

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP,)
KATHLEEN BARNES, ENRIQUE GOMEZ, HARRIETT)
MENDINGHALL, and GLENCIE S. RHEDRICK)

Plaintiffs,)

v.)

NORTH CAROLINA STATE BOARD OF ELECTIONS,)
ALAMANCE COUNTY BOARD OF ELECTIONS, ASHE)
COUNTY BOARD OF ELECTIONS, BUNCOMBE COUNTY)
BOARD OF ELECTIONS, BURKE COUNTY BOARD OF)
ELECTIONS, CHEROKEE COUNTY BOARD OF ELECTIONS,)
DAVIE COUNTY BOARD OF ELECTIONS, DAVIDSON)
COUNTY BOARD OF ELECTIONS, FORSYTH COUNTY)
BOARD OF ELECTIONS, HAYWOOD COUNTY BOARD OF)
ELECTIONS, HENDERSON COUNTY BOARD OF ELECTIONS,)
JACKSON COUNTY BOARD OF ELECTIONS, LENOIR)
COUNTY BOARD OF ELECTIONS, MECKLENBURG COUNTY)
BOARD OF ELECTIONS, NEW HANOVER COUNTY BOARD)
OF ELECTIONS, PENDER COUNTY BOARD OF ELECTIONS,)
PERQUIMANS COUNTY BOARD OF ELECTIONS, POLK)
COUNTY BOARD OF ELECTIONS, RUTHERFORD COUNTY)
BOARD OF ELECTIONS, TRANSYLVANIA COUNTY BOARD)
OF ELECTIONS, SURRY COUNTY BOARD OF ELECTIONS,)
and WARREN COUNTY BOARD OF ELECTIONS,)

From Wake County
20-CVS-5035

Defendants)

PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION
(N.C.G.S. § 7A-31 and N.C. R. App. P. 15) and
MOTION TO SUSPEND THE RULES TO ALLOW EXPEDITED REVIEW
(N.C. R. App. P. 2)

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

This is an urgent appeal arising from voting rights litigation that seeks emergency relief to protect the November 2020 general election. Plaintiffs North Carolina State Conference of the NAACP, and individual North Carolina voters Kathleen Barnes, Enrique Gomez, Harriett Mendinghall, and Glencie S. Rhedrick, respectfully petition this Court pursuant to N.C.G.S. § 7A-31 and N.C. R. App. P. 15 to certify for discretionary review prior to determination by the Court of Appeals, their appeal from the Order denying Plaintiffs' Motion for Preliminary Injunction, entered on 19 August 2020, in *North Carolina State Conference of the NAACP v. North Carolina State Board of Elections*, No. 20-CVS-5035 (N.C. Super. Ct., Wake Cty.)¹ as well as any related petitions or appellate motions relating to the Order. Plaintiffs also move to suspend the North Carolina Rules of Appellate Procedure to allow expedited review of this matter pursuant to N.C. R. App. P. 2. Expedited review is necessary to protect the rights of voters ahead of the November 2020 general election, and to avoid manifest injustice.

At stake in this appeal is the right of voters to safely and securely cast their ballots during the closely contested November 2020 general election. Absent a preliminary injunction, millions of voters across twenty-one North Carolina counties will have to vote on ExpressVote voting machines, which are vulnerable to hacking, programming error, and malfunction. Even in the absence of hacking, error or malfunction, voters that are forced to utilize the ExpressVote will not be able to verify their votes, because the ExpressVote prints human unreadable barcodes for vote scanning and tabulation. As the

¹ The Order is appended as Exhibit A.

Superior Court observed and other courts have held, since “[a] voter . . . has no way of knowing if the vote cast matches what is recorded in the barcode and ultimately counted by the tabulator. It is . . . conceivable that some level of irreparable injury will occur if the ExpressVote is used.” (Ex. A p 8). *See also Curling v. Raffensperger*, Order, No. 1:17-cv-2989-AT, Dkt. 751 at 41 (N.D. Ga. July 30, 2020) (finding that the recording of “a non-voter-verified barcode as the elector’s actual vote” was “sufficient at this stage of the proceedings to establish injury to their constitutional rights”). In counties that require all voters to use the ExpressVote, the machines will be handled by dozens or hundreds of workers, require extensive disinfection, slow the voting process, and contribute to unsafe in-person voting conditions during a pandemic that has already taken the lives of 2,700 North Carolinians. Voters therefore will have to choose between their health and their right to vote, a burden not borne by voters in other counties in North Carolina.

Plaintiffs seek to preserve their right to vote in a free election and to vote on an equal basis as their fellow North Carolina voters during the November 2020 general election. *See* N.C. Const. Art. I, § 10, 19. These are fundamental rights in North Carolina. *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) (“The right to vote is one of the most cherished rights in our system of government.”); *James v. Bartlett*, 359 N.C. 260, 269–70, 607 S.E.2d 638, 644 (2005) (citing *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990)) (“the right to vote on equal terms is a fundamental right.”). Discretionary review by the Supreme Court on an expedited basis is essential to ensure that Plaintiffs—and indeed, voters in all twenty-one affected counties—are not deprived of these substantial and fundamental rights during the November 2020 general

election and thereafter, while the case is pending; and that these important legal issues are swiftly and properly adjudicated.

I. STATEMENT OF THE CASE

On 17 April 2020, Plaintiffs filed the above-captioned case, challenging Defendants' use of the ExpressVote in North Carolina elections. Plaintiffs filed their case four months after Defendant North Carolina State Board of Elections ("SBE") approved Election Systems & Software's (ES&S) modified voting system, and six weeks after learning which North Carolina counties opted to procure and use the ExpressVote, which is manufactured by ES&S. The complaint was also filed approximately five weeks after Governor Cooper issued a State of Emergency related to the burgeoning COVID-19 pandemic.

Defendants filed a Motion to Dismiss on 1 July 2020. Plaintiffs filed their Motion for Preliminary Injunction on 22 July 2020, and the matter was heard in Wake County Superior Court on 6 August 2020.² In addition to Plaintiffs' Motion for Preliminary Injunction, argument and evidence was presented regarding Defendants' jurisdictional defenses. On 19 August 2020, the court held that it had jurisdiction over the case and that Plaintiffs had standing, but denied the Motion for Preliminary Injunction. Plaintiffs filed a Notice of Appeal on 28 August 2020, and now seek discretionary review by the North Carolina Supreme Court and suspension of the rules of appellate procedure so as to allow expedited consideration of the appeal.

² Plaintiffs' Motion for Preliminary Injunction and affidavits filed in support thereof is appended as Exhibit B. Because the affidavits filed in support of the Motion for Preliminary Injunction were identified as individual exhibits, they are identified here as "Ex. B- Ex. ___).

II. STATEMENT OF FACTS

With the ExpressVote, ballot choices are displayed on the ExpressVote screen, and voters make their selections using the ExpressVote's touchscreen or keypad. (Ex. B- Ex. 5 ¶ 21 n. 3). The ExpressVote produces a printed ballot summary cards with a text summary of the voter's choices and a barcode that purports to contain the voter's choices. (*Id.*, ¶¶ 34-35; Ex. B.-Ex. 1 ¶¶ 4, 27-29). Tabulators then scan the barcode and tabulate the voter's choices solely from the barcode, ignoring the text. *Id.* Because voters cannot read barcodes, they cannot verify the choices that are being cast on their behalf. The ExpressVote is also riddled with insecurities that make it vulnerable to programming error, malfunction, and cyberattacks, which—due to the insecurities in the system—are unlikely to be identified, caught, or corrected. (Ex. B-Ex. 1 ¶¶ 3, 18, 30, 32, 65-69 and Ex. B-Ex. 5 ¶¶ 12, 21).

In counties that require all in-person voters to use the ExpressVote, voters also face a serious and substantial risk to their lives and health during the COVID-19 pandemic. Nationwide, more than 6 million people have been infected, and more than 180,000 have died of the disease.³ In North Carolina, more than 169,000 cases and 2,700 fatalities have been reported.⁴ The risk of contracting COVID-19 is higher for individuals already suffering from existing health issues or with limited access to health care, and Black, Latinx, and Indigenous people are disproportionately likely to become ill, require hospitalization, or die due to the virus. (Ex. B-Ex.2 ¶¶ 39-45). But even low-risk

³ CDC, COVID Data Tracker, <https://covid.cdc.gov/covid-data-tracker/#cases> (last accessed Sept. 1, 2020).

⁴ North Carolina Dept. of Health & Human Servs., Cases, <https://covid19.ncdhhs.gov/dashboard/cases> (last accessed Sept. 1, 2020).

individuals can suffer a serious COVID-19 illness. Those who survive often still require hospitalization, are left with medical bills, lose weeks of work, and bear the risk of infecting family and community members.

The virus can be transmitted through virus droplets in the air, and via virus droplets left on frequently touched surfaces. (*Id.*, ¶¶ 27-33). Thus, universal use of the ExpressVote heightens the risk of virus transmission for two reasons. First, the virus can survive on and be transmitted via the surface of the machine, and ES&S's published guidelines for disinfecting the machines to counteract this type of viral spread are insufficient. (*Id.*, ¶ 33, 52-59). Second, universal use of the machines will contribute to lines and crowds because fewer people can vote at a time and the machines will require repeated downtime for disinfection. Thus, without the option of paper ballots, voters will be subjected to unnecessary crowds for longer periods of time, be required to touch frequently touched surfaces, and come into close contact with poll workers who set up the machine for each voter. *Id.*.

Soon after the SBE certified the ES&S EVS 5.2.2.0 voting system in August 2019, ES&S informed SBE that it had discontinued production of the EVS 5.2.2.0, and asked the SBE to administratively certify another voting system, the EVS 5.2.4.0, instead. The EVS 5.2.4.0 included a modified version of the ExpressVote. In December 2019, the SBE approved the EVS 5.2.4.0 (including the modified ExpressVote) for use in North Carolina. Throughout this period, Plaintiff NC NAACP advocated against the selection of these machines, raising concerns about insecurity and the inability of voters to verify their votes. (Ex. A p 2; Ex. B-Ex. 7 ¶¶ 3, 5). Between December 2019 and the March 2020

primary election, twenty-one counties (“Defendant Counties”) elected to purchase the EVS 5.2.4.0 and to deploy ExpressVote machines either as their accessible voting devices or as their sole option for in-person or early in-person voters.

III. PLAINTIFFS HAVE THE RIGHT TO IMMEDIATE APPEAL

Orders denying preliminary injunctions are interlocutory in nature and thus not ordinarily subject to appeal prior to final judgement. However, direct appeal of the denial of a preliminary injunction is appropriate where the petitioner will be “deprived of a substantial right which will be lost should the order ‘escape appellate review before final judgment.’” *Clark v Craven Reg’l Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990) (quoting *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980)). “A substantial right has consistently been defined as ‘a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right.’” *Holmes v. Moore*, ___ N.C. App. ____ (2020), 840 S.E. 2d 244, 252 (quoting *Gilbert v. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009)).

Here, Plaintiffs’ Motion for Preliminary Injunction implicates Plaintiffs’ and all voters in the Defendant Counties rights to vote and to vote on equal terms. These rights are not just substantial, but imperative. As noted above: “the right to vote is one of the most cherished rights in our system of government, enshrined in both our Federal and State Constitutions.” *Blankenship*, 363 N.C. at 522, 681 S.E.2d 759, 762; *see also Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“No right is more precious in a free county than that of having a voice in the election of those who make the laws under which, as good citizens,

we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”). Furthermore, beyond the mere right to vote, it is also well-settled that “the right to vote *on equal terms* is a fundamental right.” *James*, 359 N.C. at 269-70, 607 S.E.2d 638, 644 (2005) (citing *Northampton Cty.*, 326 N.C. at 746, 392 S.E.2d 352, 355) (emphasis added).

In keeping with the imperative nature of these rights, where they are burdened, appeal from an interlocutory order is appropriate to ensure that voters are not deprived of these substantial rights. *See Holmes*, 840 S.E. 2d 244. In *Holmes*, the appeals court held that an immediate interlocutory appeal was necessary and appropriate where plaintiffs challenged and sought to enjoin the state’s voter identification law, because otherwise the substantial right to vote freely and equally would “be lost absent immediate appeal.” *Id.* at 253. Even though the plaintiffs themselves would have been able to vote in the upcoming election, the court concluded that because they faced greater barriers to voting than others in the State, the law violated the voters’ substantial “right to participate in elections on an *equal* basis.” *Id.*

Plaintiffs here have brought claims and alleged injuries that directly parallel those made in *Holmes*. Plaintiffs claim that voters in Defendant Counties that are forced to use the ExpressVote (where it is the only option available or the only assistive technology option available) will be subjected to risks and burdens that other voters in North Carolina will not face. Specifically, as detailed below, those will be required to: (1) vote on a machine that deprives them of their ability to read and verify the contents of the ballot they cast because the vote tabulated is printed on their ballot in an unreadable

barcode; (2) vote on an insecure and unreliable machine that is easily hacked and prone to error; and (3) risk voting under circumstances that increase the risk of transmission of COVID-19. These burdens not only implicate those voters right to vote, but because they are not felt by all voters in the state, their fundamental right to participate in elections on an equal basis. Plaintiffs are therefore entitled to immediate appeal of the denial of their Motion for Preliminary Injunction.

IV. PETITION FOR DISCRETIONARY REVIEW

Plaintiffs respectfully request that this Court exercise its authority, pursuant to N.C.G.S. § 7A-31(b) and N.C. Rules of App. P. 15(a), to grant discretionary review of the Order Denying the Motion for Preliminary Injunction prior to determination by the Court of Appeals. Plaintiffs respectfully submit that the Court should grant direct review prior to a determination by the Court of Appeals because (i) the subject matter of the appeal – the rights to vote and to vote on equal terms – is of significant public interest, (ii) the cause involves legal principles of major significance to the jurisprudence of the State, and (iii) delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm in the form of thousands of voters being denied their fundamental rights to vote and to vote on equal terms with other voters in the State.

A. The Appeal is of Significant Public Interest

This appeal warrants the Court’s immediate discretionary review because “[t]he subject matter of the appeal has significant public interest.” N.C.G.S. § 7A-31(b)(1). In November, millions of North Carolina voters will go to the polls in a hotly contested election. North Carolinians in the Defendant Counties that are forced to use the

ExpressVote will be required to use voting machines that are not just insecure and problematic, but also present serious health risks.

First, while voters that are required to vote on the ExpressVote make their selections on a touchscreen or keypad, the votes that are tabulated are those that appear on a printed ballot summary card in barcode form. (Ex. B- Ex. 1 ¶¶ 4, 27-29; Ex. B-Ex. 5 ¶ 21 n. 3, 34-35). Because voters cannot read barcodes, they cannot verify the choices that are being cast on their behalf. They simply have to hope that the barcode displayed on their ballot card corresponds to the choices they selected.

Second, the ExpressVote is riddled with insecurities that make it vulnerable to programming error, malfunction, and cyberattacks, which—due to the insecurities in the system—are unlikely to be identified, caught, or corrected. (Ex. B-Ex. 1 ¶¶ 3, 18, 30, 32, 65-69; Ex. B-Ex.5 ¶¶ 12, 21). The possibility for error is only exacerbated by the fact that, as noted above, because a voter cannot verify his or her vote on the ballot card, they will be completely unaware if some malfunction or hack has resulted in their barcode vote not corresponding to their intended vote.

Finally, all North Carolina voters will be heading to the polls during a pandemic that has upended almost every aspect of their lives, and cost the lives of more than 2,700 North Carolinians. But Defendant Counties that use the ExpressVote universally are placing voters at serious and unnecessary risk of transmission of COVID-19 for multiple reasons. Most obviously, counties have only limited numbers of machines. Therefore, universal use of the machines will force voters to repeatedly touch a machine that dozens if not hundreds of other people have already touched. However, while the virus can

survive on and be transmitted via the surface of the machine, ES&S's published guidelines for disinfecting the machines to counteract this type of viral spread are severely lacking. (Ex. B-Ex. 2 ¶¶ 33, 52-59). In addition, the virus is most commonly transmitted through virus droplets in the air, and voters will also be subjected to unnecessary crowds for longer periods of time. (Ex. B-Ex. 2 ¶¶ 27-33). Specifically, because the amount of people who can vote simultaneously is limited, universal use of the machines will cause an inevitable slow-down in the voting process (which will only be exacerbated by poll workers attempts to disinfect the machines after each use).

These issues increase the risk of transmission of the virus for voters in the Defendant Counties, putting them at greater risk of contracting the virus than that faced by other North Carolina voters. This risk is particularly acute for those individuals already at higher risk to become ill, require hospitalization, or die due to the virus, including those already suffering from existing health issues, with limited access to health care, and Black, Latinx, and Indigenous people. (Ex. B-Ex. 2 ¶¶ 39-45).

The public interest in this appeal is indisputable. It will determine whether millions of North Carolina voters are given the opportunity in November to vote in a verifiable and secure manner, and without unnecessary risk to their lives and health. As noted above, the right to vote and the right to vote on equal terms are some "of the most cherished rights in our system of government." *Blankenship*, 363 N.C. 518 at 522, 681 S.E.2d at 762. *See also James*, 359 N.C. at 269-70, 607 S.E.2d at 644 (citing *Northampton Cty. Drainage*, 326 N.C. at 746, 392 S.E.2d at 355 ("[i]t is well settled in this State that 'the right to vote on equal terms is a fundamental right.'")). Moreover, because not all North

Carolina voters are impacted by the risks and burdens associated with the use of the ExpressVote, this appeal will determine to a substantial extent whether or not North Carolina's November 2020 general election guarantees voters the right to vote on an equal basis. *See e.g., Hill v. Skinner*, 169 N.C. 405, 415 86 S.E. 351, 356 (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 (1895)) (“[t]he object of all elections is to ascertain, fairly and truthfully, the will of the people – the qualified voters.”); *Curling v. Raffensperger*, 397 F. Supp. 3d 1334 (N.D. Ga. 2019) (holding that elections are only free and fair when all qualified citizens can cast votes for their candidates of choice and have those votes accurately counted).

B. The Appeal Involves Legal Principles of Major Significance

Discretionary review is also warranted because this appeal “involves a legal principle of major significance to the jurisprudence of the State.” N.C.G.S. § 7A-31(b)(2). Indeed, the appeal involves two significant legal principles: (1) whether the principle of laches can be invoked to defeat a preliminary injunction seeking to uphold fundamental constitutional rights; and (2) the proper standard for determining whether an injury is speculative.

First, this appeal presents the following critically important question: can a court invoke the doctrine of laches to effectively deny a plaintiff's fundamental constitutional right? This is a significant jurisprudential question. In *Common Cause v. Lewis*, the court found that laches did not apply to plaintiffs' challenge to state redistricting plans because laches is inapplicable to “voting-rights and other constitutional cases seeking solely prospective relief.” *Common Cause v. Lewis*, 18-CVS-014001, 2019 WL 4569584 at *129

(N.C. Super. Ct. Sept. 3, 2019); *see also Malinak v. Malinak*, 242 N.C. App. 609, 612-13, 775 S.E.2d 915, 917 (2015) (holding that laches is inapplicable to continuing obligations). In *Lewis*, the Superior Court went on to hold that, even were laches applicable, it could not be invoked to bar the plaintiffs' lawsuit where they filed their lawsuit just fourteen months after the challenged redistricting plans were enacted. *Lewis*, 2019 WL 4569584 at *130.

Other courts faced with this question have also refused to rely on laches, even where the alleged delay was similar to or greater than the alleged delay in the present case. *See e.g., Sprague v. Casey*, 550 A.2d 184, 188-89 (Pa. 1988) (finding that laches did not bar relief where plaintiffs challenged the placement of two judicial seats on a ballot, six and a half months after constructive notice of the ballot placement); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (laches did not bar plaintiffs' challenge to a reapportionment plan after four rounds of elections under the plan); *Am. Trucking Ass'n, Inc. v. N.Y. State Thruway Auth.*, 199 F. Supp. 3d 855, 872 (S.D.N.Y. 2016), vacated on other grounds, 238 F. Supp. 3d 527 (S.D.N.Y. 2017) (no laches where the suit was filed within the three year statute of limitations because "[t]here is nothing equitable about tolerating an ongoing constitutional violation").

Here, as in *Malinak* and *Lewis*, this case seeks prospective relief related to the State's continuing violation of Plaintiffs' rights to free and fair elections and equal protection under the law. Thus, the defense of laches is inapplicable. In any event, the delay involved does not rise to the "unreasonable" level required to prove laches. Plaintiffs' Complaint was filed less than a month after the Express Vote's use by the

Defendant Counties became publicly known (as a result of its use in North Carolina’s March 2020 primaries) and concern mounted over the COVID-19 pandemic. (Ex. A p 2; Ex. B-Ex. 2. ¶ 36).⁵

Second, the appeal will also address the issue of when voting-related injuries become “actual or imminent, not conjectural or hypothetical,” *Walker v. Hoke County*, 260 N.C. App. 121, 123, 817 S.E.2d 609, 611 (2018) (citing *Neuse River Found. Inc. v. Smithfield Foods Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)), particularly where fundamental rights are undermined by unreliable technology. With regard to the ExpressVote’s reliance on an unverifiable barcode to tabulate votes, the Superior Court observed that since “[a] voter . . . has no way of knowing if the vote cast matches what is recorded in the barcode and ultimately counted by the tabulator. It is . . . conceivable that some level of irreparable injury will occur if the ExpressVote is used.” (Ex. A p 8). However, other cases have specifically held that this injury is not just conceivable, but clear. For example, in *Curling v. Raffensperger*, the district court recently held that the recording of “a non-voter-verified barcode as the elector’s actual vote” was sufficient “to establish injury to their constitutional rights.” Order, No. 1:17-cv-2989-AT, Dkt. 751 at 41 (N.D. Ga. July 30, 2020). The holding in *Curling* is directly on point here.

In addition, this case will address the nature of “actual or imminent” injuries where injuries are caused by insecure voting technology that is vulnerable to hacking and malfunction that is unlikely to be detected—in part because of the machine’s

⁵ There also are disputed facts regarding the timeline asserted by defendants. See *Taylor v. City of Raleigh*, 290 N.C. 608, 621, 227 S.E.2d 576 (1976) (explaining that appellate courts should determine whether there is a dispute of the facts upon which defendants rely to show laches, and whether undisputed facts show laches).

vulnerabilities and in part because ES&S is under no obligation to report hacks or malfunctions of its systems. The Order brushed aside these concerns as expressed in detail in Plaintiffs affidavits, but other courts have held that such risk of injury is neither speculative nor remote. *See e.g., Stewart v. Blackwell*, 444 F.3d 843, 855 (6th Cir. 2006) (“The increased probability that their votes will be improperly counted based on punch-card and central-count optical scan is neither speculative nor remote.”) *vacated* (July 21, 2006), *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 machines at issue); *Banfield v. Cortes*, 922 A.2d 36, 44 (Pa. Commw. Ct. 2007) (finding that the plaintiffs had sufficiently alleged standing, 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”); *Nat’l Ass’n for Advancement of Colored People State Conference of Pennsylvania v. Cortes*, 591 F. Supp. 2d 757, 765-67 (E.D. Pa. 2008) (holding that there was a “real danger” that electronic voting machines might malfunction causing plaintiffs irreparable harm).

These issues go to the heart of the Order denying Plaintiffs’ Preliminary Injunction and warrant direct review of Plaintiffs’ appeal.

C. Review by the Court of Appeals Would Only Delay a Final Adjudication and Make it Impossible for Effective Relief To be Granted

Pursuant to N.C.G.S. § 7A-31(b)(3), this Court may certify a cause for review by it before the cause has been determined by the Court of Appeals where delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.

This Court has found certification has been found to be proper in election-related cases involving a need for expedited resolution. *See, e.g., James v. Bartlett*, 359 N.C. at 269-270, 607 S.E.2d at 643-44 (granting petition for expedited review prior to determination by the Court of Appeals, in a constitutional challenge to the counting of provisional ballots cast by voters outside their home precincts, where the ballots might affect the outcome of the November 2004 elections); *Stephenson v. Bartlett*, 358 N.C. 149, 594 S.E.2d 24 (2004) (approving expedited discretionary review a court order related to a North Carolina redistricting plan).

As detailed above, this case concerns fundamental rights – the right to vote freely and on an equal basis – and the potential deprivation of those rights to millions of citizens in the upcoming November 2020 general election. Given Defendants’ opposition to the relief sought, no matter how the Court of Appeals might rule, final adjudication of the matter will almost certainly require a determination by this Court. However, if the case proceeds for an initial determination by the Court of Appeals, there will be insufficient time before the November 2020 general election for this Court to determine and reach a final adjudication or for any ensuing relief to be effectuated before the election takes place. Delaying a final adjudication would result in substantial harm in the form of large numbers of voters having their votes miscounted by ExpressVote without their knowledge or ability to determine whether an error has been made or deciding not to vote due concerns over use of the ExpressVote’s during the COVID-19 pandemic, potentially affecting the outcome of the election. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976) (violation of constitutional rights constitutes irreparable harm).

Direct, immediate review by this Court will make it possible to grant effective relief to the Plaintiffs, and indeed to all affected voters in the Defendant Counties, before the November 2020 general election.

V. MOTION TO SUSPEND APPELLATE RULES FOR EXPEDITED REVIEW

Plaintiffs also respectfully request that the Court suspend the Rules of Appellate Procedure to expedite this appeal. Pursuant to N.C. R. App. P. 2, a court may expedite proceedings or otherwise suspend the appellate rules “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” Although, this rule is to be “invoked ‘cautiously,’” and only under “‘exceptional circumstances’” will the courts “take this ‘extraordinary step.’” *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting *State v. Hart*, 361 N.C. 309, 316-17, 644 S.E.2d 201, 205-6 (2007)). This case presents exactly the exceptional circumstances that warrant suspension of the appellate rules and expedited review.

As the U.S. Supreme Court has cautioned, “[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.” *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); see also *Dogwood Devel. & Mgmt. Co., LLC*, 362 N.C. at 194, 657 S.E.2d at 363 (quoting *Hormel*). As such, courts have “tended to invoke Rule 2 for the prevention of ‘manifest injustice’ in circumstances in which substantial rights of an appellant are affected.” *Hart*, 361 N.C. at 16, 644 S.E.2d at 205 (citing *State v. Sanders*, 312 N.C. 318, 230,

321 S.E.2d 836, 837 (1984)).⁶ As detailed above, the right to vote and the right to vote on an equal basis are substantial – and fundamental – rights. *See Holmes*, 840 S.E. 2d at 253. Indeed, the Court has previously determined expediting appellate proceedings was “in the public interest” in a case involving voting rights. *See Stephenson*, 358 N.C. at 150, 594 S.E.2d at 24 (regarding an appeal arising out of a challenge to the North Carolina redistricting plan).

The injury suffered by voters who are denied an opportunity to verify their ballots, who are required to vote on insecure voting machines, and who are at greater risk of COVID-19 transmission due to their counties’ universal use of the ExpressVote, will be substantial, amounting to a manifest injustice that will be beyond remedy. “The 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)). Therefore, it also is in the public interest to expedite a decision, so that voters can have clarity regarding the November 2020 general election, be assured that their votes will be secure and verifiable, and be assured that they will be able to cast those votes without putting their health on the line.

⁶ Although courts are more likely to suspend appellate rules in criminal cases, *see Hart*, they have done so in a number of civil cases, including *Stephenson v. Bartlett*, 358 N.C. at 150, 594 S.E.2d at 24 (suspending appellate rules to allow for expedited review of voters’ challenge to state’s redistricting plans); *Potter v. Homestead Pres. Ass’n*, 330 N.C. 569, 576, 412 S.E.2d 1, 1-2 (1992) (suspending appellate rule 10(b) and ordering a new trial for consideration of a Statute of Fraud claim in a case involving a land dispute); *Whitley’s Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 500, 238 S.E.2d 607, 609 (1977) (suspending appellate rule 10(b) to enable plaintiffs to recover debt from a defendant).

For the reasons detailed above, this case presents exceptional circumstances that warrant suspension of appellate rules and expedited consideration of the appeal.

VI. PROPOSED SCHEDULE

Plaintiffs propose the following schedule for briefing and oral argument:

1. The Record on Appeal shall be settled and filed, along with the Plaintiffs' brief, on or before 10 September 2020.
2. Appellees' brief shall be filed on or before 15 September 2020.

VII. CONCLUSION

For the aforementioned reasons, Plaintiffs respectfully request that this Court grant their Petition for Discretionary Review and their Motion for Suspension of the Appellate Rules to allow for Expedited Review of their appeal.

Respectfully submitted, this the 4 day of September, 2020.

/s/Mark Dorosin
Mark Dorosin
NC State Bar No. 20935
Lawyers' Committee for Civil Rights Under Law
P.O. Box 956
Carrboro, NC 27510
Phone: (919) 914-6106
mdorosin@lawyerscommittee.org

N.C. R. App. R. 33(b) Certification: I certify that the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

/s/Elizabeth Haddix
Elizabeth Haddix
NC State Bar No. 25818
Lawyers' Committee for Civil Rights Under Law
P.O. Box 956
Carrboro, NC 27510
Phone: (919) 914-6106
ehaddix@lawyerscommittee.org

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Plaintiffs' Petition for Discretionary Review Prior to Determination By the Court of Appeals and Motion to Suspend Appellate Rules was served on Defendant by electronic mail with written consent pursuant to Emergency Directive 6 issued by the Chief Justice of North Carolina on May 30, 2020, to:

Paul M. Cox
Special Deputy Attorney General
Terence Steed
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
pcox@ncdoj.gov
tsteed@ncdoj.gov

This the 4th day of September 2020.

/s/ Mark Dorosin

Mark Dorosin
NC State Bar No. 20935
Lawyers' Committee for Civil Rights
Under Law
P.O. Box 956
Carrboro, NC 27510
Phone: (919) 914-6106
mdorosin@lawyerscommittee.org