many layers of software, and an insecurity in one of those layers can compromise the security of all the layers above it. *Id*. Since the ExpressVote tabulates votes by reading a barcode, the ExpressVote machines are vulnerable to hacks that "could change votes as represented in the barcode." Buell Aff. ¶ 5. If the ExpressVote is hacked, and votes are changed, electoral outcomes can be illegally

[19] Press Release, "Former Philadelphia Judge of Elections Convicted of Conspiring to Violate Civil Rights and Bribery," Department of Justice, May 21, 2020, https://bit.ly/36sBgZ4.
[20] Becky Bohrer, "Officials: Hacker Accessed Alaska Elections Server in 2016," AP News, May 9, 2018, https://bit.ly/2DeY5oQ.
[21] *See* Alexandra Wolfe, "Why a Data-Security Expert Fears U.S. Voting Will Be Hacked," Wall Street J., Apr. 24, 2020, https://on.wsj.com/3de6iX2.

manipulated in violation of the Free Elections Clause. *See Lewis*, 2019 WL 4569584, at *112 (explaining that the 2017 partisan districting plans "strikes at the heart of the Free Elections Clause" because it allows Defendants to control the outcome of the election regardless of the will of the people). A hacker might manipulate the ExpressVote software to flip 5% of the votes in a single race; even if some of these errors are detected and corrected, the actual hack likely will go unnoticed—particularly, in a close election where the results are separated by a few percentage points. Even a post-election audit would not uncover the hack. Appel Affidavit ¶¶ 31-37.

"Hacking an ExpressVote-based election system, if done by skilled adversaries, would be virtually impossible to detect." Buell Aff. ¶ 34. The best malware designers "know how to insert the malware, perform the subversion of the computation, and then erase all record of the malware's being in the system." *Id*. Indeed, removing all trace of the malware has been a routine part of virtually all of the hacks of existing election equipment. *Id*. Malware can be programmed to record votes for the wrong candidate "only some of the time, at random, in the small quantity" that could nonetheless change the outcome of a close election. *Id*. ¶ 32. Moreover, "[n]o amount of 'logic and accuracy testing' (LAT) can detect such hacking," because fraudulent software can be programmed to distinguish between LAT "testing" mode – where it can be programmed to remain dormant – and real election mode. Appel Aff. ¶¶ 16, 21.

Recent versions of the ExpressVote similar to the one being used in North Carolina have proven to be susceptible to such attacks. When ATSEC Information Security Corporation carried out a source code review on behalf of the State of California on the ES&S Voting System 5.2.1.0, which uses a version of the ExpressVote that is substantially similar to the one certified for use in North Carolina, it found a number of security vulnerabilities, which include "hard-coded passwords, a failure to update the code with security patches, a failure to use full disk encryption

or to encrypt the files on the removable USB drives, and the use of default configurations." Buell Aff. ¶ 35. These vulnerabilities allow remote hackers to obtain administrator-level privileges and gain open and unauthorized access into the ExpressVote's software. In Dr. Buell's opinion, these vulnerabilities are "quite egregious," and are the type of "routine security problems that are usually observed in conducting a post-mortem after a hack or a breach." *Id*. ¶¶ 35-36.

The voter would not be able to detect a hacked vote even if they found an error in the human-readable text after the fact because there is no reliable way to distinguish between an individual incorrect vote that resulted from hacking and one that resulted from the occasional expected error by the voter in making choices. Buell Aff. ¶¶ 5, 30. 31. "Detection of hacking is also hampered by the fact that most voters do not check the printed ballot card." *Id*. ¶ 31. Multiple studies show that relatively few voters check the human-readable text once it is printed by an electronic voting machine, and that only a small fraction of those voters detect errors on their ballot cards. *Id*.

ii. ExpressVotes Can Be Connected With Devices That Have Access to the Internet

Connections to the Internet, "either direct or indirect, can lead to compromise, corruption, or hacking, from both vendor and third-party insiders, or through vendor or third-party insiders with internet connections to the election system, and there is ample evidence that third-party contractors are given remote (internet) access to the election system." Buell Aff. ¶ 51. "Although it is frequently stated that devices like the ExpressVote are not connected to the Internet," an attacker anywhere on the Internet could install fraudulent software on the ExpressVote even though those machines have no direct network connection. Buell Aff. ¶ 6; Appel Aff. ¶ 15. Every voting machine needs to be "told" before every election what contests are on the ballot and which candidates are running in those contests. Appel Aff. ¶ 15. "This 'Ballot Definition File' needs to

be downloaded into every voting machine before every election." *Id*. "On voting machines with no direct network connection, this is done by installing a removable media (memory card, or thumb-drive) into the voting machine." *Id*. "But those memory cards must be 'programmed' from some other computer, typically a county election management computer or private election contractor's computer, and that computer *is* sometimes connected to the Internet." *Id*. "It is well understood as a principle of computer security—and it has been demonstrated in practice on real voting machines—that fraudulent vote-stealing software can be made to propagate on those removable-media memory cards." *Id*.

There are records of last-minute connections to the Durham County voter registration system prior to the 2016 election. Buell Aff. ¶ 51. Internet connection capability is a part of the ES&S offering. *Id*. ¶ 39. For example, a 2018 written agreement between Travis County, Texas, and ES&S for version 5.2.2.0 included a diagram of the election system connected to the Internet for the purpose of reporting election results. *Id*. In addition, a similar agreement between Michigan and ES&S listed prices for landline and wireless modems for the DS200 scanners. *Id*.

"The transmission of voter registration databases to the counties, the configuration of the ExpressVotes, and the transmission of results to the media and candidates as votes are tabulated leave open several paths for sufficient 'connection' to allow remote hacking of the county central computers and by extension the ExpressVote." Buell Aff. ¶ 6. One vulnerability arises during configuration of the ExpressVotes and other equipment (such as scanners and e-pollbooks). Buell Aff. ¶ 43. The ballot styles for the ExpressVotes are programmed from a computer using USB memory drives. *Id*. ¶ 44. If the computer doing the configuration has ever been connected (directly or indirectly) to the Internet, then malware could be transmitted by the hacker through the Internet to the programming computer, which could in turn infect the ExpressVote. *Id*.

The second major vulnerability involves transmission of the voter registration database to county officials before an election. Buell Aff. ¶ 40. That database is loaded onto electronic pollbooks for use in polling places and typically transmitted electronically. *Id*. ¶ 40-41. While it is possible to transmit the database from an offline computer that maintains a pristine copy of the database via one-time media—thereby avoiding any connection to the internet—it is more common for the transmission to be made for a database that is kept online. *Id.* ¶ 41-42. And if the transmission is made from an online database, then the voting system components—like the ExpressVote—may now be infected with malware that began in the database, with the risks limited only by whatever security protocols were in place. *Id*. ¶ 42.

The third major vulnerability "comes after polls are closed and results are being tabulated." Buell Aff. ¶ 46. To report results in Richland County, South Carolina, which uses another version of the ExpressVote, "the USB drives from the scanners (which contain the results from each precinct) and from the ExpressVotes are plugged into the central tabulation computer . . . and the results data from the USB drives is uploaded for central tabulation." *Id.* The USB drive is then brought back to the scanner and ExpressVotes—in other words, from the computer that is connected to the Internet to the "unconnected" computer. *Id*. ¶ 49. The National Academies of Science, Engineering, and Medicine has warned against this kind of insecure connection to the Internet. *Id*. ¶ 50.

c. Unlike With Hand-Marked Paper Ballots, ExpressVote Ballots are Not Verified and ExpressVote Elections are Therefore Not Auditable

Voters have no guarantee that the votes tabulated by the scanner reflects their ballot choices because ExpressVote machines use the barcode to count votes. Unlike hand-marked paper ballots, which allow voters to physically bubble-in their candidate choices, the ExpressVote machines mark voters' choices for them. Appel Aff. ¶ 33. When a voter marks an optical-scan "bubble

ballot" with a pen, "no hackable computer intermediary stands between the voter's *indication* of a vote (the mark made with the pen) and the mark that is read by human recounters or auditors. Hand-marked paper ballots are therefore auditable and recountable." *Id.*

In contrast, "ExpressVote-marked ballots are not meaningfully auditable or recountable: hacked ExpressVotes can manipulate results in a way that is almost certainly not going to be corrected in the real world." Appel Aff. ¶ 32. This is for two reasons. First, the "two versions of your votes" format used by the ExpressVote—human-readable text and barcode—defeats the purpose of conducting recounts or audits using paper ballots. Appel Aff. ¶¶ 35-36; *see also* Buell Aff. ¶ 28. If an audit or recount is conducted and the voter's choice in the human-readable printout differs from the voter's choice as reflected by the barcode, "it is not possible to determine whether the barcode or the human-readable text is 'correct' insofar as it reflects the actual selection that the voter originally made on the ExpressVote." Appel Aff. ¶ 36. Therefore, the ExpressVote cannot be subject to a true audit.

Second, the vast majority of voters who use a touchscreen to indicate their ballot choices do not review their marked ballots carefully enough to notice whether anything is marked differently than the vote they indicated on the screen. Appel Aff. ¶ 23-25; Buell Aff. ¶ 31 (citing Bernhard/Halderman and DeMillo/Kadel/Marks studies). This is a particular concern in North Carolina counties using the ExpressVote. The Mecklenburg County Board of Elections' instructional video about how to use the ExpressVote failed to instruct voters "to review or even look at the printed ballot summary card before inserting it into the scanner." *Id.* ¶ 26. Moreover, the summary text produced on the ExpressVote ballot summary card only provides some information about the voter's selections, not the entire list of candidates or options, and not the text of ballot questions, making it even more difficult for voters to review and verify the text. Buell

Aff. ¶ 29. If voters do check, they can catch only their own ballot's errors; they cannot identify or correct systemic errors or manipulation.

If many voters fail to check, then post-election audits are of no help, just as audits cannot help if a hacker changes votes. The argument that "some sort of audit should catch any incorrect vote totals resulting from hacked ExpressVotes" has no merit because "a recount or random audit [of ExpressVote paper ballot cards] can only check the tabulation of what's printed on the paper; it cannot go back in time and understand how that mark got made on the paper." Appel Aff. ¶ 31. Nor can election officials call every voter back to their polling site to confirm that their ballot is correct. Audits therefore cannot verify either (1) whether the ExpressVote machine printed the voters' paper ballot choices correctly or (2) whether the ExpressVote's barcode accurately reflected the voters' choices. Appel Aff. ¶¶ 35-36.

Targeted attacks can change the outcome of an election conducted with ExpressVotes even with robust auditing procedures. *Id*. ¶¶ 27-28. Malware that randomly flips even a small percentage of votes can easily manipulate a close race. *Id.* Moreover, even if some voters review their ballots and catch an error, "election officials cannot change an election outcome just because 0.5% of the voters report an error; if that were the practice, than small groups of voters could invalidate elections by fraudulently reporting that their ballots were misprinted." *Id*. ¶ 30.

d. The *Curling* Case and North Carolina Precedent Support Issuing a Preliminary Injunction In These Circumstances

The U.S. District Court for the Northern District of Georgia's decision issuing a preliminary injunction in *Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019), provides the appropriate framework for adjudicating Plaintiffs' Free Elections Clause claim in this case. The court issued an order that enjoined "any use … after 2019" of the electronic voting machines that Georgia was using at the time. *Id.* at 1412. Specifically, the Court held that the

Plaintiffs "demonstrate[d] a likelihood of prevailing on the merits of their claims that the current non-auditable Georgia GEMS/DRE voting system, as implemented, burdens and deprives them of their rights to cast secure votes that are reliably counted, as guaranteed under the First and Fourteenth Amendments of the United States Constitution." *Id*. at 1402.

The court closely scrutinized Georgia's voting system, relying heavily on testimony from cybersecurity experts including Dr. Appel; the court also cited Dr. Buell. *Id*. at 1354-56, 1366-67. The court found that the DRE/GEMS voting system "has been shown to operate on unsecure, unreliable and grossly outdated technology that jeopardizes [voters'] ability to cast votes that reliably and accurately will be counted or counted on the same basis as someone using another voting method." *Id*. at 1403.

The North Carolina Court of Appeals recently found an unconstitutional burden on voting in similar circumstances. In *Holmes v. Moore*, 840 S.E.2d 244 (N.C. App. 2020), the court found that North Carolina's voter identification statute imposed "additional burdens" on Black voters even though it required county boards of elections to issue free IDs and it permitted voters to vote without ID if they could identify a "reasonable impediment." *Id*. at 263-64. In February 2020, the Court of Appeals reversed the trial court's decision to deny the plaintiffs' preliminary injunction motion, *id*. at 266-67, even though there no evidence that voters had been disenfranchised by the voter ID requirement and the legislature had delayed implementation of the statute until the March 2020 primary election. *Id*. at 252-53 (discussing the plaintiffs' contention had a right "to go to the polls in the March 2020 primary . . . under laws that were not designed to make it harder for them and other voters of color to vote"); *see also N.C. State Conf. of NAACP v. Cooper*, 430 F. Supp. 3d 15, 52 (M.D.N.C. 2019) (noting "the legislature decided to delay implementation of S.B. 824's ID requirements until the 2020 elections" in its December 31, 2019 order issuing preliminary

injunction). *Holmes* is consistent with the N.C. Supreme Court's holding that preliminary relief is appropriate where there is "a probability of substantial injury to the applicant from the continuance of the activity of which it complains." *Bd. of Provincial Elders of S. Province of Moravian Church v. Jones*, 273 N.C. 174, 182, 159 S.E.2d 545, 551 (1968); *see also Pruitt v. Williams*, 25 N.C. App. 376, 380, 213 S.E.2d 369, 371-72 (N.C. App. 1975) (issuing a preliminary injunction because "the evidence was sufficient to show a reasonable apprehension of irreparable loss").

Here, however, there is already evidence of problems with tabulating votes cast on the ExpressVote. In the March 2020 primary, the results reported on Election Day in Warren County were inaccurate according to county election director Debbie Formyduval, and the correct numbers were not reported until two days later.[22] A news report confirmed the "error amounted to 863 votes cast for the Libertarian Party candidate, when there are only 41 voters registered as Libertarians in Warren County. In addition, dozens of votes were cast for both the Constitution and Green party candidates, when each party has just one registered voter each in the county."[23]

e. The Availability of Absentee Ballots Does Not Cure the Constitutionally Deficient In-Person Voting System

In *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), the Fifth Circuit held that "mail-in voting is not an acceptable substitute for in-person voting" and that the availability of mail-in voting did not "mitigate or eliminate the discriminatory impact of" Texas' strict voter identification statute. *Id*. at 255 & n. 50. Mail-in voting "is not the equivalent of in-person voting for those who are able and want to vote in person." *Id*. at 255. This is because "[m]ail-in voting involves a complex procedure that cannot be done at the last minute. It also deprives voters of the help they would normally receive in filling out ballots at the polls." *Id*. (citation omitted). This

[22] Gary Band, "County BOE cited in lawsuit," The Warren Record, May 27, 2020, https://bit.ly/31eK4zD.
[23] *Id*.

holding is consistent with decisions from other courts on the subject. *See, e.g.*, *Westchester Disabled On the Move, Inc. v. Cty. of Westchester*, 346 F. Supp. 2d 473, 478 (S.D.N.Y. 2004) (finding that absentee ballots are "an inadequate substitute for voting in person" because absentee voters "have to vote well in advance of election day, thereby denying them as much time as other voters to consider their choice"); *see also Kerrigan v. Philadelphia Bd. of Election*, 2008 WL 3562521, at *18 (E.D. Pa. Aug. 14, 2008) (holding in an ADA case that "failing to ensure that mobility disabled voters are able to vote in their neighborhood polling places … is a failure to provide [them] with an equal opportunity to access the program of voting").

North Carolina voting data further demonstrates that voting by absentee ballot is an inadequate substitute for voting in person. As the Fourth Circuit has observed, this data confirms that white voters "disproportionately use absentee voting." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016). That data also confirms "that African Americans disproportionately use[] early voting [and] same-day registration." *Id.*; *see also Holmes*, 840 S.E.2d at 258-59 (North Carolina legislature continued to rely on this data when enacting S.B. 824 in November 2018). There is a critical benefit to voting early in person; North Carolina permits same-day registration for voters who vote in person during the early voting period; same-day registration is not accessible to absentee voters. *See McCrory*, 831 at 217. Moreover, many people distrust voting by mail or are unable to vote by mail, leaving in-person voting as their only option.[24]

2. **Plaintiffs Are Being Denied Equal Protection of the Laws**

The Equal Protection Clause of the North Carolina Constitution guarantees that "[n]o person shall be denied the equal protection of the laws." N.C. Const., Art. I, Sec. 19. The Equal Protection Clause "function[s] to restrain [North Carolina] from engaging in activities 'that either

[24] *See, e.g.*, Juana Summers, "Poll: More Than Half of Young People Lack Resources To Vote By Mail," NPR Morning Edition, July 30, 2020, *available at* https://n.pr/39Se73P.

create classifications of persons or interfere with a legally recognized right.'" *Liebes v. Guilford Cty. Dep't of Pub. Health*, 213 N.C. App. 426, 428 (2011) (quoting *Blankenship*, 363 N.C. at 521). This protection extends to the right to vote; the North Carolina Supreme Court has held that "[i]t is well settled in this State that 'the right to vote on equal terms is a fundamental right.'" *James v. Bartlett*, 359 N.C. 260, 269–70 (2005) (citing *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990)). "[O]nce the right to vote is conferred, the *equal* right to vote is a fundamental right." *State* ex rel. *Martin v. Preston*, 325 N.C. 438, 455 (1989) (citing *White v. Pate*, 308 N.C. 759, 768 (1983)); *see also Blankenship*, 363 N.C. at 525 (holding that once citizens are given the right to vote for judges, "the provision must be construed in conjunction with the Equal Protection Clause to prevent internal conflict. Stated simply, once the legal right to vote has been established, equal protection requires that the right be administered equally" (internal citations omitted)); *Holmes*, 840 S.E.2d at 265-66. When voters are "deprived of a fundamental right," courts "must use strict scrutiny in determining whether the equal protection of the laws was denied." *Northampton County Drainage Dist.*, 326 N.C. at 747. "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Stephenson v. Bartlett*, 355 N.C. 354, 377–78 (2002) (citing *Northampton County Drainage Dist.*, 326 N.C. at 746).

Voters using the ExpressVote cannot vote on an equal playing field with their fellow citizens because their ballots, unlike hand-marked paper ballots, are vulnerable to hacking, error, and malfunction that can alter votes, which are not detectable either by the voter or in an audit. Voters who are able to vote by hand-marked paper ballots or, for those voters who require or prefer assistive technology, by using other BMDs that mark and print entire ballots and not merely ballot summary cards, can ensure that their votes have been accurately recorded before they are tabulated.

In either instance, officials can conduct a legitimate audit relying on the original paper record of the voters' choices. Voters who are required to vote on the ExpressVote are deprived of these protections because they must vote on a device that tabulates votes based on a human unreadable barcode and, therefore, these voters are denied equal protection under the law.

3. By Requiring Plaintiffs to Vote Universally on ExpressVote Machines During the Pandemic, Defendants Will Violate Plaintiffs' Constitutional Rights

Requiring voters to vote universally on voting machines will place them at substantial and unnecessary risk for contracting or transmitting COVID-19, creating barriers to voting and resulting in unequal access to the polls. Nine counties intend to use the ExpressVote for universal voting during all or part of the in-person voting process. Cherokee, Jackson, Mecklenburg, Davie, Davidson, Warren, and Perquimans Counties will use the ExpressVote as their primary method of voting during early voting and on Election Day. Compl. ¶ 73. Alamance and Transylvania Counties will use the ExpressVote as the primary method of voting for early in-person voting. Compl. ¶ 74.

In these counties, dozens or hundreds of voters will be using these machines in each polling place during early voting and on Election Day. COVID-19 can spread via expelled droplets from infected persons, even when they are asymptomatic or pre-symptomatic. Weber Aff. ¶¶ 63-64. Universal use of the machines will require voters to stand in longer lines, in close proximity with poll workers and other voters. The use of electronic voting machines generally increases waiting time for voters. Buell Aff. ¶¶ 7, 56, 57-58. Fewer people can vote simultaneously on machines than by hand-marking ballots because each precinct has only a limited number of machines. Buell Aff. ¶ 56. Furthermore, it takes time to prepare the ExpressVote for each voter. Buell Aff. ¶¶ 57-58; Weber Aff. ¶ 5. In some Defendant Counties, a poll worker has to enter the poll booth with each voter to set up the machine, and in all

Defendant Counties, a poll worker has to enter the poll booth with each voter who needs help or who needs to strike a ballot. As a result, voters will be required to stand near one another and near poll workers inside the polling place, "thereby increasing the risk of airborne transmission of COVID-19." Weber Aff. ¶¶ 32, 59. "COVID-19 is a distance-related disease; the longer time and closer the distance to an infected individual, the higher the risk of transmission." *Id*. ¶ 5. Although Defendants have proposed ways of limiting touch, ExpressVote has not been certified for use by styli of any kind. Voters may still opt to touch the machines, or may not be able to use the proposed styli.

Poll workers can disinfect the machines between uses, but the guidelines for disinfecting the ExpressVote are neither simple, nor guaranteed to kill pathogens. ES&S guidance warns that failure to follow the manufacturer's cleaning protocols—which include having a trained poll worker clean the machine, not spraying the machine directly with cleanser, using lint-free clothes, and only lightly dampening the cleaning cloth with cleanser—may result in machine malfunction.[25] ES&S recommends a number of cleansers that are not recommended by the CDC, and also warns against using alcohol-based solutions of *no more than* 70% alcohol, without noting or acknowledging that the CDC has recommended that alcohol solutions contain *at least* 70% alcohol.[26] Moreover, ES&S does not guarantee that the cleaning methods necessary to protect the machine are also sufficient to thoroughly disinfect its commonly touched surfaces. Buell Aff. ¶¶ 61. And of course, each machine will be out of use during the disinfection process, which can be time-consuming, further delaying voters and forcing them into crowds and long lines. Weber Aff. ¶¶ 5, 56.

[25] *See* ES&S, "Best Practices for COVID-19, https://bit.ly/2JRLYOs; CDC, "Cleaning and Disinfecting Your Home," https://bit.ly/36BwyIM.
[26] ES&S, "Best Practices for COVID-19, https://bit.ly/2JRLYOs; CDC, "Cleaning and Disinfecting Your Home," https://bit.ly/36BwyIM; *see also* Weber Aff. ¶ 57; Buell Aff. ¶¶ 60-61.

These conditions create heightened, unnecessary risk of novel coronavirus transmission. Voters may not be able to withstand the long lines, or risk exposure that could put their own health and lives at risk, or which could risk the lives and health of family members and others with whom they come into close contact. The risks are higher for people who are likely to contract the disease or to suffer serious COVID-19 illness, including people in disproportionately affected populations: elderly people, people with pre-existing health conditions, people who routinely come into contact with people who are at heightened risk of infection, people who cannot afford healthcare in the event of illness, or people who risk losing their jobs or livelihoods if they contract the disease. *See* Weber Aff. ¶¶ 39, 43.[27] The burden of the pandemic is hitting Black, Latinx, and Native American communities hardest; these communities are experiencing disproportionate rates of infection and death, creating even greater risks for these voters. Weber Aff. ¶¶ 39-42, 45. If forced to choose between their lives and health, and voting, many will choose to stay home, forsaking their right to vote in order to preserve their health. This is an untenable choice, and not one that preserves North Carolina voters' constitutionally protected right to vote.

Universal use of the ExpressVote during the pandemic will also violate voters' right to equal protection under the laws. In counties that make hand-marked paper ballots available to voters, with ballot-marking devices available for those who need or prefer to use them, election officials will have greater flexibility in decreasing health risks for voters. *See* Weber ¶ 72. Hand-marked paper ballots do not require person-to-person contact once the poll worker gives the ballot to the voter. Hill Aff. ¶¶ 6-7 (describing the process by which voters receive and then cast their paper ballots); Weber ¶ 74.

[27] CDC, "What You Can Do," https://bit.ly/3dS54Be; CDC, "People Who Are At Higher Risk for Severe Illness," https://bit.ly/3hip2r4, "People Experiencing Homelessness," https://bit.ly/3f93L18.

Voting by paper will be safer for voters and poll workers, as the ballot will only be handled by the voter and poll workers. *See* Hill Aff. ¶¶ 6-7; Weber Aff. ¶ 74. Voting surface can be disinfected quickly with any CDC-approved cleaner, and voting surfaces cannot malfunction. Because paper ballots do not require a source of electricity, election officials have greater flexibility in configuring voting booths to socially distance voters, while still enabling as many people as possible to vote simultaneously—which will control lines and protect voters from unnecessary person-to-person exposure. *See* Weber Aff. ¶ 28, 51, 74; Buell ¶ 59 (discussing longer lines where voting machines are used by all voters). Voting will be safer for people who still choose to use the voting machines, as well. Because fewer people will use the machines, the risk of exposure is lessened, and poll workers will have time to properly and thoroughly disinfect each machine without delaying voters.

To protect their right to free elections and their right to equal protection of the laws, voters must be afforded the opportunity to vote safely, without unnecessary and heightened risks to their lives and health. If "[t]he right to vote is one of the most cherished rights in our system of government," *Blankenship*, 363 N.C. at 522, then voters must be able to exercise that right, freely and without risk of dying. If qualified voters are staying home, or forced to risk their health in order to vote, then the elections will not "ascertain, fairly and truthfully, the will of the people." *Hill*, 86 S.E. at 356.

Universal use of the ExpressVote, either during early voting or on Election Day, deprives voters of the right to vote on equal terms, a fundamental right to which all North Carolina voters are entitled. *See Northampton County Drainage Dist.*, 326 N.C. at 747. Other voters will be able to go to the polls with far less risk to their health and lives. Ensuring that hand-marked paper ballots are available at all polling locations, when other safety measures are followed, will provide

all voters with a safe method of voting during the pandemic—one that does not require them to decide which right they value more: their right to life, or their right to vote.

C. Absent a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm

Plaintiffs will suffer irreparable harm absent a preliminary injunction. It is settled law that violations of fundamental constitutional rights cause irreparable harm, *see, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976), and can be remedied through a preliminary injunction. *See High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653 (1965) ("[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect . . . the rights of persons against injuries otherwise irremediable.").

Here, the irreparable harm from violation of voters' constitutional rights will manifest itself in several ways. First, use of the ExpressVote may result in erroneous recording and tabulation of voters' choices, either as the result of intentional hacking or computer errors. Because the ExpressVote does not provide a reliable audit mechanism, those inaccurate votes and the irreparable harm to the voters will be irreparable. And all North Carolinians will be governed by lawmakers chosen in elections marred by the disenfranchisement of voters in these ExpressVote counties. Therefore, "[t]he need for immediate relief is especially important in this context given the fact that 'once the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin [the] law." *Holmes*, 840 S.E.2d at 265-66 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)).

The court in *Curling* found that "[t]he threatened, ongoing injury here is an irreparable injury – one that goes to the heart of the Plaintiffs' participation in the voting process and our democracy." *Curling*, 397 F. Supp. 3d at 1402. These same rights are protected by the North

Carolina Constitution's Free Elections Clause and Equal Protection Clause. Critically, the *Curling* court found Georgia's voting system imposed an unconstitutional "burden[] of Georgia citizens' right to cast a vote that reliably will be counted," *id*. at 1340, although there was no conclusive proof that any individual voting machine failure disenfranchised any particular voter, *see id*. at 1382-92 (describing anecdotal evidence of "problems with the voting process" reported by voters).

The pandemic creates additional risk of irreparable harm to voters. Voters will be forced to choose between protecting their health and exercising their right to vote. The dire choice that voters will face is illustrated by the recent Georgia primary, where many voters chose to stay home rather than risk their lives and health in the long lines that formed due to limited polling locations, malfunctioning voting machines, machines that were never properly set up or turned on, and malfunctioning e-pollbooks.[28] Neither voters who leave polling places before being able to vote nor voters who lose their health or their lives to COVID-19 will be able to redress their injuries.

North Carolina courts have held that "[t]o constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one *to which the complainant should not be required to submit or the other party permitted to inflict,* and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *A.E.P. Indus.*, 308 N.C. at 406-07 (quoting *Barrier v. Troutman*, 231 N.C. 47, 50 (1949)). Here, plaintiffs are faced with such irreparable injuries.

[28] *See, e.g.*, Danny Hakim, Reid Epstein & Stephanie Saul, *Anatomy of an Election 'Meltdown' in Georgia*, N.Y. Times, July 25, 2020, https://www.nytimes.com/2020/07/25/us/politics/georgia-election-voting-problems.html.

D. Plaintiffs Have Standing

The North Carolina Constitution confers standing on those who suffer harm: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. I, § 18. All individuals who have been "injuriously affected" by the complained-of action "in their persons, property, or constitutional rights" have standing. *New Hanover Cnty. Bd. of Educ. v. Stein*, 374 N.C. 102, 116, 940 S.E.2d 194, 204 (2020) (alteration in original) (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). "It is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate or threatened injury' will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642-43, 669 S.E.2d 279,282 (2008) (citing *River Birth Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)). North Carolina standing requirements are more permissive than those in federal court. *See Goldston v. State*, 361 N.C. 26, 35 637 S.E.2d 876, 882 (2006).

1. The Individual Plaintiffs Have Standing

The Individual Plaintiffs have been "injuriously affected" by the use of the ExpressVote machines in their respective counties. First, the Individual Plaintiffs are concerned about the security of voting on the ExpressVote and are particularly worried that their votes in the March primary election may not have been properly counted because they could not verify their ballot. Barnes Aff. ¶ 7; Gomez Aff. ¶ 7; Mendinghall Aff. ¶ 6; Rhedrick Aff. ¶ 7. Second, the Individual Plaintiffs are concerned about the health risks they would face by voting on the ExpressVote in the November election in the midst of the COVID-19 pandemic due to the number of people who will also be touching the machines on Election Day. Barnes Aff. ¶ 8; Gomez Aff. ¶ 8; Mendinghall

Aff. ¶ 7; Rhedrick Aff. ¶ 8. Plaintiffs Harriett Mendinghall and Reverend Glencie S. Rhedrick are both registered voters in Mecklenburg County, which mandates use of the ExpressVote machines for all in-person voting. Mendinghall Aff. ¶ 4; Rhedrick Aff. ¶ 5. Ms. Mendinghall "has always voted in person," and Rev. Rhedrick prefers to vote in person. Mendinghall Aff. ¶ 10; Rhedrick Aff. ¶ 11. Both intend to cast a ballot in upcoming elections, and the county's decision compels them to use a voting machine that they believe is insecure and puts their health at risk if they want to vote in person. Mendinghall Aff. ¶ 5-6, 10; Rhedrick Aff. ¶¶ 6-7, 11. Similarly, Plaintiffs Kathleen Barnes and Enrique Gomez have always voted in person in Transylvania and Jackson Counties, including in the March primary when they voted early using the ExpressVote. Barnes Aff. ¶¶ 6, 10-11; Gomez Aff. ¶¶ 6, 10-11. Because they must continue using the ExpressVote if they want to vote early and in person in the future, they are considering voting absentee for the first time in the November 2020 election. Barnes Aff. ¶¶ 11-12; Gomez Aff. ¶¶ 11-12. The harm of being forced to vote absentee is similar to the injuries suffered by individual voter in the *Curling* case and discussed in an earlier decision. *Curling v. Kemp*, 334 F. Supp. 1303, 1315-16 (N.D. Ga. 2018) (observing that several plaintiffs alleged standing because they was "required to undergo the inconvenience of requesting paper ballot[s] and the cost of postage to mail their ballots well before Election Day" and because "Plaintiffs allege[d] that Defendants are requiring them to vote early, mail a paper absentee ballot, and pay for postage to avoid having to use unsecure DRE machines, thereby subjecting them to unequal treatment").

These injuries unquestionably burden the Individual Plaintiffs' constitutionally protected rights. Their right to vote in free and fair elections, "the object of [which] is to ascertain, fairly and truthfully, the will of the people—the qualified voters," is imperiled by the use of the ExpressVote in their counties. *Hill*, 86 S.E. at 356. Their claims also raise equal protection

concerns because most North Carolina counties do not use the ExpressVote and the North Carolina Supreme Court has held that "[t]he right to vote on equal terms is a fundamental right." *Northampton Cty. Drainage Dist.*, 326 N.C. at 747.

The Individual Plaintiffs' "threatened or immediate" injuries are far more direct than those deemed adequate in other cases. In *Mangum*, for example, the N.C. Supreme Court held that landowners' allegations that granting a Special Use Permit on neighboring property would create future security concerns, storm-water run-off, increased traffic, and other "anticipated secondary adverse effects upon . . . business" were "sufficient to demonstrate special damages to these property owners separate and apart from the damage the community as a whole might suffer" and thereby conferred standing. 362 N.C. at 645-46. Similarly, the N.C. Court of Appeals recently found that voter plaintiffs had standing to challenge a recently enacted photo-identification statute even though "all Plaintiffs will be able to vote under [the statute]." *Holmes*, 840 S.E.2d at 253. The court found that plaintiffs had standing based on the "denial of equal treatment," and explained "[t]hat Plaintiffs may ultimately be able to vote in accordance with S.B. 824's requirements is not determinative of whether compliance with S.B. 824's commands results in an injury to Plaintiffs." *Id.* at 253 & n.4; *see also Davis v. New Zion Baptist Church*, 258 N.C. App. 223, 225-26, 811 S.E.2d 725,727 (N.C. App. 2018) (holding the plaintiffs had standing to assert the church violated its bylaws even though the plaintiffs were no longer voting members of the church).[29]

[29] Other courts have recognized these sorts of alleged harms as concrete injuries that are sufficient to confer standing. *See, e.g.*, *Stewart v. Blackwell*, 444 F.3d 843, 855 (6th Cir. 2006) ("The increased probability that their votes will be improperly counted … is neither speculative nor remote."), *vacated and superseded*, 473 F.3d 692 (6th Cir. 2007) (vacated and superseded on the grounds that the case was rendered moot by the county's subsequent abandonment of the DRE machines at issue); *Banfield v. Cortes*, 922 A.2d 36, 44 n. 7 (Pa. Commw. Ct. 2007) (finding that the plaintiffs had sufficiently alleged standing under similar Pennsylvania law, based on "the fact that Electors have no way of knowing whether the votes they cast on a DRE have been recorded and will be counted," which "gives Electors a direct and immediate interest in the outcome of this litigation"); *c.f. Stein v. Cortes*, 223 F. Supp. 3d 423, 432-33 (E.D. Pa. 2016).

The *Curling* court ruled last week that Plaintiffs' allegations that imminent harm resulting from Georgia's BMDs' reliance "on a non-voter-verified barcode as the elector's actual vote" are "sufficient at this stage of the proceedings to establish injury to their constitutional rights and demonstrate standing to proceed on their asserted claims." *Curling v. Raffensperger*, Order, No. 1:17-cv-2989-AT, Dkt. 751 at 41 (N.D. Ga. July 30, 2020).[30] The court found credible Plaintiffs' allegation "that their votes will 'likely be improperly counted' under the BMD[] system due to security vulnerabilities," observing that the National Academy of Sciences has warned that "BMDs that print only selections with abbreviated names/descriptions of the contests are virtually unusable for verifying voter intent" and that the State's own retained expert opined "that if a BMD is going to be used, the more reliable approach is to use a BMD that produces a ballot readable by a human voter, rather than a barcode." *Id*. at 40-41.

2. NC NAACP Has Associational Standing

Plaintiff NC NAACP has associational standing to bring suit on behalf of its members who are unable to vote by mail or who otherwise wish to vote in person. *See Willowmere Cmty. Assoc., Inc. v. City of Charlotte*, 307 N.C. 553, 557-58, 809 S.E.2d 558, 561 (2018); *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129-30, 388 S.E.2d 538, 555 (1990). An organization such as the NC NAACP satisfies the requirements for associational standing "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it 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." *Id*. at 130. The NC NAACP has approximately 20,000 members in North Carolina and has active branches in every county that uses the ExpressVote. Spearman Aff. ¶ 9. Plaintiffs Glencie Rhedrick, Enrique Gomez, Harriett

[30] The 2020 decision in the *Curling* case is appended as Exhibit A.

Mendinghall, and Kathleen Barnes are NC NAACP members. Barnes Aff. ¶ 4; Gomez Aff. ¶ 4; Mendinghall Aff. ¶ 4; Rhedrick Aff. ¶ 4. NC NAACP members face the imminent and substantial injury in that their votes will not be counted at all, their selections will not be recorded accurately, or they will have to choose not to vote in person to avoid using the ExpressVote, which would put their health at risk. Spearman Aff. ¶ 10. The NC NAACP seeks to protect interests that are germane to the organization's purpose of protecting the political rights of its members and removing impediments to voting that undermine free and fair elections. *Id*. ¶¶ 4, 8, 10. The participation of the impacted individual members of the NC NAACP is not required.

3. NC NAACP Has Organizational Standing

The NC NAACP also has independent organizational standing to bring suit based on the direct injury it has suffered as a result of the widespread use of the ExpressVote. *See, e.g.*, *Texfi Indus., Inc. v. City of Fayetteville*, 261 S.E.2d 21, 23 (N.C. App. 1979), *aff'd*, 301 N.C. 1 (1980) (holding that corporation "has standing to assert that the annexation statute has been applied to it in an unconstitutional manner by allegedly denying" notice and "opportunities to register its opposition to the annexation in a manner equal to the right of opposition exercisable by resident voters").

The NC NAACP has had and—if counties continue using the ExpressVote—will have to continue to divert personnel, time, and resources away from its planned activities in order to study the ExpressVote, identify security risks and technological vulnerabilities, advocate against its certification and its procurement by the ExpressVote counties, and convene meetings and educate members of the public and elected officials about the ExpressVote and the potential security risks and other dangers it creates. Spearman Aff. ¶¶ 7. For example, the NC NAACP organized a livestreamed emergency meeting in September 2019 at the New Light Baptist Church in

Greensboro at which computer scientists, other experts, and election administrators educated NC NAACP members and other members of the public about the vulnerabilities and security risks created by using the ExpressVote. *Id.* ¶ 5. NC NAACP President Rev. T. Anthony Spearman also advocated against the ExpressVote on behalf of the NC NAACP before the U.S. House of Representatives and the North Carolina State Board of Elections. *Id.* ¶ 3. The NC NAACP will also have to divert resources towards assisting voters who cannot take the risk of voting on the ExpressVote during the pandemic.

The use of the ExpressVote has detracted from the NC NAACP's fundamental mission, which includes eliminating racial hatred and discrimination, public education and advocacy to challenge racially discriminatory policies and practices, and fighting gerrymandering and other impediments to voting that undermine free and fair elections, to its detriment. *Id.* ¶ 8. The NC NAACP's voter education, advocacy, and election protection efforts remain ongoing and "if another election is allowed to go forward using these machines, NC NAACP will continue to suffer such injuries." *Id.* ¶ 7.

Federal courts have found that the NC NAACP has standing to bring suit based on similar injuries in past cases. In *NAACP v. North Carolina State Board of Elections*, 283 F. Supp. 3d 393 (M.D.N.C. 2017), the U.S. District Court for the Middle District of North Carolina held that the NAACP had organizational standing because it alleged that it was particularly injured by State Board of Elections. The NAACP alleged that it had "been forced to divert its valuable and limited resources away from its core mission and planned voter-mobilization, voter-protection, and voter-education activities…in order to investigate, respond to, mitigate, and address the concerns of its members resulting from Defendants' unlawful en masse voter challenge and purging practices." *Id.* at 402-03 (observing the NC NAACP had conducted "an investigation that 'included

interviews, reviews of publicly available information, and requests for further information from individuals with first-hand knowledge of the challenges'"); *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014). The court held that this allegation established a cognizable injury where "Defendants' 'practices have hampered [NAACP's] stated objectives causing [it] to divert its resources as a result.'" *N.C. NAACP*, 283 F. Supp. 3d at 402.

Since the injuries suffered by the NC NAACP are sufficient to give the organization standing to pursue this case in federal court, they are sufficient to confer standing in North Carolina state court. *Compare Common Cause v. Lewis*, 18-CVS-014001, 2019 N.C. Super. LEXIS 562019 WL 4569584 at *105 (observing that "[a]t a minimum, a plaintiff in a North Carolina court has standing to sue when it would have standing to sue in federal court"), *with Guilford Coll. v. McAleenan*, 389 F. Supp. 3d 377, 388 (M.D.N.C. 2019) (holding that "[a]n injury is cognizable, for organizational standing purposes, when the plaintiff alleges that 'a defendant's practices have hampered an organization's stated objectives causing the organization to divert its resources as a result'") (quoting *Action NC v. Strach*, 216 F. Supp. 3d 597, 616 (M.D.N.C. 2016)); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

E. The Balance of Equities Strongly Favors a Preliminary Injunction.

The balance of equities weighs strongly in Plaintiffs' favor. *See A.E.P. Indus.*, 308 N.C. at 400 (issuing an injunction "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities" (quoting *State v. School*, 299 N.C. 351, 357-58 (1980))); *Fayetteville St. Christian Sch.*, 299 N.C. at 357.

1. **Weighing the Burdens on the Respective Parties if Relief is Granted**

The ExpressVote will undermine and burden Plaintiffs' ability to vote and participate in a free election that accurately reflects the will of the voters. It is an insecure machine, charged with

printing the voters' choices for tabulation. But the voters cannot verify the machine's barcode, and the ExpressVote's numerous vulnerabilities create ample opportunity for programming error and hacking. And in this era of serious cyberthreats and election tampering, it is critical that voters are able to vote in a manner that is secure and reliable.

It is critical for all levels of governance. Local elections are frequently extremely close, with a margin of victory of only a few votes. Martin Aff. ¶ 88 (finding dozens of close elections in a single county over the course of 16 years). For example, in the November 2014 general elections, Judge Lindsey McKee Luther defeated her opponent for North Carolina District Court, District 5 by only 5 votes, in a contest in which more than 61,000 voters were cast.[31] Leaving the results of these local elections to the flawed, insecure, and unverifiable ExpressVote will take an unacceptable risk with the governance of municipalities, and deny voters their right to free elections. *See* Martin Aff. ¶¶ 87, 92 .

Furthermore, due to the pandemic, universal use of the ExpressVote will create substantial, unnecessary health risks for voters and force them to choose between their health and their vote. For these reasons, enjoining the Defendants from using the ExpressVote also will further "the public interest[, which] favors permitting as many qualified voters to vote as possible." *Holmes*, 840 S.E.2d at 266 (quoting *League of Women Voters*, 769 F.3d at 247 (alteration in original). The injunction will ensure that voters are given an opportunity to vote in a manner that limits risk to their health and provides them with an effective, secure method of casting their ballots, thereby enabling many voters to go to the polls and have their votes counted.

Plaintiffs face substantial injury absent an injunction that outweighs the burden on Defendants if injunctive relief is granted. *See Williams v. Greene*, 36 N.C. App. 80, 86 (1978) (in

[31] *See* North Carolina State Board of Elections, 11/04/2014 Official General Election Results—Statewide, https://bit.ly/2AI2cZC (last accessed Aug. 3, 2020).

balancing equities, courts must "weigh[] potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted"). Defendants have no interest in placing unconstitutional burdens upon voters. But they do have an interest in ensuring that the elections held are free and fair and are accepted by the voters as being free and fair—not influenced by hacking, malfunctions, or the disenfranchisement of anyone who could not bear the risks placed unnecessarily upon their health.

Defendants are already planning to produce additional paper ballots to satisfy the mail-in vote requests; they can also ensure that all North Carolinians have the option of voting by paper ballot. And alternative machines are available and certified already in North Carolina, so that voters who prefer or need to vote on a HAVA-compliant machine can do so on a reliable device.

2. It is Feasible to Implement the Injunction Before the November 2020 Elections

Plaintiffs' requested relief can be implemented by all Defendant Counties before the November 2020 election. Transitioning to hand-marked paper ballots with secure, reliable accessible voting devices for individuals who require or prefer them is feasible under this time frame, will secure North Carolina elections, and will protect North Carolina voters from unnecessary risk to their health as they vote during the pandemic. In similar circumstances, when the State of Georgia raised a feasibility defense in the *Curling* case, the court stated that it "disagrees with Defendants' assertions that Plaintiffs' requested relief is not feasible from either a timing or cost perspective." *Curling*, 397 F. Supp. 3d at 1405.[32]

Plaintiffs' proposed remedy is well within the mainstream in North Carolina. North Carolina law permits use of hand-marked paper ballots as the primary method of voting on Election

[32] The *Curling* Court was concerned "about the State's capacity to manage a transition to paper ballots for the 2019 elections while overseeing and undergoing a simultaneous transition to the newly enacted voting system during this time" – circumstances that are not present in this case. *Curling*, 397 F. Supp. 3d at 1405.

Day. N.C. Gen. Stat. Ann. § 163-165.7(a). Out of 100 Counties in North Carolina, only seven counties use the ExpressVote as the Election Day standard voting machine, while 93 counties use hand-marked paper ballots for in-person voting on Election Day.[33] All counties use hand-marked paper ballots for absentee voting and for provisional ballots.

The Defendant Counties can switch from the ExpressVote to hand-marked paper ballots as their primary method of voting on Election Day without purchasing any new scanners or certifying any new voting systems. In the nine Defendant counties that mandate the use of ExpressVote by voters either during early voting, on Election Day, or both, election officials may provide hand-marked paper ballots as well as accessible devices for voters who need or prefer them. They already own the optical scanners necessary to count paper ballots using a central count tabulation method. *See* Ritchie Aff. ¶ 32 (observing "all [c]ounties in North Carolina that use the ExpressVote can switch to hand-marked paper ballots and continue to count the ballots on the same tabulation device"); Martin Aff. ¶ 46 ("No new system selection, certification, testing and implementation is required for the deployment of hand-marked paper ballots counted by the DS200 optical scanners already in use."); Hoke Aff. ¶ 34 (noting "the defendant counties have already purchased and deployed their new EMS servers, software, the precinct optical scanners," and "[a]ll of this hardware and most of the software can continue to be used with little to no change.")

Defendant Counties can replace the ExpressVote with accessible, non-barcode BMDs that are already certified for use in North Carolina. For example, the AutoMark, a BMD manufactured by ES&S, is already certified for use in North Carolina and is compatible with the optical-scan tabulators used to count hand-printed paper ballots that Defendants have purchased.[34] The Help

[33] NORTH CAROLINA STATE BOARD OF ELECTIONS, *Voting Systems by County*, https://www.ncsbe.gov/Voting-Options/Elections-Voting-Systems (last accessed Aug. 3, 2020).
[34] ES&S, "System Overview: ES&S Voting System 5.2.2.0," Sec. 1.2.2.7, *available at* http://bit.ly/2KJ7MN4. (last accessed Aug. 3, 2020).

American Vote Act ("HAVA") requires states to provide at least one voting system at every polling place that is accessible to voters with disabilities. 52 U.S.C. § 21081(a)(3)(B); *see also* Martin Aff. ¶ 19. Therefore, all counties must provide accessible voting devices for individuals who need or prefer them. U.S.C. § 21081(a)(3)(A-B); N.C. Gen. Stat. Ann. § 163-165.4(3).

Virginia Martin, who has overseen a transition of election systems to hand-marked paper ballots within a short timeframe, observes that the transition to a primarily hand-marked paper ballot system "can be accomplished smoothly, securely, and effectively" by these counties. Martin Aff. ¶ 3, 7, 47. The transition to hand-marked paper ballots was straightforward; "voters have no trouble understanding how to hand-mark a paper ballot or insert it into an optical scanner" and "[t]raining time for pollworkers is not lengthy." *Id*. ¶ 43. Indeed, North Carolina counties such as Guilford County recently transitioned from voting on electronic DRE voting machines to hand-marked paper ballots. Spearman Aff. ¶ 6. Gloria Hill has managed hand-marked paper ballot elections in Hoke County, where she is the Chair of the Board of Elections, since 2009. Hill Aff. ¶¶ 2, 4. Her experience is that tabulating hand-marked paper ballots is very efficient in her county. *Id*. ¶ 10. Election officials in Hoke County can "complete the total reporting to the State Board of Elections and announce the final election results within 2 hours after the polls close." *Id*.

It is not uncommon to for counties to switch voting systems in approximately two months and "[t]here is more than sufficient time for election officials in North Carolina counties to make the transition to hand-marked, human readable paper ballots for the November [2020] General Election." Hoke Aff. ¶¶ 22, 38. Boards of elections across the country, including in Virginia, have successfully transitioned to hand-marked paper ballots and robust post-election auditing on "far tighter timetables than would be available here." *Id*. ¶ 28. The Defendant Counties used the ExpressVote for the March 3, 2020 primary election, less than three months after December 13,

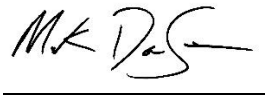
2019, when the N.C. State Board of Elections certified the ExpressVote. *Id*. ¶¶ 23-24. In Mecklenburg County, the transition took less than 60 days. *Id*. ¶ 23. The transition "to using the ExpressVote in the early months of 2020 was a much more complex and difficult undertaking than it would be for those same counties to move to hand-marked paper ballots, given that these counties already use hand-marked paper ballots" for absentee and provisional voting. *Id*.

Defendants have placed unconstitutional burdens on voters' right to vote, to participate in free elections, and to do so on equal terms with other North Carolina voters; and there is a feasible, reliable way to transition to a constitutional voting system ahead of the November 2020 election.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an order granting their motion for a preliminary injunction.

Respectfully submitted this the 4th day of August, 2020.



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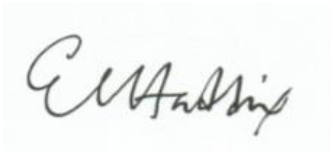

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction was served on Defendant by electronic mail to:

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This the 4th day of August 2020.

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A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:17-cv-2989-AT
BRAD RAFFENSPERGER, *et al.*,	:	
	:	
Defendants.	:	

ORDER

During the pendency of this lawsuit and following the 2018 gubernatorial general election, the Georgia Legislature enacted legislation requiring the Secretary of State to implement a new voting system that includes a voter-verifiable paper record. In addition to their original claims aimed at the State's former electronic voting machines, Plaintiffs' newly amended claims challenge the ballot marking device system chosen by the Secretary of State which tabulates votes using an encrypted 2D barcode that Plaintiffs allege cannot be voter-verified. The State Defendants' Motion to Dismiss Curling Plaintiffs' Third Amended Complaint and Coalition Plaintiffs' First Supplemental Complaint [Doc. 645] is now pending before the Court.[1]

[1] After the Court granted Plaintiffs leave to file amended complaints, both the Coalition's First Supplemental Complaint (Doc. 628) and the Curling Plaintiffs' Third Amended Complaint (Doc. 627) were filed on October 15, 2019.

I. BACKGROUND AND FACTUAL ALLEGATIONS

A. Georgia Enacts New Election Code and Adopts New Ballot Marking Device Voting System

Effective April 2, 2019, the Georgia legislature passed H.B. 316 and S.B. 34, mandating a new uniform statewide voting system that provides for:

> the use of scanning ballots marked by electronic ballot markers and tabulated by using ballot scanners for voting at the polls and for absentee ballots cast in person, unless otherwise authorized by law; provided, however, that such electronic ballot markers shall produce paper ballots which are marked with the elector's choices in a format readable by the elector.

O.C.G.A. § 21–2–300(a)(2). (Coalition Pls.' Compl. ¶ 3.) Georgia's new election code defines "electronic ballot marker"– also referred to as a ballot marking device or BMD – to mean:

> an electronic device that does not compute or retain votes; may integrate components such as a ballot scanner, printer, touch screen monitor, audio output, and a navigational keypad; and uses electronic technology to independently and privately mark a paper ballot at the direction of an elector, interpret ballot selections, communicate such interpretation for elector verification, and print an elector verifiable paper ballot.

O.C.G.A. § 21–2–2(7.1). (Coalition Pls.' Compl. ¶ 20; Curling Pls.' Compl. ¶ 136.) The law also requires that the "equipment used for casting and counting votes in county, state, and federal elections shall be the same in each county of this state and shall be ***provided to each county by the state, as determined by the Secretary of State***." O.C.G.A. § 21–2–300(a)(1) (emphasis added).

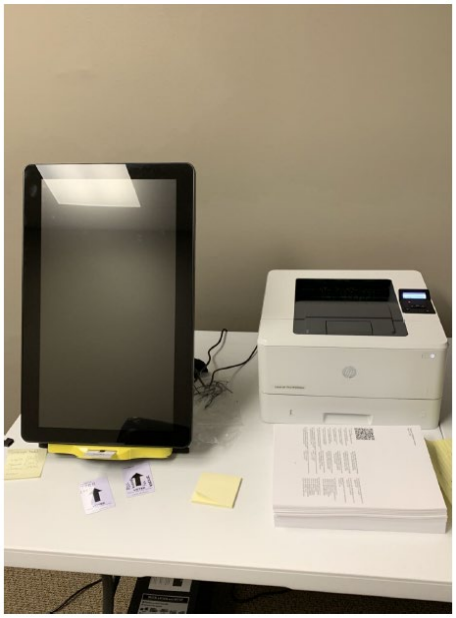
The election code requires the Secretary of State to certify that the new BMD voting system is "safe and practicable for use" in all state, federal, and county

elections in the State and complies with the Georgia Election Code, the Rules of the Georgia State Election Board, and the Rules of the Secretary of State. O.C.G.A. § 21–2–300(a)(2); Ga. Comp. R. & Reg. r. 590–8–1–.01(d). To comply with the rules governing certification, the voting system must meet qualification testing performed by an Independent Test Agency (ITA) certified by the Election Assistance Commission (EAC) or a Georgia Certification Agent designated by the Secretary of State. Ga. Comp. R. & Reg. r. 590–8–1–.01(d).

On July 29, 2019, the Secretary of State announced his intent to award the contract for this new system to Dominion Voting Systems, Inc. (Doc. 552; *see also* Curling Pls.' Compl. ¶ 70; Coalition Pls.' Compl. ¶ 5.)[2] The Secretary of State engaged Pro V&V to conduct certification testing of the system. (Coalition Pls.' Compl. ¶ 89.) According to the Coalition Plaintiffs' Complaint, Pro V&V's certificate of accreditation by the EAC as a voting system test laboratory expired on February 24, 2017. (*Id.* ¶ 90.) On August 7, 2019, Pro V&V signed a Test Report stating that the requirements set forth for voting systems by the EAC 2005 Voluntary Voting System Guidelines ("VVSG") and the State of Georgia were satisfied. (*Id.* ¶ 90; *see also* Pro V&V Test Report at 18, Doc. 61-7.) Two days later, on August 9, 2019 the Secretary of State certified the Dominion BMD system as compliant with the election code. (Doc. 575 at 7; *see also* Coalition Pls.' Compl. ¶ 92.)

[2] On August 9, 2029, after no protests were made to the award, the Secretary of State issued its Final Notice of Award. (Doc. 575.)

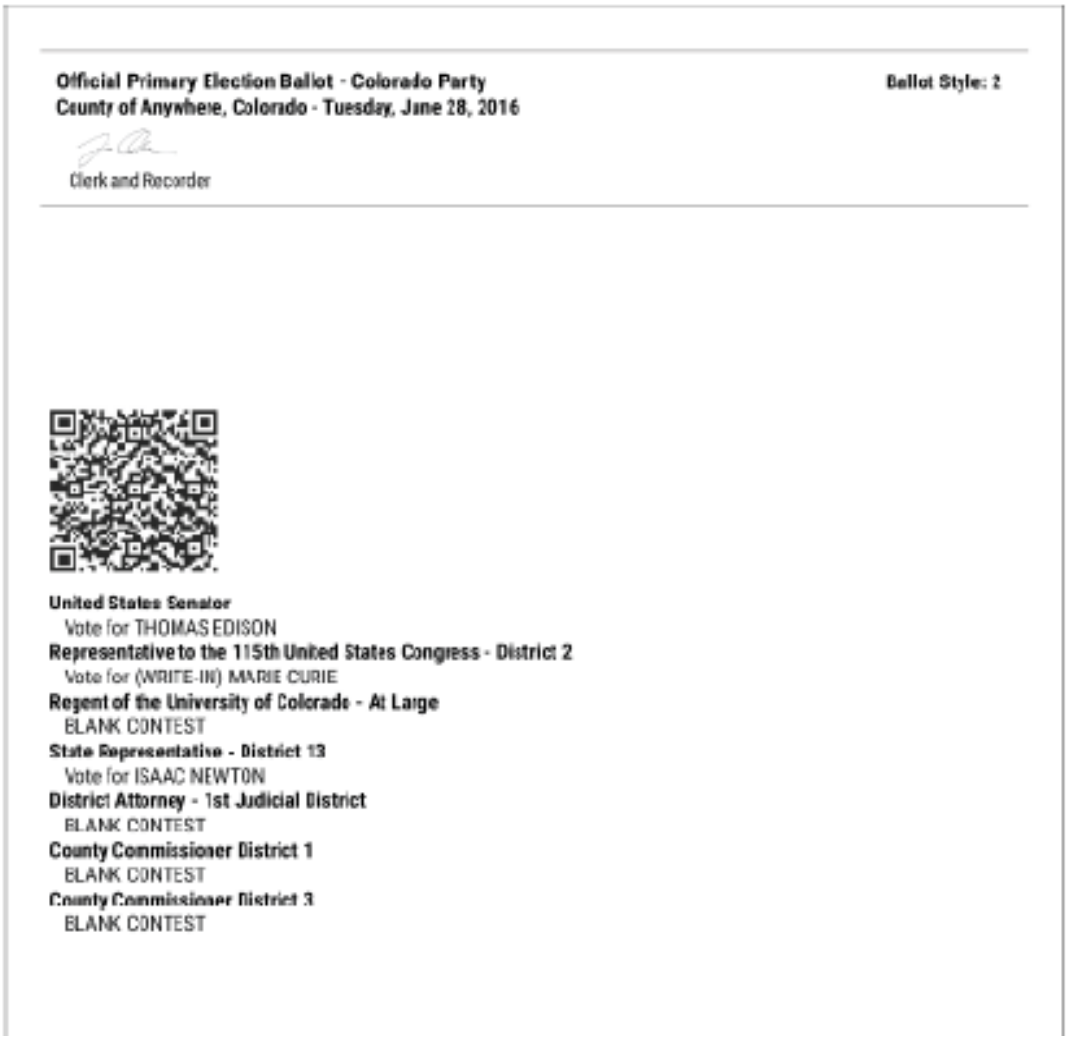
The Dominion voting system includes an election management system ("EMS"), ePollbook electronic voter check-in pollpads and software, electronic BMDs, and ballot scanners. (Coalition Pls.' Compl. ¶¶ 67, 70.) Below are photos of the ePollbook, BMD, and ballot scanner certified for use by the Secretary of State:



(Pro V&V Test Report, Dominion Voting Systems D-Suite 5.5A Voting System, Georgia State Certification Testing at 13-14.)

Pollworkers use the ePollbook to confirm a voter is in the correct polling place and eligible to vote and then to encode and issue a voter access card. (Coalition Pls.' Compl. ¶¶ 70-71.) The voter inserts the access card into the BMD which pulls up the ballot style assigned to the voter encoded on the access card and displays voting options on the BMD touchscreen. (Coalition Pls.' Compl. ¶¶ 72-73.) After the voter makes her selections on the touchscreen, the BMD prints a

paper "ballot" containing a 2D barcode encoded with the selections and a human readable text summary of the voter's selections as shown in the example image below:



Official Primary Election Ballot - Colorado Party
County of Anywhere, Colorado - Tuesday, June 28, 2016

Ballot Style: 2

Clerk and Recorder

United States Senator
Vote for THOMAS EDISON
Representative to the 115th United States Congress - District 2
Vote for (WRITE-IN) MARIE CURIE
Regent of the University of Colorado - At Large
BLANK CONTEST
State Representative - District 13
Vote for ISAAC NEWTON
District Attorney - 1st Judicial District
BLANK CONTEST
County Commissioner District 1
BLANK CONTEST
County Commissioner District 3
BLANK CONTEST

(Doc. 555 at 13.) The voter is expected to review the human readable summary on the paper ballot printout to confirm that it correctly reflects the choices made on the touchscreen before casting her ballot by inserting it into a separate ballot scanner. (Coalition Pls.' Compl. ¶¶ 82-83.) The summary indicates the candidates for whom a vote was cast, but not the other candidates identified in each race.

The ballot scanners do not tabulate votes from the written text summary of the voter's selections generated by the BMD. (Curling Pls.' Compl. ¶ 71.) Instead, the ballot scanners tabulate votes by interpreting the encoded information about the voter's choices generated by the BMD in computer-readable form in the 2D barcode. (Coalition Pls.' Compl. ¶ 79; Curling Pls.' Compl. ¶¶ 71, 73.) The scanner saves this information, referred to as the cast vote record, to removable flash cards for use by county election officials for final tabulation along with hand-marked absentee and provisional ballots. (Coalition Pls.' Compl. ¶¶ 84-86.)

The paper ballot printouts are also retained by county election officials and can be used for audit or recount purposes. (Coalition Pls.' Compl. ¶¶ 87-88.) The election code provides that "[t]he paper ballot marked and printed by the electronic ballot marker shall constitute the official ballot and shall be used for, and govern the result in, any recount conducted pursuant to Code Section 21-2-495 and any audit conducted pursuant to Code Section 21-2-498." O.C.G.A. § 21–2–379.23(d).

Georgia's Election Code contains new audit provisions. *See* O.C.G.A. § 21-2-498. First, beginning with the November 2020 general election, local election superintendents will be required to conduct "precertification tabulation audits" for any federal or state general election in accordance with rules promulgated by the State Election Board.[3] O.C.G.A. § 21-2-498(b). Second, after successfully

[3] O.C.G.A. § 21-2-498(c) provides that "[i]n conducting each audit, the local election superintendents shall:
(1) Complete the audit prior to final certification of the contest;

completing a risk-limiting audit pilot program, the Secretary of State will be required to implement risk-limiting auditing for all statewide elections "beginning not later than November 1, 2024."[4] O.C.G.A. § 21-2-498(e). Finally, the code provides that "[t]he procedures prescribed by the State Election Board shall include security procedures to ensure that collection of validly cast ballots is complete, accurate, and trustworthy throughout the audit." O.C.G.A. § 21-2-498(d).

B. Procedural Posture

On August 16, 2019, the day after this Court entered an Order partially granting the Plaintiffs' motions to preliminarily enjoin Georgia's use of DREs for future elections past 2019, the Curling Plaintiffs moved to amend their Complaint to include claims challenging the incoming BMDs. The Coalition Plaintiffs followed suit three weeks later, filing their own separate motion to amend on September 6, 2019. The Court granted the Plaintiffs' motions on October 15, 2019, based on Defendants' written indication of their consent on the condition that they

(2) Ensure that all types of ballots are included in the audit, whether cast in person, by absentee ballot, advance voting, provisional ballot, or otherwise;
(3) Provide a report of the unofficial final tabulated vote results for the contest to the public prior to conducting the audit;
(4) Complete the audit in public view; and
(5) Provide details of the audit to the public within 48 hours of completion."

[4] The Secretary shall (i) conduct a risk-limiting audit pilot program with a risk limit of not greater than 10 percent in one or more counties by December 31, 2021; and (ii) review the results of the pilot program and provide the members of the General Assembly with a comprehensive report, including a plan on how to implement risk-limiting audits state wide, within 90 days following the election in which such pilot program is used. O.C.G.A. § 21-2-498(e). The code provides that if the "risk-limiting audit is successful in achieving the specified confidence level within five business days following the election for which it was conducted, then all audits performed pursuant to this Code section shall be similarly conducted." *Id.*

retained their right to "to file motions to dismiss on the merits of the new claims," and that discovery would be stayed pending a ruling on the motions. The State Defendants moved to dismiss the amended complaints on October 25, 2019, but as discussed below they did not confine their motion to the new claims as represented.

C. New Allegations Challenging BMDs

The Curling and Coalition Plaintiffs allege that Defendants have failed to implement a constitutionally acceptable election system by requiring all in-person voters to use ballot-marking devices ("BMDs") which suffer from the same vulnerabilities as Defendants' flawed DRE Voting System. (Curling Pls.' Compl. ¶¶ 11, 75-76; Coalition Pls.' Compl. ¶¶ 6-7.) The basis for their claims fall into three main criticisms[5]: (1) the barcode-based BMD voting system will not be substantially safer than the DREs because BMDs are also susceptible to cybersecurity risks and manipulation, (2) the barcode-based BMD voting system does not produce a voter-verifiable paper record, and (3) the barcode-based BMD voting system is incapable of being meaningfully audited.

Plaintiffs allege that the Secretary of State adopted the Dominion barcode-based BMDs against the recommendation of cybersecurity experts and despite the fact that such voting systems have some of the same demonstrated security vulnerabilities as DREs. (Curling Pls.' Compl. ¶¶ 75-76; Coalition Pls.' Compl. ¶¶

[5] As discussed below, the Coalition Plaintiffs assert additional allegations about the security, reliability, and lawfulness of BMDs. (*See, e.g.*, Coalition Pls.' Compl. ¶ 93.)

132-136, 168-169.) Their Complaints identify several alleged vulnerabilities identified with Dominion's election software and hardware. First, they allege that Dominion's election system was certified under a 14-year old standard VVSG 1.0) rather than the more recent VVSG 1.1 or VVSG 2.0 standards.[6] (Curling Pls.' Compl. ¶ 79; Coalition Pls.' Compl. ¶¶ 149-154.) Second, they allege that BMDs rely on software released in February 2015, which has not received security updates since March 2018. (Curling Pls.' Compl. ¶ 82.) Third, they contend that in February 2019, Texas voting systems examiners refused to certify Dominion's election management system based upon several problems with the software that did not appear to have ready-made or simple solutions, including that: (1) Dominion's hardware could be connected to and infected by the internet; (2) the audit trail stored voter selections in sequential order, which would permit the secrecy of the ballot box to be compromised; and (3) the paths for import of election data into the election management program revealed multiple opportunities for mistakes, requiring three separate restarts of the adjudication process during testing. (Curling Pls.' Compl. ¶ 80.) Fourth, Plaintiffs allege that hackers at the 2019 DEFCON Voting Village identified twenty vulnerabilities in Dominion's precinct scanners. (Curling Pls.' Compl. ¶ 81; Coalition Pls.' Compl. ¶ 173.) These vulnerabilities included the ability of remote attackers to implement a Domain Name System ("DNS") attack and the existence of an exposed flash card containing

[6] The Coalition Plaintiffs further allege that the Secretary has failed to satisfy Georgia's certification requirement for the Dominion system. (Coalition Pls.' Compl. ¶¶ 154-162, 170-172.)

an .xml file that, if manipulated, would allow for scanned votes to be redirected to a different candidate. (*Id.*)

Finally, the Coalition Plaintiffs allege that there is a risk that malware-infected components of the compromised DRE/GEMS system can be transmitted to the new Dominion BMD System if the two systems interface either by direct or indirect physical and networked interaction between any pieces of the old system and any pieces of the new system at any point in time, including by shared interfacing with intermediary equipment. (Coalition Pls.' Compl. ¶ 176.) The Coalition Plaintiffs allege that despite the State Defendants' denial that any electronic data from the existing GEMS server and database will be imported for use with the new Dominion BMD System, (Doc. 556), the Dominion BMD System will be exposed at least indirectly to compromised components of the old system as the result of each system's separate interfacing with the Secretary's IT infrastructure which is compromised because of the history of security breaches already documented and proven in this litigation. (*Id.* ¶¶ 177-180.) According to Coalition Plaintiffs, "the DRE voting system and its components, including existing files, data sets, and auxiliary programs, can pass malware to the 'new' servers and working files of the Dominion BMD System. As legacy GEMS files are converted or transferred to work with the new Dominion BMD System, they will carry with them undetected malware or erroneous coding that will compromise the new system." (*Id.* ¶ 181.)

Plaintiffs' second major criticism of the Dominion BMD system is their assertion that it lacks a voter-verifiable paper record. As a result of the alleged vulnerabilities outlined in their new Complaints, Plaintiffs contend that there is the potential that the BMD could generate barcodes that contain information regarding a voter's choices that do not match what the voter entered (as reflected in the written text summary), or could cause a precinct scanner to improperly tabulate votes. (Curling Pls.' Compl. ¶¶ 83-84; *see also* Coalition Pls.' Compl. ¶¶ 167-174.) Plaintiffs allege that the human readable text generated by the BMD is irrelevant to the vote tabulation by the ballot scanners which read only the undecipherable barcodes. (Curling Pls.' Compl. ¶ 73; Coalition Pls.' Compl. ¶ 64.) Therefore, voters will be unable to conduct any verification of the information encoded in the non-human readable barcode, will have no way of knowing what votes they are actually casting, and will instead be forced to trust that the barcode accurately conveys their intended selections. (Curling Pls.' Compl. ¶ 74; Coalition Pls.' Compl. ¶ 66, 79, 82, 104.) Plaintiffs claim this fundamental characteristic of the BMD voting system, even if operated as designed, fails to provide voters with a verifiable auditable voting record in violation of their Constitutional right to a "transparent, fair, accurate, and verifiable election process" and to "cast an accountable vote." (Coalition Pls.' Compl. ¶¶ 1, 64-66, 105, 107; *see also* Curling Pls.' Compl. ¶¶ 74, 90, 116-119.)

Additionally, even if the barcode is identical to the text summary, Plaintiffs allege that the text summary does not redeem the system because: (1) research has

demonstrated that most voters are unlikely to review these summaries even when specifically directed to do so; (2) polling place exit interviews of voters who do choose to review a text summary of their vote reveal that some are unable to recall details of the ballots they cast and that voters fail to recognize errors in ballots presented to them for verification, or fail to recognize that the ballots presented to them for verification were not the ones they actually cast; and (3) on those occasions where a voter does notice a discrepancy on their ballot, research suggests that they are far more likely to attribute the discrepancy to their own mistake and are therefore "unlikely to raise concerns about a systemic attack on an election." (Curling Pls.' Compl. ¶¶ 85-87; *see also* Coalition Pls.' Compl. ¶ 110-120.) This is allegedly also a function of the length and complexity of ballots, because the BMD generated printed paper ballot contains only a paraphrased summary of the voter's choices, and because voters may assume that the barcode contains accurate and complete information, even if the printout appears to be incomplete. (Coalition Pls.' Compl. ¶¶ 114-115, 117.) The voter must rely exclusively upon her memory to review the text summary and confirm that it is complete and correct despite agreement by auditing and voting system experts that "in most elections, many, if not most, voters will be unable, from memory, without the benefit of any visual cues or context, to reliably, accurately, and completely verify the completeness and correctness of a paraphrased textual summary of the selections they previously made on the touchscreen over the course of potentially 5 or 10 minutes" and "are unlikely to detect if a low-profile down-ballot race or ballot question is left off the

paper printout, or to notice if their votes were switched between 'Yes' and 'No' on a particular question." (*Id.* ¶ 115.)

The third major critique shared by the Curling and Coalition Plaintiffs is that, in light of these identified problems, Georgia's new barcode-based BMD system does not allow for a meaningful audit to guarantee that votes are accurately recorded and tabulated. (Curling Pls.' Compl. ¶¶ 72, 90; Coalition Pls.' Compl. ¶¶ 130-136, 142-147.) According to the Curling Plaintiffs, this alleged flaw is exacerbated by Georgia's failure to implement risk-limiting audits for all of its elections, including the November 2020 Presidential election. (Curling Pls.' Compl. ¶ 89.) The Coalition Plaintiffs rely on the opinions of experts, including Dr. Phillip Stark, the creator of risk-limiting audits, and the National Academy of Sciences as a basis for their contention that it is impossible to conduct a valid audit of BMDs that use barcodes to tabulate votes. (Coalition Pls.' Compl. ¶¶ 132-135.)

The Coalition Plaintiffs also raise three separate factual challenges to the implementation of the Dominion BMD system: (1) that the ballots cast on the Dominion BMDs are not secret ballots, (*id.* ¶¶ 121-129); (2) that the Dominion system is illegal to use because the Secretary of States' improper certification of the system is void, (*id.* ¶¶ 148-163); and (3) that proper implementation of the BMD system in time to conduct the upcoming elections is impractical and will expose voters to an electoral disaster, (*id.* ¶¶ 187-199).

In addition to their original claims challenging the DRE/GEMS voting system, Curling Plaintiffs bring three new causes of action regarding BMDs: (1)

Count III asserts that the BMD voting system will result in a violation of the Fourteenth Amendment's guarantee of substantive due process, based on the substantial burden placed on Plaintiffs fundamental right to vote; (2) Count IV asserts that the BMD voting system will result in a violation of the Fourteenth Amendment's guarantee of equal protection as a result of the unequal treatment between votes cast on BMDs and votes cast by absentee paper ballot; and (3) Count V asserts a claim for declaratory judgment that the Dominion BMD voting system selected by the Secretary of State violates the provisions of Act. No. 24/H.B. 316 that require an "elector verifiable paper ballot." The Coalition Plaintiffs assert similar claims for substantive due process and equal protection violations related to the new BMDs in Counts I and II of their First Supplemental Complaint. They also assert a procedural due process claim in Count III.[7]

II. DISCUSSION

The State Defendants filed a Motion to Dismiss Plaintiffs' amended/supplemental complaints on nearly identical grounds as their prior motions, which include: lack of standing, Eleventh Amendment immunity, failure

[7] According to the Coalition Plaintiffs' First Supplemental Complaint "Pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, the Coalition Plaintiffs, in this supplemental complaint, hereby set out the following transactions, occurrences, and events that happened after the relation-back date of the Coalition Plaintiffs' Third Amended Complaint (the "TAC," Doc. 226). ***The allegations and claims stated by this supplemental complaint are additional to, and do not supersede or replace, the allegations and claims stated in the TAC***. (at page 6.)" (Coalition Pls.' First Supp. Compl. at 6, Doc. 628.) Despite stating that the allegations and claims are additional to, but do not supersede or replace those in the Third Amended Complaint, the Coalition's First Supplemental Complaint does not pick up where the TAC left off. Instead, the factual allegations begin with paragraph 1, and the claims are enumerated as Counts I, II, and III. As a result, the Coalition Plaintiffs now confusingly have two different claims cast as "Count I" and two different claims cast as "Count II."

to state a claim, and the additional ground that Plaintiffs' remedy violates the Americans With Disabilities Act.[8] But Defendants also seek to dismiss Plaintiffs' original claims regarding the DREs, arguing that: (1) the claims are moot because the DREs have been decertified by the Secretary of State and will no longer be used in Georgia elections; and (2) Defendants are entitled to Eleventh Amendment immunity because Plaintiffs' claim for declaratory relief regarding the DRE system as a whole seeks redress of past harms.

As an initial matter, the Court notes that in an October 23, 2019 Order, the Court advised Defendants that:

> The Court has entered two prior orders addressing motions to dismiss Plaintiffs' claims regarding DREs and will not entertain further arguments regarding the dismissal of those claims which now form the basis of the Court's August 15, 2019 preliminary injunction order. Defendants should focus their arguments entirely on the new claims related to the BMDs.

(Doc. 638.) The State Defendants ignored this Court's directives and move to dismiss Plaintiffs' existing claims seeking relief as to the DRE voting system in addition to the Plaintiffs' newly added BMD claims.

A. Plaintiffs' Claims Challenging the DRE/GEMS Voting System and Associated Software Systems Are Not Entirely Moot

In response to Plaintiffs amending their Complaints to assert new claims challenging the replacement of DREs with BMDs, State Defendants assert that

[8] This last argument was previously raised by the State Defendants in connection with the prior round of preliminary injunction motions.

Plaintiffs' continued challenges to the DRE system are moot[9] because of: (a) the change in Georgia's election law with the passage of HB 316; and (b) the State's voluntary transition from DREs to BMDs. As a result, the State Defendants contend that the State's "voluntarily cessation" of the "the allegedly wrongful behavior" precludes further relief by the court warranting the dismissal of the claims as moot. *See United States v. Georgia*, 778 F.3d 1202, 1205 (11th Cir. 2015) (finding that in light of the passage of "comprehensive election reforms," the court could not "conclude that the Georgia Legislature would go back to the old electoral system if [the case] were dismissed as moot"); *Atheists of Fla. Inc. v. City of Lakeland*, 713 F.3d 577, 594 (11th Cir. 2013) (reasoning that the "voluntary cessation by a government actor gives rise to a rebuttable presumption that the objectionable behavior will not recur").

A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Atheists of Florida, Inc.*, 713 F.3d 577, 593-94 (11th Cir. 2013); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). Mootness can occur due to a change in circumstances or a change in the law. *Coral Springs Street Systems, Inc. v. City of Sunrise*, 371 F.3d 1328 (11th Cir. 2004). However, if the plaintiff's injury is likely to reoccur, despite events that occur

[9] Defendants assert that Plaintiffs cannot have it both ways – they cannot proceed on their "DRE claims" if their "BMD claims" are ripe. The Court asked the parties to address the issue of ripeness in supplemental briefing. The parties are in agreement that Plaintiffs' claims challenging the BMDs are ripe. State Defendants contend, instead, that Plaintiffs lack standing to pursue claims challenging the BMDs. While the concepts of standing, ripeness, and mootness are related, they are each subject to a distinct body of case law. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000).

subsequent to the filing of a lawsuit, then the court can still provide injunctive relief, and the claim is not moot. *See Knox v. Service Employees*, 567 U.S. 298, 307 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."); *Friends of the Earth*, 528 U.S. at 193; *De La Teja v. United States*, 321 F.3d 1357, 1362 (11th Cir. 2003).

An "event" that may moot a claim can occur when the defendant ceases the behavior on which a claim is based. But, a defendant's "voluntary cessation" of a challenged practice does not necessarily "deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173 (2007); *Troiano*, 382 F.3d at 1282. The standard for determining whether a case has been mooted by the defendant's voluntary conduct "is stringent: A case *might* become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189 (emphasis added); *Coral Springs Street Systems, Inc.*, 371 F.3d at 1328 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953) ("[T]o say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.")).

A defendant claiming that its voluntary compliance moots a case bears a "formidable" burden of persuading the court that the challenged conduct cannot

reasonably be expected to start up again. *Laidlaw*, 528 U.S. at 190, 189; *Sheely*, 505 F.3d at 1184. A defendant's assertion that it has no intention of reinstating the challenged practice "does not suffice to make a case moot" and is but "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.* (quoting *W.T. Grant,* 345 U.S. at 633); *see also Hall v. Bd. of Sch. Comm'rs of Conecuh Cty*, 656 F.2d 999, 1001 (5th Cir. 1981) ("To defeat jurisdiction ..., defendants must offer more than their mere profession that the conduct has ceased and will not be revived."). "The defendant's burden to show that a plaintiff is not facing future injury (and, therefore, is not in need of court-ordered relief) is heavier than the plaintiff's burden of demonstrating the possibility of future injury when establishing standing. *Fair Fight Action Inc. v. Raffensperger*, Civil Action 1:18-cv-5391-SCJ, Order, Doc. 68 at 25 (citing *Friends of the Earth*, 528 U.S. at 190).

When the defendant is a government actor, "there is a rebuttable presumption that the objectionable behavior will *not* recur." *Troiano*, 382 F.3d at 1282-83 (emphasis in original) (citing *Coral Springs St. Sys., Inc.*, 371 F.3d at 1328–29. Governmental entities and officials "have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs*, 371 F.3d at 1328–29; *Troiano*, 382 F.3d at 1283 (courts are "more apt to trust public officials than private defendants to desist from future violations").

The enactment of a superseding statute or regulation moots a case "only to the extent that it removes challenged features of the prior law." *Coral Springs*, 371 F.3d at 1329 (quoting *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000)). "To the extent that those features remain in place, and changes in the law have not so fundamentally altered the statutory framework as to render the original controversy a mere abstraction, the case is not moot." *Coal. for the Abolition of Marijuana Prohibition*, 219 F.3d at 1310. For example, in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, the Supreme Court declined to find moot a challenge to a minority set-aside program even though the challenged law had been repealed, because it had been replaced with a law that, although somewhat narrower, still had the potential to disadvantage the plaintiff: "There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so." 508 U.S. 656, 662 (1993). Thus, claims based on provisions of the law that continue after the enactment of a superseding law are not moot. *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992) ("Where a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot.").

The State Defendants seek dismissal of Plaintiffs' claims relating to DREs as now being moot because: (1) the State has voluntarily moved from the use of DRE voting to BMDs as a result of the passage of HB 316; (2) the State has purchased and is employing BMDs statewide in time for statewide use in the 2020 primary

and general elections; (3) the Court also has prohibited the State's use of "the GEMS/DRE system in conducting elections after 2019;" and (4) the State has decertified the DREs and has collected and stored them in a suitable facility in a fiscally prudent manner for testing of a sample and future disposal per the parties' agreement and the Court's approval.[10] (*See* Consent Order on Storage of DREs, Doc. 745) (addressing storage, testing of DRE memory cards and/or DRE Recap Sheets for purposes of identifying a sample of DRE machines to evaluate for assessment of electronic hacking/access issues in dispute).

Defendants are correct that all of this precludes the possibility of the DRE machines being used again in Georgia elections.[11] And the Court has indicated that it does not intend to grant any further relief relating to the use of the old DRE voting machines. But Plaintiffs' original claims challenged elements of the voting system beyond the DRE voting machines themselves. As highlighted extensively in this Court's prior orders, Plaintiffs' claims encompassed the security of the Secretary of State's election technology infrastructure and the actual breach of the Center for Election Systems ("CES") servers, computer networks, and data and the State's electronic voter registration system and database.[12] These concerns were at

[10] The Court recognizes that at the time this Order is being issued, both the 2020 Presidential Preference Primary and Georgia's Statewide Primary elections (pre-runoffs) have been conducted on the BMD system and DREs are no longer being used for any elections.

[11] At the time when Plaintiffs' amended complaints were filed and these motions were being briefed in 2019, DREs were still being used to conduct a small number of local elections and runoffs.

[12] Given the State's strong desire to protect the total confidentiality of its central GEMS server, the Court has authorized discovery of a sample of DRE voting machines, pursuant to Consent Order, to allow Plaintiffs' access to potentially relevant evidence in connection with these security, breach, and data integrity claims.

the center of the Court's consideration in ordering relief in August 2019 and remain a focus of this case even as the State implements the BMDs in connection with multiple other components and the State's main election system server. Plaintiffs allege in their amended/supplemental complaints that elements of the former system, including the voter registration database, will carry over into the new election system. And as this Court noted in its August 15, 2019 Order:

> The voter registration database, containing millions of Georgia voters' personal identifying information, plays a vital role in the proper functioning of the voting system. Yet it has been open to access, alteration, and likely some degree of virus and malware infection for years, whether in connection with: CES/KSU's handling of the system and data and failure to address these circumstances upon transfer of CES's functions back to the SOS; failure to remediate the database, software and data system flaws and deficiencies; or exposure of the widespread access to passwords to the voter registration data system throughout the SOS, CES/KSU, the 159 counties, or the public via the virtual open portal maintained at CES/KSU. Most significantly, the programming and use of ballots in both the DRE and future Dominion BMD system is tied to the accuracy of voter precinct and address information. Inaccuracy in this voter information thus triggers obstacles in the voting process. New Dominion express poll machines bought as part of the new contract with Dominion cannot alone cleanse the voter database to be transferred and relied upon.

(August 15, 2019 Order, Doc. 579 at 88-89.)

Defendants admit that the voter registration database (ENET), which is used by county registrars to maintain and update voter registration records is not being replaced and that information from this system will be loaded into the new electronic pollbooks for each election. (Defs.' Mot. at 11, n. 14; *see also* Dec. 6, 2019 Tr. at 11) (explaining that the ENET system "used to program ExpressPoll check-in units for the GEMS/DRE system" is "not being replaced" and that "[t]he same

database and same data, a flat text file, will be used to populate the Poll Pads"). They contend that the information is not electronically transmitted, and therefore cannot corrupt the new pollbook system, because only a flat text file from ENET (that will be run through a security scan) will be loaded into the pollpads for use during elections. Defendants offer nothing, however, to show that any action has been taken in response to issues experienced by voters in November 2018 (and prior elections or allegedly, during more recent elections) to ensure that the information from ENET is reliable, accurate, and updated. Due to the volume of evidence of voter issues at the polls detailed in the Court's August 2019 Order, Plaintiffs' allegations that errors and deficiencies in the voter registration system and database are likely to carry over into the new system and cause another round of voter disenfranchisement are plausible and remain a material concern. And of course, Defendants' motion is not being decided in a vacuum. As the Court is aware from the evidence presented in the context of the Plaintiffs' prior preliminary injunction motions, Defendants' contentions that the other two voter registration systems, the My Voter Page (MVP) and the Online Voter Registration system, do not interface with ENET are challenged by Plaintiffs. Plaintiffs have offered testimony of cybersecurity experts to rebut the State's assertions.[13] Clearly, to the

[13] Plaintiffs presented evidence that the State's technology failures (whether caused by malicious interference, out of date software, or even human error by county registrars in failing to update voter registration information) have resulted in voter disruption and have potentially been left unremediated. Numerous declarations from voters highlighted instances where a voter's registration status on MVP, the "outward-facing system used to provide information to voters" did not match the voter registration status in the electronic pollbooks used to check in voters at the voting polls. At the December 6, 2019 hearing, counsel for the State explained it this way: "The My Voter page is a snapshot of the ENet database at a particular point in time. So it is a read only.

extent that the Court views the MVP system as part of the Plaintiffs' continuing challenge, the State's position on the MVP interface issue conflicts with this evidence provided to date.

Although O.C.G.A. § 21-2-221.2 (f) requires that "the Secretary of State shall employ security measures to ensure the accuracy and integrity of voter registration applications submitted electronically," the Plaintiffs have demonstrated a detailed account of the Secretary of State's deficient security practices in Georgia's pre-2020 elections. The Court therefore required the State Defendants to develop procedures and take other actions to address the significant deficiencies in the voter registration database and the implementation of the ExpressPoll system.

It is unclear what actions, if any, the State has undertaken to address these deficiencies in the electronic pollbooks and MVP voter registration interface or new versions of such in advance of June 2020 elections or the elections to be held in August and November 2020. While the Court at this juncture has only preliminary evidence in the record before it that addresses these claims in their current form, the Court notes that alleged significant problems relating to the express pollbooks were reported by the media during the June 2020 election cycle. The Court makes no findings whatsoever based on this reporting, but simply finds

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A voter can look up their information. But if they click to say I want to change something, they are taken to the online voter registration system. That system will then send information to the county registrars that they are then able to say we're not going to put this in or will put this in. So it is not like a voter is able to actively edit the ENet database themselves. They have to do that – all of those systems will remain in place, the ENet system, the My Voter page, the online voter registration. None of those systems are changing with the adoption of the new voting system for the election process." (December 6, 2019 Tr., Doc. 679 at 12-13.)

that given the body of evidence originally presented and presented in connection with Plaintiffs' newest amended complaints, the Plaintiffs' claims relating to continuing, critical deficiencies in the MVP and voter registration system and electronic pollbooks are, at very least, plausible and not moot. Similarly, in the absence of evidence of the Secretary of State's progress or timeline for enactment or measures to address Plaintiffs' claims for relief regarding the deficiencies in the voter registration database relied on as the foundation of the voting system, the Court cannot find that these registration related claims are moot. *See Fanin v. United States Department of Veterans Affairs*, 572 F.3d 868, 876 (11th Cir. 2009) (finding that the plaintiff's case was not moot because there was "a wide gulf between the [defendant] being 'in the process' of implementing new procedures and it having those new procedures fully in place"). Thus, the Court cannot say that Plaintiffs' allegations have an insufficient basis or are sheerly speculative given this record.

Accordingly, although the portion of Plaintiffs' claims challenging the DRE voting machines themselves may for all practical purposes be moot because the DREs have been barred from use past 2019 as explained above, these other aspects of Plaintiffs' claims are not.[14] Nor would Plaintiffs' claims relating to the handing

[14] This Court has twice indicated its view that Plaintiffs' original claims challenging the constitutionality of the DRE/GEMS voting system were not moot as a result of the passage of Act No. 24/H.B. 316. First, in April 2019 (and before the DREs were enjoined for use past 2019), the Court noted that because the DREs were still being used for elections in 2019, the claims were still very much alive at that time. Indeed, the Court ordered substantive preliminary injunctive relief on those claims in its August 2019 Order. Second, the Court noted in November 2019 that "[w]hile the Court finds that discovery relating to the DREs and GEMS systems is not necessary to the Court's resolution of the Plaintiffs' claims based on the current posture of the case, the Court does

of security of the current voting system be moot to the extent that evidence is introduced linking this to prior security issues and breaches.

B. Plaintiffs' Claims Are Not Barred by Eleventh Amendment Immunity

State Defendants have renewed their argument that Plaintiffs' claims are barred by the Eleventh Amendment. Implicitly recognizing the failure of their first attempt at an Eleventh Amendment defense, Defendants assert that "Plaintiffs' Complaints raise different Eleventh Amendment questions than those the Court previously addressed." (Mot., Doc. 645-1 at 15.) They argue that the Eleventh Amendment bars claims in the amended/supplemental complaints because Plaintiffs' requested relief: (1) seeks redress of *past* harm; (2) is drastically different and more comprehensive than before; and (3) impermissibly seeks removal of the State's constitutional authority to oversee the details of elections. These are the exact arguments previously raised by the State in connection with Plaintiffs' claims challenging the DREs and rejected by both this Court and the Eleventh Circuit on appeal.

not agree with the State Defendants' characterization of Plaintiffs' claims as being entirely moot. The State has declined to concede that it will not seek to appeal the Court's August 15, 2019 injunction order upon entry of a judgment in the case. The State has further declined to agree to stipulate to the conversion of the Court's order as a permanent injunction. As such, Plaintiffs' claims challenging the DRE/GEMS election system are not legally moot." (November 22, 2019 Ord., Doc. 668 at 2-3.)

(i) Curling Plaintiffs' claim for declaratory relief regarding DREs

State Defendants assert that "in Counts I and II of their Amended Complaint, Curling Plaintiffs *still* seek *retrospective* declaratory relief regarding use of the 'DRE Voting System' in the 'Relevant Previous Elections,'" and that the Eleventh Amendment bars such claims for retrospective relief. (Mot., Doc. 645-1 at 16) (citing Pls.' Third Am. Compl., Doc. 627 ¶¶ 98(a), 110, 112(a)). Defendants' argument is misplaced, mischaracterizes Plaintiffs' allegations in Counts I and II, is contrary to the Eleventh Circuit's decision on appeal, and ignores the aspects of Plaintiffs' claims that challenge elements of the voting system that persist despite the passage of HB 316 as discussed above.

First, the Curling Plaintiffs are not *reasserting* claims challenging the DREs. Rather, the Curling Plaintiffs filed a Third Amended Complaint to add claims challenging the BMDs to their existing claims from the Second Amended Complaint.[15] While Plaintiffs have not omitted their prior allegations and claims regarding the DREs, the Court does not view the Curling Plaintiffs' retention of these allegations that form the basis of relief already granted as seeking any new or additional relief regarding the defunct DRE voting machines.

Second, Defendants mischaracterize Plaintiffs' allegations as seeking relief related to past elections. When the Third Amended Complaint was filed, and when

[15] Rather, the purpose of the amended complaint was to "adds claims related to GA SOS's proposed implementation of a voting system relying on ballot-marking devices ("BMDs") that produce a 2D barcode scanned for tabulation, along with a written summary of a voter's selections," and to "update[] the named defendants based on resignations and subsequent elections, and updates the factual assertions to reflect the passage of time." (Pls.' Mot. for Leave, Doc. 581 at 2.)

Defendants filed their Motion to Dismiss, elections were still being conducted on DREs, including a runoff in December 2019. Although the complaint details deficiencies in the State's DRE/GEMS voting system in prior elections that resulted in alleged denial of the Plaintiffs' constitutional rights that form the basis of the claims, the complaint further alleges continuing violations as a result of the State's choice to continue using DREs in elections through the end of 2019 until such time as the BMDs are fully implemented. Therefore, at the time it was filed the Curling Plaintiffs' claims in Counts I and II sought relief for future elections in 2019.

Third, the State's recycled arguments were already rejected by the Eleventh Circuit in its decision on the State Defendants' appeal of the denial of their earlier motion to dismiss. The Eleventh Circuit held that Plaintiffs' claims fell squarely within the *Ex parte Young* exception to Eleventh Amendment immunity because Plaintiffs alleged ongoing violations of federal law against the State Defendants in their official capacities and sought only declaratory relief and an injunction against enforcing the election system in future elections and that the State's arguments to the contrary ran "counter to the complaints' allegations and settled precedent." *Curling v. Secretary of Georgia*, 761 F. App'x 927, 932 (11th Cir. 2019) ("Here, there is no question that, like the plaintiffs in *Grizzle*, Plaintiffs seek only an injunction barring the State Defendants from enforcing election rules that allegedly violate Plaintiffs' constitutional rights. Since they allege those rules will violate their constitutional rights in the future, they have satisfied *Ex parte Young's*

exception.") (citing *Grizzle v. Kemp*, 634 F.3d 1314, 1317–19 (11th Cir. 2011) (holding that claims of plaintiffs challenging constitutionality of a Georgia election law by seeking to enjoin the Secretary of State and members of the State Election Board from enforcing the law in upcoming elections the way they had in past elections sought "prospective injunctive relief" and fell within the *Ex parte Young* exception to Eleventh Amendment immunity).

Most important, the Court has already granted the relief requested in the form of a preliminary injunction and found that Plaintiffs had shown a substantial likelihood of success on the merits of their claims that the State's DRE/GEMS voting system violated the constitutional rights of Plaintiffs and other Georgia voters and has enjoined the use of DREs in elections after 2019. The State is not immune from those claims just because they are based on evidence of past wrongdoing and harm. The Eleventh Circuit rejected the State's argument that Plaintiffs only sought relief for past harms because "Plaintiffs seek to succeed in showing the unreliability (and thus unconstitutionality) of the DRE machines in past elections), explaining "Plaintiffs use these allegations only to show that past is prologue to their future injuries caused by the same election system." *Id.* (citing *Lynch v. Baxley*, 744 F.2d 1452, 1456 (11th Cir. 1984) ("Past wrongs do constitute evidence bearing on whether there is a real and immediate threat of repeated injury which could be averted by the issuing of an injunction.")).

Defendants rely on *Green v. Mansour* to support their argument that they are immune because that the State's statutory changes have eliminated any alleged

ongoing violation of constitutional rights based on the DRE System. *Green v. Mansour*, 474 U.S. 64, 68 (1985).[16] As explained above, because Plaintiffs' claims challenge as unconstitutional other aspects of the voting system (apart from the DREs machines) that will allegedly continue and seek prospective relief in future elections from such harm, these claims *still* fall within the *Ex parte Young* exception. Therefore, *Green* is inapplicable.[17]

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[16] In *Green*, the plaintiffs conceded on appeal that any claim they might have had for the specific type of injunctive relief approved in *Ex parte Young* was rendered moot by the amendments to the program under which plaintiffs sought benefits. They nevertheless sought "notice relief" and and a declaration that the defendant's prior conduct violated federal law, arguing that notice is an independent form of prospective relief protected against the Eleventh Amendment bar by *Ex parte Young*. 474 U.S. at 68. The Supreme Court held that "[b]ecause 'notice relief' is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief." *Id.* at 71. Therefore, "a request for a limited notice order will escape the Eleventh Amendment bar if the notice is ancillary to the grant of some other appropriate relief that can be 'noticed.' Because there is no continuing violation of federal law to enjoin in this case, an injunction is not available. Therefore, notice cannot be justified as a mere case-management device that is ancillary to a judgment awarding valid prospective relief." *Id.* at 72.

[17] Defendants also incorrectly assert that Plaintiffs are seeking relief that would only indirectly encourage compliance with federal law through deterrence which is "insufficient to overcome the dictates of the Eleventh Amendment," citing *Fla. Ass'n of Rehabilitation Facilities, Inc. v. State of Fla. Dep't of Health and Rehabilitative Svcs.*, 225 F.3d 1208, 1219 (11th Cir. 2000). (*See* Defs.' Mot. at 16). In that case, the Eleventh Circuit explained that "Plaintiffs' suit originally fell within the *Ex parte Young* exception. Their suit was directed against state officials in their official capacities and asked for prospective injunctive relief to halt continuing violations of federal law. Plaintiffs are not barred by the Eleventh Amendment from seeking enforcement, in a federal court, of a federal statute which state agents have violated. Defendants, in fact, do not argue that Plaintiffs' suit was barred from the outset. Instead, they make a more focused argument that much of the relief ordered by the district court is retrospective rather than prospective. They assert that, to the extent the district court directed them to make changes to the State's Boren-era reimbursement plan retroactive to September 4, 1991, it essentially required them to redress inequities in their past reimbursement payments from 1991 to the date of final judgment (April 1999), and potentially to reimburse Plaintiffs for those past deficiencies. We reluctantly agree." *Id.* at 1220. The Eleventh Circuit held that the Defendants were entitled to immunity because although "the Eleventh Amendment does not generally prohibit suits against state officials in federal court seeking only prospective injunctive or declaratory relief, but bars suits seeking retrospective relief such as restitution or damages" and if "the prospective relief sought is "measured in terms of a monetary loss resulting from a past breach of a legal duty," it is the functional equivalent of money damages and *Ex parte Young* does not apply." *Id.* Plaintiffs' claims here challenging the constitutionality of the State's election system have nothing to do with reimbursement or restitution for monetary damages. And Plaintiffs do not simply seek indirect

Accordingly, the Court denies Defendants' motion to dismiss Counts I and II of the Curling Plaintiffs' Third Amended Complaint as barred by the Eleventh Amendment.

(ii) Coalition Plaintiffs' Claims for Relief Regarding BMD claims

The State Defendants next assert that the Coalition Plaintiffs' Supplemental Complaint *now* requests "relief beyond the scope of that permitted by *Ex Parte Young*, implicating special state sovereignty interests."[18] (Defs.' Mot. at 16.) Specifically, the State asserts that because "Coalition Plaintiffs seek a mandatory injunction to 'employ a properly certified system using hand marked paper ballots as the standard method of voting' with specific 'post-election, precertification audits' and tabulation of all votes using optical scanners," the relief they seek "implicates special sovereignty interests of the State by seeking judicial legislation in an area specifically reserved to the states by the Constitution." (*Id.*) The State

compliance with the law. Therefore, Defendants' reliance on *Fla. Ass'n of Rehabilitation Facilities, Inc.* is off base.

[18] Strangely, State Defendants have not moved to dismiss the identical claims of the Curling Plaintiffs on this basis. State Defendants do seek dismissal of Count V of Curling Plaintiffs' Third Amended Complaint requesting a declaration that the Dominion BMD system violates the provisions of H.B. 316 because the BMDs do not print an "elector verifiable paper ballot." Defendants assert that Count V should be dismissed because: (i) it is premised on an alleged violation of state, not federal, law and does not fall within the *Ex parte Young* exception to Eleventh Amendment immunity; (ii) it is barred on state sovereign immunity grounds because Georgia has not abrogated or waived its immunity with respect to this claim; and (iii) the proper forum for the claim is in a Georgia state court. In response, Curling Plaintiffs indicate they "do not oppose dismissal of Count V, which resolves State Defendants' state-law arguments." (Curling Pls.' Resp., Doc. 651 at 29.) Despite referring to various provisions of H.B. 316 in the complaint for context, the Curling Plaintiffs do not assert any other state law claims. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss [Doc. 641] Count V of the Curling Plaintiffs' Third Amended Complaint. As the Court has not ruled on the merits of the claim in light of the Curling Plaintiffs' concession, Count V is **DISMISSED WITHOUT PREJUDICE**.

Defendants again cite the Supreme Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281–288 (1997), though without any substantive discussion or argument as to its application this second time around.[19]

While the Court recognizes that the Coalition Plaintiffs seek significant relief with respect to the State's implementation of a new voting system, Defendant's contention that the Coalition Plaintiffs' newly supplemented claims seek relief that is drastically different from that which they sought related to DREs rings hollow. As this Court previously stated in its September 17, 2018 Order on Plaintiffs' first motion for preliminary injunction and Defendants' earlier motion to dismiss in addressing the State's prior Eleventh Amendment immunity arguments:

> the requested relief does not implicate special state sovereignty interests by essentially usurping the State's role in regulating elections. Plaintiffs are not asking the Court to direct how the State counts ballots. They are asking the Court to bar the use of DREs based on the specific circumstances, history, and data security issues presented in this case and where the State has alternative options of using optical scanners and hand counting ballots. And they seek to require the State to implement a fully auditable ballot system designed to ensure the accuracy and reliability of the voting process

[19] Defendants also cite *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008). That case, however, has nothing to do with Eleventh Amendment immunity principles and in fact recognizes that a state's broad control over the election process "is not absolute, but is 'subject to the limitation that [it] may not be exercised in a way that violates ... specific provisions of the Constitution.' In particular, the State has the 'responsibility to observe the limits established by the First Amendment rights of the State's citizens,' including the freedom of political association. *Id.* at 451-52 (internal citations omitted). The *Washington State* case also acknowledges the *Anderson-Burdick* balancing test is applicable to cases that challenge as unconstitutional a state's election regulations and practices. *Id.* (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("Election regulations that impose a severe burden on associational rights are subject to strict scrutiny, and we uphold them only if they are narrowly tailored to serve a compelling state interest. If a statute imposes only modest burdens, however, then the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions on election procedures. Accordingly, we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls.)) (internal citations and quotations omitted).

> in this challenging era when data system vulnerabilities pose a serious risk of opening election data, processes, and results to cyber manipulation and attack. Thus, pursuant to *Ex Parte Young*, the Court finds that the Eleventh Amendment does not bar Plaintiffs' federal claims.

(September 2018 Order, Doc. 309 at 30.) Plaintiffs seek identical relief with respect to the state's newly adopted BMD voting system.

On appeal, the Eleventh Circuit also rejected the State's argument that Plaintiffs' claims implicate "special sovereignty interests," by seeking to interfere with how Georgia operates its elections. *Curling v. Secretary of Georgia*, 761 F. App'x at 933. The Eleventh Circuit found that Plaintiffs' claims requesting "enjoining Georgia's use of DRE machines do[] not impermissibly violate Georgia's special sovereignty interests." *Id.* The *Coeur d'Alene Tribe* decision (the premise for Defendant's argument), the Eleventh Circuit explained, was "an unusual case" that presented an exception to the *Ex parte Young* doctrine because ruling in the tribe's favor would "extinguish" the state's ownership over "a vast reach of lands and waters long deemed by the State to be an integral part of its territory." *Id.* (quoting *Coeur d'Alene Tribe*, 521 U.S. at 282). But, the Eleventh Circuit concluded that there was "nothing unusual about Plaintiffs' case" and that "[u]ndoubtedly, *Ex parte Young* suits are permitted when the plaintiff alleges that state election officials are conducting elections in a manner that does not comport with the Constitution." *Curling*, 761 F. App'x at 934 (citing *Grizzle*, 634 F.3d at 1316 (permitting the plaintiffs to challenge the constitutionality of a Georgia election law)).

Defendants contend that because *now* "Plaintiffs seek relief that reaches far deeper into the sovereignty interests of the state to the point of choosing one auditable paper-ballot system over another," their requested relief is impermissible. Again, in their prior motion to dismiss, Defendants argued that "[o]verriding a constitutional statute and mandating by injunction a reversion to using and counting paper ballots by hand for a statewide election implicates exactly the 'special sovereignty interest' that makes an exception under *Ex parte Young* infirm." (Defs.' Mot. to Dismiss Coalition Plaintiffs' Third Am. Compl., Doc. 234-1 at 46.) Plaintiffs have been requesting that this Court order the State of Georgia to conduct elections using hand-marked paper ballots from the inception of this case. The only difference now is that they seek to enjoin BMDs rather than DREs. Plaintiffs' supplemental complaint does not raise different Eleventh Amendment questions than those previously rejected.

Nonetheless, the Court is cognizant that it must guide its consideration of both the claims raised and relief requested by balancing the State's interests in the administration of its elections with the burden on the rights of the State's voters, and has endeavored to give proper deference to the State's legislative and administrative determinations as set forth in the law and in this Court's prior orders.

C. Plaintiffs' Allegations Are Sufficient to Establish Standing to Assert Claims Challenging Constitutionality of BMDs

As they did with the DREs, Defendants argue that Plaintiffs lack standing to bring their BMD claims in federal court. Defendants' motion asserts first that Plaintiffs have failed to allege harm from the BMD voting system that affects them in "a personal and individual way," and instead allege threatened injuries that are purely theoretical and speculative. Second, Defendants argue that the alleged injuries are not fairly traceable to State Defendants or to the challenged conduct of the State but are instead attributable to third-party nefarious actors. And third, Defendants assert that the BMD-related injuries alleged by Plaintiffs are not redressable because Plaintiffs' requested relief of hand-marked paper ballots suffer from the same potential harms as those associated with the BMDs. These arguments are largely the same as those raised by Defendants in the prior motion to dismiss Plaintiffs' claims challenging DREs.

Standing is a "threshold question in every federal case, determining the power of the court to entertain suit.'" *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)); *see also Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1349 (11th Cir. 2009) (quoting *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir. 2005)). Standing has three elements:

> a plaintiff must show that he is under threat of suffering "injury in fact" that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable

> to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Inst., 555 U.S. 488, 493 (2009) (citing *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (2000). The requirement that a plaintiff demonstrate standing "assures that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Id.* (internal citations omitted).

"Foremost among these requirements is injury in fact – a plaintiff's pleading and proof that he has suffered the invasion of a legally protected interest that is concrete and particularized, i.e., which affects the plaintiff in a personal and individual way." *Gill v. Whitford*, --- U.S. ----, 138 S. Ct. 1916, 1929 (2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, and n. 1 (1992)) (internal quotation marks omitted). The Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature.'" *Gill*, 138 S. Ct. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). "Thus, 'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). The Eleventh Circuit recently held in *Jacobson v. Florida Sec'y of State* that although "voters have no judicially enforceable interest in the *outcome* of an election," they do "have an interest in their ability to vote and in their vote being given the same weight as any other." 957 F.3d 1193, 1202 (11th Cir. 2020) (emphasis in original). "A plaintiff need not have the franchise wholly denied to

suffer injury. Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient." *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009).

At the pleading stage, the plaintiff is only required to provide "general factual allegations of injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "[H]owever, those allegations must nevertheless contain sufficient detail for the Court to determine that plaintiffs 'have made factual averments sufficient, if true, to demonstrate injury in fact.'" *Summers*, 555 U.S. at 493 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) ("extreme generality" of allegations insufficient to demonstrate standing)). In a case like this one, where a plaintiff seeks declaratory or injunctive relief, as opposed to damages for injuries already suffered, "the injury-in-fact requirement insists that a plaintiff 'allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future.'" *Strickland v. Alexander*, 772 F.3d 876, 883 (11th Cir. 2014) (quoting *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1346 (11th Cir. 1999)). In ruling on a motion to dismiss for lack of standing, the court must accept as true all material allegations of the complaint and construe them in the Plaintiffs' favor. *Warth v. Seldin*, 422 U.S. 501-02 (citations omitted). At the same time, it is within the court's power to consider by affidavits further particularized allegations of fact deemed supportive of plaintiff's standing to determine whether the plaintiff's standing adequately appears from all materials of record. *Id.* Here, the Court is able to refer both to the Amended Complaints and a host of expert and other

affidavits in connection with Plaintiffs' Motions for Preliminary Injunction relating to the additional claims asserted in their Amended Complaints. The Court also can draw on its knowledge of the record in the case as context. The question of whether the Plaintiffs ultimately will prevail on the merits of their asserted claims is not the question before the Court in assessing standing.

As to injury in fact, Defendants contend that Plaintiffs are attempting to bootstrap their way into standing for their BMD allegations by relying on their previous claims about DREs. Defendants also contend that Plaintiffs have not sufficiently alleged a concrete "injury in fact" because they "fail to allege that they are under threat of suffering a prospective injury that is 'real and immediate' regarding Georgia's new BMD voting system." (Mot. at 25) (emphasis in original). Specifically, Defendants assert that Plaintiffs' allegations of generalized fear that malicious activity might occur is insufficient to confer standing:

> Plaintiffs allege that that the BMDs "remain susceptible to manipulation," are "vulnerable to intentional [and] unintentional forms of manipulation," and that these vulnerabilities "could cause" BMDs to malfunction or improperly tabulate votes. *Id.* In sum, Plaintiffs' injury allegations are that: (1) a malicious hacker *might* hack BMDs; (2) voters *might* not review the ballot; (3) the optical-scan unit *might* incorrectly count votes; (4) post-election audits of the ballot or an election challenge *might* not catch any errors.

(*Id.* at 26.) Defendants also argue that "Plaintiffs have complete control over whether they are 'injured' because they can review their selections on their BMD-marked paper ballot." (*Id.*)

These arguments mischaracterize the alleged injury. While voting security issues obviously form an important context surrounding the operation of elections and vote counts, the injury Plaintiffs allege is that they will be required to cast a ballot that cannot be read or verified as reflecting their actual choices because the votes are tabulated solely from an encrypted barcode that is not human readable. This injury is not speculative; it is "certainly impending," since Plaintiffs intend to vote in person in each upcoming election in Georgia. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013).

Contrary to Defendants' characterizations, Plaintiffs' allegations are not *solely* premised on a theoretical and hypothetical possibility that the new BMD voting system might be hacked or improperly accessed and manipulated.[20] Defendants' motion focuses exclusively on allegations about security vulnerabilities and the potential for hacking, which they claim only implicates injuries that will be legally caused by nefarious third parties, instead of by the State. The State does not address Plaintiffs' other allegations, which assert that the operation of the Dominion BMD System *as designed* will injure in-person voters by depriving them of their fundamental right to cast a verifiable vote and have *that* vote counted, and their right to be treated equally with similarly situated absentee

[20] According to the Curling Plaintiffs, the BMD claims are legally identical to the DRE-related claims that this Court previously ruled Plaintiffs have standing to pursue, and no new facts should materially alter the Court's standing analysis here. (Curling Pls.' Resp., Doc. 651 at 18.) To be sure though, the posture of Plaintiffs' BMD claims is markedly different from the claims regarding DREs.

voters.[21] (Coalition Pls.' Compl. ¶¶ 99–120, 129; Curling Pls.' Compl. ¶¶ 70-90.)[22] Defendants ignore the fundamental basis of Plaintiffs' claims – the allegation that the Dominion system ballot scanner only tabulates votes from the encrypted barcode that is indecipherable to the human eye.

Plaintiffs allege that the BMD system's reliance on a BMD generated condensed summary of voter electoral choices in tandem with ballot counting based on an unverified barcode does not provide a means by which completed ballots can be accurately counted, tested, or verified, thereby depriving or

[21] Plaintiffs each also assert equal protection violations based on allegations that by planning to allow electors to vote using two different methods, the unverifiable BMD system and paper ballots available to provisional and absentee voters that are verifiable and recountable, they are being subject to unequal treatment. (Doc. 627 ¶¶ 124, 129) ("The voters of the respective ballots have not been treated equally in that the votes of those who will vote using the Proposed Election System cannot be meaningfully recounted, reviewed against an independent record to verify, or have discrepancies detected and corrected. These votes are unequally weighted, with greater weight given to those who vote by absentee paper ballot, whose votes can be verified as to voter intent, can be accurately recounted, and can have processing errors identified and corrected, while votes cast under the Proposed Election System, whose votes do not share those essential advantages."); (Doc. 628 ¶ 145) ("The Dominion BMD System deprives in-person voters of the right to have their official votes audited that other voters enjoy."); (*Id.* ¶ 231) ("Voters who are similarly situated in all respects but who instead cast their votes on mailed paper ballots in the same election will be treated differently and will suffer none of the foregoing burdens, risks, and harms, including the inability to read and verify the votes they cast.") The fact that an individual Plaintiff could choose to vote by absentee ballot rather than voting in person using a BMD in order to cast a ballot that is verifiable and auditable does not diminish standing to assert an equal protection claim here. As Plaintiffs have alleged, voting by absentee ballot carries its own burdens, ranging from the minimal cost of postage (without consideration of pandemic conditions) to severe (the risk that a ballot is rejected for signature mismatch or is lost in the mail and never received for counting by the elections office). Because Plaintiffs may have a preference for one alternative method of voting over another does not destroy their standing to bring a claim challenging the Defendants' failure to provide uniform procedures for recounts and audits to both in person and absentee voting. This Court recognized previously that "[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." *See Bush v. Gore*, 531 U.S. 98, 105 (2000) (finding that application of different standards to determine voter intent in conducting a recount led to the unequal evaluation of ballots).

[22] Coalition Plaintiffs also separately allege that BMDs infringe their right to vote using a secret ballot. (Coaltion Pls.' Compl. ¶¶ 39–41, 121–28.)

burdening their voting franchise rights. (Curling Pls.' Compl. ¶¶ 71-75, 89-90, 116, 125; Coalition Pls.' Compl. ¶¶ 63, 66, 80, 82, 87, 88, 100, 103, 106, 203, 223; Affidavit of Plaintiffs' Expert Dr. Philip B. Stark at Doc. 680-1[23]). And because the State has yet to adopt and implement a post-election audit procedure to verify that the barcode tabulations match the human-readable voter selections, voters cannot verify that the votes they cast were the votes that were counted. (Coaltion Pls.' Compl. ¶¶ 130-36, 142-47; Curling Pls.' Compl. ¶¶ 89-90.)

Plaintiffs separately allege, as they did with DREs, that their votes will "likely be improperly counted" under the BMDs system due to security vulnerabilities that have already been identified in the Dominion system and because of the Secretary of State's failure to act to address voting systemic vulnerabilities in its existing IT infrastructure. Plaintiffs challenge the State Defendants' implementation of a barcode-based system with known and demonstrated vulnerabilities contrary to the recommendations of voting system experts that is incapable of being properly audited. These include: (i) the State of Texas's refusal in February 2019 to certify Dominion's election management system based upon several problems with the software, (ii) the 2019 DEFCON Voting Village Report that found twenty vulnerabilities in a Dominion BMD system similar to the one being employed in Georgia, (iii) the National Academy of Sciences warning that BMDs that print only

[23] Dr. Stark's affidavit discusses, among other things, the various reasons why "there is no way to establish that the BMD printout is a trustworthy record of what the BMD displayed to the voter or what the voter expressed to the BMD." (Doc. 680-1 at 4.) His affidavit addresses in turn why this makes a trustworthy, accurate full recount or audit of VMD votes cast not possible.

selections with abbreviated names/descriptions of the contests are virtually unusable for verifying voter intent, (iv) the opinion of the State's own retained expert, Dr. Shamos, that if a BMD is going to be used, the more reliable approach is to use a BMD that produces a ballot readable by a human voter, rather than a barcode, and (v) the Secretary of State's failure to remedy compromises in its current voter registration and internal IT systems. (Curling Pls.' Compl. ¶¶ 75-88; *see also* Coalition Pls.' Compl. ¶¶ 135, 176-186.) In sum, Plaintiffs allege that despite the fact that cybersecurity experts and government officials recommended a voting system that included a voter-verified paper trail, Georgia's BMD System will rely on a non-voter-verified barcode as the elector's actual vote.[24] (Curling Pls. Compl. ¶¶ 74-75; *see also* Coalition Pls.' Compl. ¶¶ 164-175.)

Accordingly, the Court finds that Plaintiffs' allegations of the threat of imminent harm are sufficient at this stage of the proceedings to establish injury to their constitutional rights and demonstrate standing to proceed on their asserted claims.

Turning to the second standing element, "to satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson v. Florida Sec'y of State*, 957 F.3d

[24] Although Plaintiffs' Complaints can be read as a criticism of the State of Georgia's selection of the BMD voting system over a hand-marked paper ballot system, the Court does not view Plaintiffs' claims as challenging the legislature's passage of HB 316 itself as unconstitutional. Rather, the Court views Plaintiffs as challenging the Secretary of State's implementation of a barcode-based BMD system for the reasons discussed herein.

1193, 1207 (11th Cir. 2020) (quoting *Lujan*, 504 U.S. at 560 (alterations adopted)). Defendants assert that to the extent any injuries arise, they are the result of third-party actions, not the actions of the State Defendants because "[t]he theoretical hacking, potential auditing issues, and hypothetical bar-code problems could be traced either to illegal hacking by third parties; improper conduct by election officials; or voters' failures to verify their paper ballots – not the State of Georgia's implementation of BMDs." (Mot. at 27-28.) Defendants have essentially recycled the same argument (with the exception of blaming the voters themselves) previously raised in connection with Plaintiffs' DRE claims. The same reasoning applies to reject this argument now.

Again, Plaintiffs' injury stems from Defendants' implementation of an alleged unconstitutional voting system that is subject to the same demonstrated vulnerabilities as the DREs and that is not a voter-verifiable and auditable paper ballot system. Pursuant to H.B. 316 mandating the statewide use of "electronic ballot markers [that] shall produce paper ballots which are marked with the elector's choices in a format readable by the elector," Georgia's new Election Code placed the responsibility of selecting the equipment for the new voting system with the Secretary of State. *See* O.C.G.A. § 21–2–300(a). The law expressly requires that the "equipment used for casting and counting votes in county, state, and federal elections shall be the same in each county of this state and shall be ***provided to each county by the state, as determined by the Secretary of State***." O.C.G.A. § 21–2–300(a)(1) (emphasis added). The Election Code

further requires the Secretary of State to certify the new BMD voting system as "safe and practicable for use" in compliance with the Rules of the Georgia State Election Board prior to authorizing its implementation in state, federal, and county elections in the State. O.C.G.A. § 21–2–300(a)(2); *see also* Ga. Comp. R. & Reg. r. 590–8–1–.01(d). The Election Code also tasks the Georgia State Election Board with promulgating rules and regulations governing audit procedures and requires that "[t]he procedures prescribed by the State Election Board shall include security procedures to ensure that collection of validly cast ballots is complete, accurate, and trustworthy throughout the audit." O.C.G.A. § 21-2-498(b)&(d).

Plaintiffs challenge the actions of the Secretary of State and the State Election Board, not some potential absent third party hackers. Plaintiffs allege that State Defendants ignored the recommendations of election security experts to ensure that a proper audit regime was in place to verify the State's voting machine election results. And Plaintiffs allege that in implementing a mandatory statewide electronic barcode-based voting system without current or sufficient audit protocols in place in upcoming elections, Defendants are requiring Plaintiffs to exercise their right to vote using a system incapable of producing verifiable results. (*See, e.g.,* Curling Pls.' Compl. ¶¶ 89-90, 117; Coalition Pls.' Compl. ¶¶ 130, 135, 137, 145-47.) They also allege that the Secretary of State's failure to act to address the security and reliability vulnerabilities in its voting data systems and infrastructure over a sustained period of time continues to pose threats in implementation of the new BMD system. (Curling Pls.' Compl. ¶¶ 34-90; Coalition

Pls.' Compl. ¶¶ 176-186.) The Coalition Plaintiffs further allege that the Secretary of State failed to properly certify the new BMD machines as required under HB 316 prior to their use in Georgia elections, and failed to test "whether the operation of the system would permit valid auditing of the results." (Coalition Pls.' Compl. ¶¶ 155-63.) At the motion to dismiss stage, these allegations are sufficient to show a causal connection, even if arguably indirectly, between Defendants' implementation of the BMD system and the injury to Plaintiffs' constitutional rights. *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1273 (11th Cir. 2003) ("[E]ven harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action . . . ."); *Lewis v. Governor of Alab*ama, 944 F.3d 1287, 1301 (11th Cir. 2019) ("it must be the effect of the court's judgment on the defendant" – not an absent third party – "that redresses the plaintiff's injury, whether directly or indirectly").

Finally, State Defendants argue that "Plaintiffs also cannot show redressability, because the same concerns allegedly associated with BMDs (lack of audits, hacking, and interference from election officials) are present in Plaintiffs' requested relief" of hand marked paper ballots. (Mot. at 37). As this Court previously indicated in its September 15, 2019 Order rejecting Defendants' argument that Plaintiffs' claims are not redressable because "no election system is flawless," this is not the standard for redressability. *Curling*, 334 F. Supp. 3d at 1318. Plaintiffs are seeking relief to address a particular voting system which they allege, as designed *or as implemented by Defendants*, burdens Plaintiffs' capacity

to cast votes that are actually properly counted and fails to produce a voter-verifiable auditable paper trail that is recognized as essential on a national level by election security experts. "Plaintiffs are not asking for a system impervious to all flaws or glitches." *Id*. They are seeking to vindicate their right to effectively and reliably cast a verifiable vote reflective of their ballot choices.

In sum, the Court finds that Plaintiffs have sufficiently alleged standing to bring their claims at this juncture.

D. Coalition Plaintiffs Have Failed to State a Claim for Procedural Due Process Regarding the BMD Voting System

Defendants moved to dismiss Count III of Coalition Plaintiffs' First Supplemental Complaint[25] because: (i) Coalition Plaintiffs have failed to sufficiently allege the deprivation of a constitutionally protected liberty or property interest, (ii) the complaint does not allege that Plaintiffs have been subjected to inadequate process; and (iii) the availability of a state remedy necessarily prevents Plaintiffs from maintaining a procedural due process claim as a matter of law. Alternatively, Defendants also argue that "even assuming a liberty or property interest existed for a preferred voting system, there is no deprivation of that interest, given the State's no-excuse absentee voting system by hand-marked paper ballots."[26] (Defs.' Mot., Doc. 645 at 21.)

[25] The Curling Plaintiffs do not assert a procedural due process claim. (Curling Resp., Doc. 651 at 29.)

[26] The Court rejected this argument raised in connection with Plaintiffs' substantive due process claims raised in the Defendants' prior motion to dismiss. The Court found that the "choice" between undergoing additional burdens on their right to vote by absentee ballot to avoid having to use unsecure voting machines was itself a burden that Plaintiffs had plausibly alleged subjected

In Count Three of the First Supplemental Complaint, Coalition Plaintiffs allege that by implementing the Dominion BMD voting system, Defendants will violate their procedural due process rights because it will "severely restrict and/or arbitrarily and capriciously deprive" the Coalition Plaintiffs of the following "state-created liberty and property interests" without proper notice:

- The right of voters under Georgia statutes to have their official votes counted in an initial count.
- The right of voters under Georgia statutes to have their initial votes recounted in a recount or examined in an audit.
- The right of voters under Georgia statutes to cast their votes using a voting system that has been properly certified as safe for use.
- The right of voters under Georgia statutes to cast their votes on a voting system that is fundamentally compliant with Georgia law.
- The state statutory and state constitutional rights of voters to vote by secret ballot.

(Doc. 628 ¶ 240.) Plaintiffs allege generally that "Defendants' threatened conduct will violate the procedural requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution." (*Id.* ¶ 242.)

A violation of procedural due process occurs where the state fails to provide due process in the deprivation of a protected property or liberty interest. *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (en banc). "A procedural due process

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them to unequal treatment. The Court further found that the additional burdens and inconveniences associated with voting by absentee paper ballot were not mere trivial concerns and noted that "[a]s evidenced by the most recent election, absentee voting is not without its constitutional problems. *See Martin v. Kemp*, 341 F.Supp.3d 1326 (N.D. Ga. 2018) (concluding that specific additional burdens and procedures imposed on absentee voters there were violative of due process guarantee of Fourteenth Amendment); *see also Democratic Executive Committee of Florida v. Lee*, 915 F.3d 1312 (finding that plaintiffs had established a likelihood of success on constitutional challenge to Florida's signature-match requirement for vote-by-mail paper ballots)." (May 21, 2019 Order, Doc. 375 at 47-48.)

claim has three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) a constitutionally-inadequate process." *Doe v. Fla. Bar*, 630 F.3d 1336, 1342 (11th Cir. 2011). It is not the deprivation of a protected interest that causes a violation, but rather, "[i]t is the state's failure to provide adequate procedures to remedy the otherwise procedurally flawed deprivation of a protected interest that gives rise to a federal procedural due process claim." *Id.* Accordingly, only when the state refuses to provide a process sufficient to remedy the procedural deprivation does an actionable constitutional violation arise. *Id.* Therefore, Plaintiffs carry the burden of "alleging that, as a result of some state action, the plaintiff was deprived of a constitutionally protected interest, and the state did not afford the plaintiff adequate process to challenge the deprivation." *Searcy v. Prison Rehab Industries & Ent, Inc.*, 746 F. App'x. 790, 795 (11th Cir. 2018).

As to the first element of the procedural due process claim, Defendants contend that there is no state-created liberty or property interest in a preferred choice of voting systems, citing the Georgia Supreme Court's decision in *Favorito*, 285 Ga. at 797–798. Plaintiffs' allegations in Count III are not based on a preference of one voting system over another. Rather, the Coalition Plaintiffs allege that Defendants' failure to comply with certain provisions and requirements of Georgia law deprives them of their constitutional rights, including the right to have their votes accurately counted, the right to a properly certified voting system,

the right to an auditable voting system, and the right to a secret ballot as guaranteed by the Georgia constitution.

Because the Court finds that Plaintiffs have failed to sufficiently allege the third element of a procedural due process claim – a constitutionally inadequate process – the Court assumes without deciding that Plaintiffs' allegations adequately establish the alleged deprivation of their constitutionally protected voting interests. As this Court has recognized, once a state creates a statutory voting regime, the state "must administer it in accordance with the Constitution." *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Georgia*, 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018). The Supreme Court has long held that state-created statutory entitlements can trigger due process. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Paul v. Davis*, 424 U.S. 693, 710-12 (1976).

Coalition Plaintiffs, however, have failed to allege, except in the most general and conclusory fashion, that the State Defendants have failed to provide adequate procedures to remedy the alleged harms.[27] "The law is well established that the

[27] Plaintiffs' allegations in their supplemental complaint are distinguishable from those in which courts have recognized a claim based on inadequate procedures in the context of voting. For example, in *Georgia Muslim Voter Project v. Kemp*, (consolidated with *Martin v. Kemp*) the plaintiffs alleged that under Georgia law, county elections officials were required to reject all absentee ballots whose signature "does not appear to be valid" because the signature does not match the signature on file. *See* 1:18-cv-4789, Compl. ¶¶ 1, 30 (citing O.C.G.A. § 21-2-386(a)(1)(C)). Plaintiffs there further alleged: This determination is made by election officials who are not required to receive training on handwriting analysis or signature comparison and no statute or regulation provides standards to make such determinations or distinguish natural variations in a person's handwriting or to consider extrinsic evidence that might confirm the identify of the voter. *Id.* ¶¶ 5-6, 36. When these rejections occur, voters are not provided any pre-rejection notice or an opportunity to be heard or to otherwise ensure that their absentee ballot

mere failure to follow state procedures does not necessarily rise to the level of a violation of federal procedural due process rights." *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1345 (N.D. Ga. 2018) (finding that plaintiffs had not established substantial likelihood of success on claim of a lack of adequate process to remedy the rejection of mail-in ballots because the challenge "of failure to follow state procedures" did not establish a federal denial of due process); *Maddox v. Stephens*, 727 F.3d 1109, 1124 (11th Cir. 2013) ("[W]e emphasize that the violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal constitution. If otherwise, federal courts would have the task of insuring strict compliance with state procedural regulations and statutes."); *Harris v. Birmingham Bd. of Educ.*, 817 F.2d 1525, 1528 n.15 (11th Cir. 1987) (holding that although plaintiff had a state given property interest of continuing employment in the absence of just cause for termination, he received what was due under the Constitution, and declining to

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will be counted. *Id.* ¶1. The elections officials' determination is final without any review or appeal. *Id.* ¶¶ 1, 31 (citing O.C.G.A. § 21-2-386(a)(1)(B)-(C)). The same process applies to the absentee ballot application process. *Id.* ¶¶ 19-24 (citing O.C.G.A. § 21-2-381(b)(1)-(3)). With respect to the applications, while there is no procedure by which an elector can contest the registrar's decision, the statutes do not prevent an elector whose application is rejected from applying a second time or voting in person. Plaintiffs alleged, however, that there is no reason to believe that the same signature will not be rejected again, and that a second application would not be futile. *Id.* ¶ 24. The district court found that these claims had merit and granted a preliminary injunction requiring the Secretary of State to instruct county election officials to cease rejecting absentee ballots and applications based on perceived signature mismatch and requiring them to provide pre-rejection notice and an opportunity to resolve the alleged signature discrepancy to the absentee voter and ordered that absentee voters shall have the right to appeal any absentee ballot rejection following the outcome of the court-ordered process. 341 F. Supp. 3d 1326, 1341-42 (N.D. Ga. 2018).

address whether the plaintiff had a cause of action in the state courts for failure of the board of education to strictly comply with the state's notice statute).

Coalition Plaintiffs' allegation that "there is no adequate legal remedy" for the alleged deprivations is likewise couched in entirely conclusory terms. (Coalition Pls.' Compl. ¶ 245.) Fellow District Court Judge Steve Jones recently addressed a similar constitutional challenge to the Secretary of State's compliance with provisions of H.B. 316 in *Fair Fight v. Raffensperger*, Civil Action No. 1:18-cv-5391-SCJ. In denying the plaintiffs' request for a preliminary injunction that would have required an interpretation of the new state election law for the first time by a federal court, Judge Jones noted that "Plaintiffs also have an additional remedy in the form of seeking a mandamus in the state courts." December 27, 2019 Order, Doc. 188 at 18-20) (citing inter alia, *Roe v. State of Ala.*, 43 F.3d 574, 582 (11th Cir. 1995).[28]

Accordingly, the Court finds that Coalition Plaintiffs have failed to sufficiently allege a claim for procedural due process and **GRANTS** Defendants' Motion to Dismiss Count III of their First Supplemental Complaint. As Plaintiffs

[28] A plaintiff cannot rely on the failure of the state to provide her due process where adequate state remedies are available. As the Eleventh Circuit has explained, if the state courts generally would provide an adequate remedy for the procedural deprivation the plaintiff claims to have suffered, there is no federal due process violation regardless of whether the plaintiff has taken advantage of the state remedy or attempted to do so. *Horton v. Bd. of County Comm'rs of Flagler County*, 202 F.3d 1297, 1300 (11th Cir. 2000). Thus, if Georgia law provides an adequate means to remedy the alleged procedural deprivation, Plaintiff's procedural due process claim fails. In applying Georgia law, the Eleventh Circuit has previously held that the writ of mandamus can be an adequate state remedy to ensure a party was not deprived of her due process rights. *See Cotton v. Jackson*, 216 F.3d 1328, 1332 (11th Cir. 2000); *A.A.A. Always Open Bail Bonds, Inc. v. DeKalb County, Ga.*, 129 F. App'x. 522, 525 (11th Cir. 2005).

are not foreclosed from pursuing their state remedies, Count III is **DISMISSED WITHOUT PREJUDICE**.

E. Defendants' Contentions That Plaintiffs' Requested Remedy Violates the ADA is not an Appropriate Basis on Which to Dismiss the Claims

In their final argument for dismissal, State Defendants contend that Plaintiffs' proposed remedy of using hand-marked paper ballots for the majority of voters and to reserve the use of BMDs solely for disabled voters would require the State to provide disabled individuals with a voting system that is not equal as that provided to others, in violation of the Americans with Disabilities Act and the Rehabilitation Act. Despite the potential merits of their position, Defendants' motion does not explain the legal authority that would require the Court to accept Defendants' argument over the Plaintiffs' allegations and therefore that would support the dismissal of Plaintiffs' claims. Plaintiffs are correct that Defendants' arguments regarding the propriety of the relief Plaintiffs seek in their motion for preliminary injunction have no bearing on the sufficiency of the allegations of their complaints under Rule 12.[29] While the Court may ultimately be required to weigh the interests of the impact of any proposed remedy on disabled voters in fashioning any potential relief on Plaintiffs' claims, Defendants have failed to demonstrate that Plaintiffs' Complaints require dismissal at this stage on this basis.

[29] As Curling Plaintiffs note in their Response in opposition to Defendants' Motion to Dismiss, they do not request that disabled voters be forced to use the Dominion BMD system. Rather, they request only that Defendants "make available at each polling place at least one electronic or mechanical BMD that is in compliance with the Americans with Disabilities Act and Help America Vote Act." (Doc. 619 at 2.)

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' Motion to Dismiss the Curling Plaintiffs' Third Amended Complaint and the Coalition Plaintiffs' First Supplemental Complaint [Doc. 645]. The Motion to Dismiss is **GRANTED** as to Count V of the Curling Plaintiffs' Third Amended Complaint and Count III of the Coalition Plaintiffs' First Supplemental Complaint and those claims are **DISMISSED WITHOUT PREJUDICE**. The motion is **DENIED** in all other respects.

The Court **AUTHORIZES** discovery on these claims to begin immediately upon entry of this Order. Finally, the Court **DIRECTS** Defendants to file a response to Plaintiff's proposal on the scope and schedule for expedited discovery on Monday, August 3, 2020.

IT IS SO ORDERED this 30th day of July, 2020.

Amy Totenberg
United States District Judge