

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*,)
)
Plaintiffs,)
)
v.)
)
STATE OF NORTH CAROLINA, *et al.*)
)
Defendants.)
)
)

**DEFENDANTS' BRIEF ON
SCHEDULING ISSUES FOR A
THIRD PRIMARY**

In response to the request of the Court, made at the end of trial on April 15, 2016, defendants provide this brief on scheduling issues associated with the conduct of an additional primary, should one be necessitated by any order of this Court. This brief will note areas of agreement with plaintiffs on scheduling issues, steps required to conduct an additional primary, the latest possible date that such an additional primary could be held prior to the November 8, 2016, general election, and practical considerations that must be borne in mind when considering the schedule for an additional primary. Attached to this brief as Exhibit 1 is the Second Declaration of Kim Westbrook Strach, Executive Director of the North Carolina State Board of Elections (“the State Board”), which further discusses and elaborates on these issues.

BACKGROUND

The 2016 general election will be held on November 8, 2016, and will include elections for both state and federal offices, including the office of President of the United States. Candidate filing for the 2016 Elections Cycle began at noon on December 1, 2015, and ended at noon on December 21, 2015. If a primary was required in a particular contest, that election was added to a statewide primary election on March 15, 2016 (the “March Primary”). In compliance with the federal Uniformed and Overseas Citizens Absentee Voting Act, 52 USCS § 20302(a)(8) (“UOCAVA”), which requires that ballots be available no later than 45 days before an election involving a federal office, and N.C. GEN. STAT. § 163-258.9, which requires ballots be available no later than 50 days prior to a primary election, absentee voting for the March Primary began on January 25, 2016.

On February 5, 2016, the State Board suspended ongoing primary elections for the United States House of Representatives pursuant to an order issued in *Harris et al. v. McCrory et al.*, No. 13-cv-949 (MDNC Feb. 5, 2016), which struck down two of North Carolina’s congressional districts and required that a new congressional district plan be adopted by the General Assembly. On February 23, 2016, Governor Pat McCrory signed Session Laws 2016-1 and 2016-2, which established a new districting plan for the United States House of Representatives and directed the State Board to open filing for a congressional primary election to be held June 7, 2016 (the “June Primary”). As a result of a decision of the Superior Court of Wake County, the June Primary will also include a primary for a seat on the North Carolina Supreme Court. Absentee voting for the June Primary began on April 18, 2016, and early voting for the June Primary will run from

May 26 to June 4, 2016. In compliance with UOCAVA and with N.C. GEN. STAT. § 163-258.9, which requires that ballots be available no later than 60 days prior to a general election, absentee voting for the November 8 general election will begin on September 9, 2016.

AREAS OF AGREEMENT BETWEEN THE PARTIES

The parties to this litigation generally agree as to the following with regard to any additional primary for seats in the North Carolina Senate or North Carolina House of Representative, though the parties may disagree as to their relevance or application in this case:

1. A new primary is only needed in districts that are affected, directly or indirectly, by any potential remedial maps, and as a result it is possible that less than the entire State will be affected by any order of this Court. Defendants note, however, the possibility that the need to redraw districts could extend beyond any specific districts that the Court might strike down, or the current groupings that contain those districts. Any order enjoining one or more VRA districts could trigger a requirement under *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) ("*Stephenson I*") that counties be re-grouped. This in turn could have a domino effect causing the redrawing of other districts, including districts that the court has upheld or districts that the court has not reviewed.

2. The 100-day notice requirement under state law, N.C. GEN. STAT. § 163-258.16, is for ballot measures and offices that will be on the ballot, not for candidates, so it doesn't limit the election timing.
3. The federal UOCAVA requirement for sending overseas ballots is 45 days and applies only to federal elections, so it does not apply to a new primary for House and Senate districts.
4. N.C. GEN. STAT. § 163-258.31 provides that the State Board may exercise certain emergency powers "[i]f an international, national or local emergency or other circumstances" make substantial compliance with the absentee ballot statutes "impossible or unreasonable." The parties do not necessarily agree that an additional primary that might be ordered in this case would qualify as "other circumstances" contemplated by the statute.
5. Federal law allows state to administratively seek exemption from the 45-day requirement of UOCAVA, and North Carolina has in the past extended the date to receive ballots after an election to compensate for a shorter period before they are sent out. The parties do not necessarily agree that such an exemption is advisable in a presidential election year, or that it is something that the State would think appropriate to seek.
6. County boards of elections generally need at least 21 days to create, code and print ballots, but can begin sending ballots out earlier if they are completed earlier.

7. An eight-day filing period would be sufficient for an additional primary; a five-day filing period has been used in the past for other modified elections.
8. The Court can eliminate a second (or run-off) primary by specifying that the candidate with the largest number of votes wins the additional primary.

POSSIBLE SCHEDULES FOR A THIRD PRIMARY

The possible schedules for a Third Primary in this election cycle, and the requirements and assumptions underlying those schedules, are laid out in Exhibit 1, the Second Declaration of Kim Westbrook Strach. These schedules all work backwards from the unmovable date of the November 8, 2016, general election. It is important to understand these schedules all presume constricted time periods for necessary components of the election cycle, and that every such constriction carries with it significant challenges and risks to the integrity of the election as a whole.

1. The latest date possible for a Third Primary

It is the opinion of the State Board that the latest Tuesday on which a Third Primary could be held is **August 16, 2016**. This date is arrived at as follows:

The general election will be held on November 8, 2016. As noted above and in the Second Declaration of Kim Westbrook Strach, UOCAVA requires that absentee voting begin 45 days before the general election, and N.C. GEN. STAT. § 163-258.9 requires that ballots be available no later than 60 days prior to a general election.

Pursuant to these legal requirements, then, absentee voting for the November 8 general election must begin on September 9, 2016.¹

Before absentee voting can begin on September 9, ballots must be prepared and coded, and digital ballots for touchscreen voting machines must be prepared. This process will take 2 weeks. Ex. 1, ¶¶ 25 and 28. Ballot preparation and coding cannot begin until the results of a primary are final. Ex. 1, ¶ 36. The results are only final after the election results are canvassed, a process that allows time for election protests to be filed to challenge election results, for recounts when necessary and for audits of the results. The shortest period of time in which canvass can reasonably occur is two weeks, though that poses a very tight deadline. Ex. 1, ¶ 39.

Thus, in order for absentee balloting to begin on September 9, the latest Tuesday on which a Third Primary could be held is August 2, 2016. If, however, the absentee voting period were to be shortened from the State-mandated 60 days to the 45 days required by UOCAVA (a 25% reduction in time for absentee voting), absentee voting would for the general election would begin on September 24, 2016, and the latest Tuesday on which the Third Primary could be held is August 16.

¹ Plaintiffs may argue that the 60-day period required by N.C. GEN. STAT. § 163-258.9 can be shortened, possibly either by action of the State Board pursuant to N.C. GEN. STAT. § 163-258.31 or by the Court. The latest Tuesday date of August 16 would in fact require shortening the absentee voting period to UOCAVA's 45 days. Unless the absentee voting period is shortened by an additional 14 days (to 31 days), the only way to achieve a Third Primary date of August 30 is for ballot preparation to begin immediately after the Third Primary, without allowing time for the results of that election to be finalized. Such a course would be irresponsible, as it would effectively foreclose the possibility of recounts, audits or protests to correct errors that may be present in the initial results on primary night.

2. What would be necessary for the Third Primary to be held on August 16.

In order to hold the Third Primary on August 16, a number of steps would be required: receipt of the digital data for newly-enacted plans (known as “shapefiles”) from the General Assembly, reassignment of all voters affected by the new plans, preparation of ballots for the primary election, and an absentee voting period. In order for all of these steps to be completed in time for a Third Primary on August 16, the first step in the process—receipt of shapefiles from the General Assembly—would have to occur no later than the start of business on **May 12, 2016**. This date is arrived at as follows:

If the State-mandated period of 50 days is used for absentee voting for the Third Primary, absentee voting would need to begin on June 27, 2016. Ballot preparation and coding would need to begin two weeks before that date. Ex. 1, ¶ 22. The process of geocoding to reassign voters can reasonably be expected to take three weeks (15 business days). Ex. 1, ¶ 23.

The June Primary presents a particular challenge to geocoding, however. In essence, geocoding cannot occur at the same time that voting is happening without posing a substantial risk that voters who present at the polling place will not actually be able to vote. Ex. 1, ¶¶ 46–48. Voting for the June Primary will start on May 26 and will continue through June 4 (Saturday), with the June Primary being held on June 7. Realistically, geocoding cannot happen during this time. As a result, the State Board would have had to receive shapefiles from the General Assembly by start of business on

May 4, 2016, to have geocoding completed by the beginning of early voting on May 26. Even if the State-mandated 50-day absentee voting period for the Third Primary were to be reduced to UOCAVA's 45-day requirement (a 10% reduction), shapefiles would still have been needed by May 4 in order to be completed before the beginning of early voting in the June Primary.

The only way possible to allow for a later date for receipt of the shapefiles would be for geocoding to begin prior to early voting for the June Primary, then be suspended while voting in the June Primary is occurring, and then resume after June 7. In order to accommodate this schedule, shapefiles would have to be received by the State Board no later than start of business on Thursday, May 12, 2016. This option, however, presents significant risks by requiring that geocoding and canvass happen simultaneously, which increases the risk of error and decreases the ability of county board staff to complete these processes.

The basic components of the schedules described above are shown below:

Decision Point	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Third Primary is subject to the State absentee deadline (50 days)	Yes	Yes	No	No
Absentee deadline to which the general election is subject	State deadline (60 days)	UOCAVA (45 days)	State deadline (60 days)	UOCAVA (45 days)
Last possible Third Primary election date	Tuesday, August 2, 2016	Tuesday, August 16, 2016	Tuesday, August 2, 2016	Tuesday, August 16, 2016
Last date to get shapefiles	Wednesday, May 4, 2016	Wednesday, May 4, 2016	Wednesday, May 4, 2016	Thursday, May 12, 2016
Would geocode changes occur before early voting for the June Primary or be split before and after early voting?	All geocode changes would occur before early voting	All geocode changes would occur before early voting	All geocode changes would occur before early voting	6 business days would occur before early voting and 9 after the June Primary

PRACTICAL CONSIDERATIONS THAT MUST BE BORNE IN MIND FOR A THIRD PRIMARY THIS ELECTION CYCLE

As noted above, the constricted timeframes allotted in the schedules described above for certain tasks—geocoding to assign voters to newly-created districts, preparation and coding of ballots, canvassing to certify the results of the primary elections—carry significant challenges and risks. For example, normally a county board of elections would be able to focus on geocoding without the distractions of other aspects of election preparation or follow-up. Here, any affected county boards would have to engage in geocoding for voter reassignment while at the same time preparing for the June Primary or engaging in canvassing after the June Primary. This time after the primary could include recounts, protests or audits, the resolution of which could affect the

outcome of the election. Trying to conduct voter reassignment and canvass at the same time would require the often limited staff of county boards to work on both simultaneously rather than allowing them to focus on one specific task. Especially in such a tight timeframe, this would increase the risk of error, both as to geocoding and audits or recounts. Any error could have the effect of delaying election results or possibly disenfranchising voters. In short, these schedules leave little to no room for detection or correction of error of any kind.²

In order for the Third Primary to be held on August 16, the absentee voting period or the general election mandated by State law would have to be shortened by 25%, while the time mandated by State law for a primary would be shortened by 10%. In order for the Third Primary to be held later, the absentee voting period for the general election would have to be shortened even more, perhaps by as much as 33% of UOCAVA's 45 days. Such a shortening of absentee voting period would primarily affect overseas voters, especially voters in the armed services, whose participation in the electoral process the deadlines are intended to benefit and protect. While it might be possible to offset any change in the absentee period with an extended period of time for receipt of ballots after the election, such an approach can delay the ability to ascertain and certify

² The severely truncated canvass period that would be required in order to hold a Third Primary would also impose unreasonable limitations on the ability of county boards and the State Board to deal with protests, which could diminish the rights of candidates and of the public at large. As noted in Exhibit 1, the deadline for filing protests is 5:00 P.M. on the second business day after the primary. Ex. 1, ¶ 40. Limiting the canvass period to two weeks would mean that a protestor could file on Thursday at 5:00 P.M., the State Board would have to assume jurisdiction the following day and then notice a meeting that conforms to North Carolina's Public Meetings Act for a final hearing adjudicated before the Tuesday canvass.

election results. Particularly in a presidential election year, prompt finality of election results is not only in the interests of North Carolinians but of the nation as a whole.

Moreover, a Third Primary for legislative seats, held after one primary has already been held for those seats and after the nominees of the political parties have begun campaigning, will only result in voter confusion. Changing rules that voters have come to rely on—and will have used twice in this election cycle already—will confuse voters further and may depress what will likely be very low turnout to start with. This Court should avoid such a result. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”)

Perhaps most fundamentally, the proposed schedules—both from defendants and, it is anticipated, from plaintiffs—are dependent on something out of the control of the elections administrators: entry of an order striking down some or all of the challenged districts and adoption of new plans by the General Assembly. The schedules outlined above not only show that August 16, 2016, is the latest Tuesday on which a Third Primary could be held, but also show that new legislative plans would need to be received by the State Board no later than May 12, 2016, in order for a Third Primary to be held on August 16, and that is only possible if reassignment of voters takes place while canvass of the June Primary results is also occurring, which increases the risk of error for both processes. And of course the General Assembly cannot adopt new plans until this Court has not only entered an order in favor of plaintiffs, but has provided sufficient

explanation as to *each district* found to be in violation of the law of how that district violates the law, as well as sufficient guidance to the General Assembly so that it knows what standards to apply in any new plan. There simply is not time for this to happen in this election cycle.³

Defendants, of course, believe that plaintiffs have failed to carry their burden of proof and that judgment should be entered for defendants, not for plaintiffs. The plans adopted by the General Assembly in 2011 are legal and should not be struck down. The North Carolina Supreme Court has twice rejected the arguments put forward by plaintiffs and upheld the plans. As a result, three election cycles have now been conducted using these plans.

Should the Court decide otherwise, however, the Court should also act consistently with its order of November 25, 2015, denying plaintiffs' motion for preliminary injunction. [D.E. 39] In that order, this Court noted that the preliminary relief sought by plaintiffs "would cause an extraordinary disruption to North Carolina's 2016 election cycle." [D.E. 39, p. 8] That order was entered three and one-half months *prior* to the March Primary. Now that the March Primary has been held and candidates have begun campaigning, it is even more accurate. *See Pender County v. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007) ("We also realize that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn.

³ Likewise, these schedules do not allow for any time for review of new plans by this Court, much less for this Court to adopt its own plans should it find it must do so. Nor do they provide any time for the General Assembly to conduct an analysis of racial polarization should such an analysis be required by a decision of this Court, or to make a functional analysis on the "right" percentage of black VAP for any specific district.

Accordingly, to minimize disruption to the ongoing election cycle, the remedy explained above shall be stayed until after the 2008 election.”) Requiring a Third Primary at this point in the election cycle would unquestionably “cause an extraordinary disruption to North Carolina’s 2016 election cycle.” This is something federal courts have been counseled to avoid. *See Purcell, supra*.

Given all of these considerations, should this Court find in favor of plaintiffs, this Court should nevertheless allow the 2016 election cycle to proceed using the 2011 plans and order that any new plans be adopted in time for the 2018 election cycle. Doing so will not only avoid “extraordinary disruption” to the election cycle currently in progress, but will allow time for the Supreme Court to resolve the conflict between a decision of this Court and the decisions of the North Carolina Supreme Court.

CONCLUSION

For the foregoing reasons and reasons stated in defendants’ post-trial brief, filed contemporaneously herewith, plaintiffs’ claims should be dismissed and judgment entered for the defendants. If judgment is entered for plaintiffs, judgment should be stayed pending appeal to the Supreme Court and the 2016 election cycle should be allowed to continue using the 2011 legislative plans.

This the 6th day of May, 2016.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

By: /s/ Alexander McC. Peters
Alexander McC. Peters
Senior Deputy Attorney General
N.C. State Bar No. 13654
apeters@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900
Facsimile: (919) 716-6763
Counsel for Defendants

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
Phillip J. Strach
N.C. State Bar No. 29456
thomas.farr@ogletreedeakins.com
phil.strach@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Co-counsel for Defendants

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day served the foregoing

DEFENDANTS' BRIEF ON SCHEDULING ISSUES FOR A THIRD PRIMARY to the following:

Edwin M. Speas, Jr.
John W. O'Hale
Carolina P. Mackie
Poyner Spruill LLP
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
espeas@poynerspruill.com
johale@poynerspruill.com
cmackie@poymerspruill.com
Attorneys for Plaintiffs

Anita S. Earls
Allison J. Riggs
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
anita@southerncoalition.org
allisonriggs@southerncoalition.org
Attorneys for Plaintiffs

Adam Stein
Tin Fulton Walker & Owen, PLLC
312 West Franklin Street
Chapel Hill, NC 27516
astein@tinfulton.com
Attorney for Plaintiffs

This the 6th day of May, 2016.

OGLETREE, DEAKINS, NASH
SMOAK & STEWART, P.C.

/s/ Thomas A. Farr
Thomas A. Farr
N.C. State Bar No. 10871
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Telephone: 919.787.9700
Facsimile: 919.783.9412
thomas.farr@odnss.com

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-00399**

SANDRA LITTLE COVINGTON, *et al.*,)
Plaintiffs,)
v.)
THE STATE OF NORTH CAROLINA,)
et al.,)
Defendants.)
_____)

**SECOND DECLARATION OF
KIM WESTBROOK STRACH**

NOW COMES Kim Westbrook Strach, who under penalty of perjury states as follows:

1. I am over 18 years of age, legally competent to give this declaration and have personal knowledge of the facts set forth in it.
2. I am the Executive Director of the North Carolina State Board of Elections (“State Board”), a position I have held since May 2013. My statutory duties as Executive Director of the State Board include staffing, administration, and execution of the State Board’s decisions and orders. I am also the Chief Elections Officer for the State of North Carolina under the National Voter Registration Act of 1993 (“NVRA”). As Executive Director of the State Board, I am responsible for the administration of elections in the State of North Carolina. The State Board has supervisory responsibilities for the 100 county boards of elections, and as Executive Director of the State Board, I provide guidance to the directors of the county boards.

Exhibit 1

3. As the Executive Director of the State Board and Chief Elections Officer for the State of North Carolina, I am familiar with the procedures for registration and voting in this State. I am also responsible for implementing the laws passed by the North Carolina General Assembly, supervising the conduct of orderly, fair, and open elections, and ensuring that elections in North Carolina are administered in such a way as to preserve the integrity of and protect the public confidence in the democratic process.

I. SUMMARY OF 2016 ELECTION CYCLE

March Primary

4. Candidate filing for the 2016 elections cycle began at noon on December 1, 2015 and ended at noon on December 21, 2015.

5. If a primary was required in a particular contest, that election was added to a statewide primary election held on March 15, 2016 (the “March Primary”).

6. Absentee voting for the March Primary began on January 25, 2016. The Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) requires that ballots be available no later than 45 days before an election involving a federal office, while state law requires ballots be available no later than 50 days prior to a primary election in an even-numbered year.¹ Ultimately more than 55,000 voters requested absentee ballots during the March Primary, more than 3,700 of which were requested by military and overseas voters.

¹ N.C. GEN. STAT. § 163-227.3 requires that absentee ballots be available 60 days in advance of a general election in an even-numbered year.

7. On February 5, 2016, the State Board suspended ongoing primary elections for the United States House of Representatives pursuant to an order issued in *Harris et al. v. McCrory et al.*, No. 13-cv-949 (MDNC Feb. 5, 2016).

8. Because absentee voting had already begun, logistical constraints surrounding the printing of ballots and coding of the election within the Statewide Elections Information Management System (“SEIMS”) prevented county boards of elections from removing congressional races from March Primary ballots. Accordingly, congressional primary candidates appeared on ballots, though votes cast in those contests were not made public by the State Board.

9. More than 2.33 million voters participated in the March Primary, surpassing all previous primaries in this State.

June Primary

10. On February 23, 2016, Governor McCrory signed Session Laws 2016-1 and 2016-2, establishing a new districting plan for the United States House of Representatives and directing the State Board to open filing for a congressional primary election to be held June 7, 2016 (the “June Primary”).

11. On March 4, 2016, the Superior Court of Wake County overturned Session Law 2015-66, eliminating a retention election option formerly available to sitting justices on the Supreme Court of North Carolina. The State Board opened a special candidate filing period for the affected office, and a nonpartisan primary is now underway as part of the June Primary. Because justices are elected statewide, the additional contest required no jurisdictional changes within SEIMS—all voters in the State are eligible to participate.

12. Seventy-six (76) candidates filed for the U.S. House of Representatives during a special filing period that opened on March 16 and ended March 25. By comparison, 46 candidates filed in December 2015.

13. Absentee voting for the June Primary began on April 18. SEIMS records indicate that county boards of election have already mailed more than 55,300 ballots to voters in 108 states and U.S. territories, and an array of international locations. This total includes military voters serving overseas.

14. Early voting for the June Primary will run from May 26 to June 4.

November General Election

15. A statewide general election for both state and federal office, including the office of President of the United States, will be held November 8 (the “November General Election”).

16. The State Board has required that county boards of election submit their early voting plans for approval on or before July 29. Early voting plans include detailed plans and operating hours for one-stop voting locations scouted and secured by county elections officials throughout the state.

17. Absentee voting for the November General Election begins September 9, three months after the June Primary.

18. Early voting will occur between October 27 and November 5, and may involve more than 36,000 voting hours at one-stop locations. *See* Paragraph 53, *infra*. In 2008—the most recent general election involving an open presidential contest— more than 55% of all votes were cast at early voting locations.

19. Overall participation increased roughly 4.3% between the 2008 and 2012 general elections. If a similar increase occurs in 2016, participation could surpass 4.7 million voters, a record in North Carolina.

II. LOGISTICAL CONSIDERATIONS REGARDING A SEPARATE PRIMARY FOR GENERAL ASSEMBLY

20. Logistical considerations affecting a special primary held for seats in the General Assembly (a “Third Primary”) involve a number of complex administrative processes, statutory deadlines, and significant backwards-planning from the November General Election. All estimates are limited by uncertainty as to the scope of any redistricting that might be required by an order of the Court. A Third Primary would likely require cutting short the absentee voting period for both the Third Primary and for the November General Election, a critical opportunity relied upon by military and overseas voters.

Geocoding Changes

21. Redistricting requires both state and county elections administrators to assign individual voters to their proper jurisdiction, a largely manual process that involves changes to each voter’s “geocode” in SEIMS. The complexity of reassignment procedures vary, depending on the number of jurisdictions that divide a particular county and the number of voters affected. If a county is not wholly nested within a jurisdiction, elections administrators must assign voters to the new jurisdiction on a street-by-street basis within SEIMS, often requiring the use of physical maps along with the time and attention of a county board’s most senior staff.

22. Until elections officials complete jurisdictional changes in SEIMS, ballot preparation and voting equipment coding cannot begin in those jurisdictions; neither can candidates positively identify which voters reside within the revised district. SEIMS jurisdictional data serves as the backbone to voting processes throughout the counties, and finalizing jurisdictional changes within SEIMS is a prerequisite to vital features of elections administration in our state.

23. While the scope of any possible redistricting required—should the Court strike down any aspect of the current districting plans—is currently unknown, staff estimates based on recent experience that geocoding would take approximately three (3) weeks after our agency receives new jurisdiction files. Changes following the recent congressional redistricting plan affecting North Carolina’s 13 congressional districts took more than two (2) weeks. This task was completed within a short timeframe because 87 counties were wholly nested within single districts. In the case of the remaining counties involving more than one congressional district, no county straddled more than two districts. Legislative districts, by comparison, encompass 120 State House districts and 50 State Senate districts, many of which will likely subdivide counties in any plan. Additional subdivisions require additional time. Without additional time, the risk becomes higher of mistakes in geocoding at the county level that could negatively affect voting in any Third Primary.

Ballot Preparation and Election Coding

24. Information compiled by SEIMS is used to generate ballots and to code voting systems in a manner necessary to ensure the integrity of elections processes.

Jurisdictional data, for instance, is used to pair every voter with a specific “ballot style” that displays all races for which that voter is eligible to participate. In a primary, ballot styles are used to ensure affiliated voters cannot participate in a different party’s primary. Elections officials proof ballot styles prior to printing and data from SEIMS is used to code voting equipment so each machine tabulator accurately reads results from the distinct ballot styles within a particular county.

25. Once jurisdictions are properly assigned, the time required for ballot preparation and election coding depends on the type of election. Staff informs me that the below estimates represent the bare minimum amount of time necessary:

- a. Ballot preparation and coding for the November General Election could be completed in as little as three (3) weeks, leaving no margins for error. Staff, however, informs me that ballot preparation and election coding during the March Primary occurred over five (5) weeks, including several weekends.
- b. A Special Election is estimated to require at least two (2) weeks.

Burning Media and Preparing Touch-Screen Ballots

26. Once ballots are prepared and voting systems are coded, county boards of elections must load data onto physical media cards that are placed in tabulation machines, a process called “burning media.” The media cards ensure that the tabulator anticipates the layout of ballots, properly reads ballot markings, and records votes cast.

27. Counties that use touch-screen voting machines—including the populous Mecklenburg County—must prepare digital ballots that will display properly and interact with the machine’s software.

28. Staff inform me that burning media and preparing touch-screen ballots ordinarily takes the same amount of time as ballot coding: two (2) weeks for a Third Primary.

29. These processes are often completed after the start of mail-in absentee voting.

L&A Testing, and Mock Election

30. Before live ballots are tabulated, county boards of election must conduct logic and accuracy (L&A) testing to ensure tabulation machines accurately read ballots. This process involves running a test deck of ballots through tabulation machines within the county and auditing results. L&A testing allows counties to assess whether tabulators recognize and properly record results for the ballot styles in that county.

31. The State Board hosts mock elections during which all 100 counties upload results into SEIMS, mimicking Election Night. These mock elections test county systems and ensure SEIMS is accurately processing and aggregating results. The State Board also relies on mock elections to test the accuracy of its web-based elections results page.

32. If L&A testing has not occurred by the beginning of absentee voting, past protocol requires that those mail-in absentee ballots are marked and counted by hand in order to avoid an improper reading if changes are made to the machine logic as a result of L&A testing.

33. Staff informs me that the time required to complete these tasks varies across counties, but that neither L&A testing nor mock elections should be held less than two (2) weeks from the start of one-stop early voting. In the past, that two (2) week period has provided a needed opportunity to correct errors.

Effect of November General Election on Third Primary Date

34. Identifying the last possible date for a Third Primary requires that the State Board plan backwards from critical dates governing the November General Election, especially deadlines associated with absentee voting.

35. The beginning of the absentee voting period for the November General Election under state law (60 days) requires that ballots be available beginning September 9. The federal minimum under UOCAVA (45 days) requires that ballots be available beginning September 23.

36. Absentee ballot preparation and election coding for any one jurisdiction can begin only after results from any Third Primary are final.

37. The finalization process for a Third Primary would include a canvass by the county boards of election—a certification process occurring one (1) week after Election Day—and a final canvass by the State Board to aggregate totals in multicounty jurisdictions and to certify the accuracy of the election as a whole. State law does not designate a deadline for the State Board’s canvass of a primary election. Post-election proceedings may affect the State Board’s ability to canvass, including recounts, the filing and adjudication of elections protests, and a sample audit of election returns.

38. To date, nearly two months after the March Primary, election protest proceedings arising from that election remain ongoing. No active proceeding involves a contest for the General Assembly. The State Board has not canvassed and staff continues to ensure that counties uniformly and properly count provisional ballots.

39. The deadlines to initiate certain post-election proceedings fall after the date of county canvass. Accordingly, canvass by the county or by the State Board would not stand-in for finalization required to code ballots. Assuming every effort is made to audit results and compact the timeframe of post-elections proceedings below the three (3) weeks set out by statute for a general election—where an incumbent's holding over in office does not pose the same problem as uncertainty as to the nomination—it may be possible to conduct county and state canvass within two (2) weeks after Election Day. It is not certain that any recount or protest would occur, though it is difficult to overstate the effect of any lingering post-election proceeding on the effort to begin ballot preparation and election coding ahead of the November General Election.

40. The deadline for filing an election protest is no later than 5 p.m. on the second business day after county canvass. Under ordinary circumstances, county boards of election hold a preliminary consideration meeting, followed by a properly noticed and transcribed hearing that results in a written order, which may be appealed to the State Board with subsequent recourse in Superior Court. Taking into consideration notice to parties, the production of transcripts, and windows of appeal, this process can take many weeks. A truncated, two-week canvass period would materially affect the recourse ordinarily available to aggrieved candidates and members of the public.

41. Working backward from the state absentee deadline for the November General Election (September 9), the latest Tuesday on which a Third Primary could occur is August 2, as reflected below:

Third Primary (August 2)	Canvass/Finalize (2 weeks)	Ballot Preparation & Election Coding (3 weeks)	November Absentee (September 9)
-----------------------------	-------------------------------	--	---------------------------------------

42. Critical dates for a Third Primary on August 2 include the following:

- a. June 13: Absentee by mail begins (state absentee deadline)
- b. July 21: Early voting begins
- c. August 2: Election Day
- d. August 9: County canvass
- e. August 16: State canvass

43. Working backward from the federal UOCAVA deadline for absentee ballots during the November General Election (September 23), the latest Tuesday on which a Third Primary could occur is August 16, as reflected below:

Third Primary (August 16)	Canvass/Finalize (2 weeks)	Ballot Preparation & Election Coding (3 weeks)	November Absentee (September 24)
------------------------------	-------------------------------	--	--

44. Critical dates for a Third Primary on August 16 include the following:

- a. June 27: Absentee by mail begins (state absentee deadline)
- b. August 4: Early voting begins
- c. August 16: Election Day

- d. August 23: County canvass
- e. August 30: State canvass

Preparations for the Third Primary Date

45. Although the state or federal absentee deadlines for the November General Election may establish the latest possible date for a Third Primary, it is necessary to identify concomitant statutory and logistical deadlines to ensure adequate time for needed preparations.

46. After receiving shapefiles that contain jurisdictional data containing new district boundaries, county officials will have to manually process those changes through their county's geocoding database. There are several days within an election cycle where processing such changes would be highly inadvisable, including any time voting is occurring: one-stop and Election Day.

47. Early voting for the June Primary runs from May 26 to June 4. During that period, county administrators use a SEIMS tool called the Statewide One-stop System Administrator ("SOSA"), which functions as a digital poll book at all early voting locations. SOSA derives its data from SEIMS; if, however, the application determined that jurisdictional information has changed within SEIMS, security protocols within the system will lock and prevent voting from occurring. If a county intentionally or unintentionally allows SOSA to communicate with SEIMS while geocoding is in progress, voters would be prevented from participating. The same type of problem arises on Election Day.

48. Beyond the risk of halting voting activity, my experience suggests that county boards of elections are not sufficiently staffed to carry out duties associated with an ongoing election while making geocode changes accurately. The same constraints would recommend against any timetable that would require that counties conduct geocode changes during the day prior to Election Day, and during the county's canvassing period. Candidate filing, ballot preparation and election coding could, however, occur during early voting and the canvassing period, since most of these activities occur at the State Board of Elections or through vendors—not the county. It should be noted that geocode changes must precede ballot coding, since ballot coding relies on accurate jurisdictional information to create the different ballot styles.

49. Assuming the (1) state absentee deadline remains for the November General Election, and (2) state absentee deadline (June 13, *see* Paragraph 42, *supra*) remains for a Third Primary held August 2, the State Board would have needed new jurisdiction files by May 4, as reflected below:

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
May 2016	1	2	3	4 Deadline to receive shapefiles	5 Geocode changes begin	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30 Ballot Preparation and Election Coding Begins	31	1	2	3	4 One-Stop Ends



Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
Jun 2016	5	6	7 Congressional Primary Election	8	9	10	11
	12	13 State Absentee Deadline	14 County Canvass	15	16	17	18

- ☐ Geocode changes (15 Business Days; 3 weeks)
☒ Geocode changes should not occur during this time period

50. Assuming (1) absentee deadlines are reduced to the federal minimum for the November General Election, and (2) state absentee deadlines (June 27, *see* Paragraph 44, *supra*) remain for a Third Primary held August 16, the State Board would have needed new jurisdiction files by May 4, as reflected below:

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
May 2016	1	2	3	4 Deadline to receive shapefiles	5 Geocode changes begin	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30	31	1	2	3	4 One-Stop Ends
Jun 2016	5	6	7 Congressional Primary Election	8	9	10	11
	12	13 Ballot Preparation and Election Coding Begins	14 County Canvass	15	16	17	18
	19	20	21	22	23	24	25

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
	26	27 State Absentee Deadline	28	29	30		

-  Geocode changes (15 Business Days; 3 weeks)
-  Geocode changes should not occur during this time period

51. Based on my experience and the estimates provided by staff, it is my view that a Third Primary cannot be held on either August 2 or August 16 without reducing the absentee voting period for the Third Primary.

52. The need for jurisdiction files on May 4 is not altered by picking between absentee requirements for the November General Election, because there are windows in which it is inadvisable for county boards to perform geocoding processes, including during the early voting period.

Third Primary preparations omitting an Absentee Deadline



53. In the absence of an absentee deadline for a Third Primary, it is helpful to plan backwards from the start of one-stop early voting.

54. A Third Primary held August 2 would have required that the State Board receive new jurisdiction files on or before May 4. According to the timelines referenced above, *see* Paragraph 24, *supra*, ballot preparation and election coding can begin no later than June 9.

Ballot Preparation can begin (June 9)	Ballot Preparation & Election Coding (2 weeks)	Burning Media and Touch Screen Ballots (2 weeks)	L&A and Mock Election buffer (2 weeks)	Early Voting (Jul 21)
--	---	---	--	-----------------------------

As illustrated in the calendar below, geocode changes must therefore begin by May 5 in order to avoid days where no geocode changes can occur. See Paragraph 46 through 48, *supra*.

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
May 2016	1	2	3	4 Deadline to receive shapefiles	5 Geocode changes begin	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30	31	1	2	3	4 One-Stop Ends
Jun 2016	5	6	7 Congressional Primary Election	8	9 Ballot Preparation and Election Coding Begins	10	11
	12	13	14 County Canvass	15	16	17	18



-  Geocode changes (15 Business Days; 3 weeks)
 Geocode changes should not occur during this time period

55. A Third Primary held August 16 would have required that the State Board receive new jurisdiction files on or before May 12. According to the timelines referenced above, *see* Paragraph 24, *supra*, ballot preparation and election coding can begin no later than June 23.

Ballot Preparation can begin (June 23)	Ballot Preparation & Election Coding (2 weeks)	Burning Media and Touch Screen Ballots (2 weeks)	L&A and Mock Election buffer (2 weeks)	Early Voting (Aug 4)
--	--	--	--	----------------------

As illustrated in the calendar below, geocode changes must therefore begin by May 13 in order to avoid days where no geocode changes can occur. See paragraphs 46 through 48.

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
	8	9	10	11	12 Deadline to receive shapefiles	13 Geocode changes begin	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30	31	1	2	3	4 One-Stop Ends
Jun 2016	5	6	7 Congressional Primary Election	8	9	10	11
	12	13	14 County Canvass	15 Geocode changes resume	16	17	18
	19	20	21	22	23 Ballot Preparation and Election Coding Begins	24	25

-  Geocode changes (15 Business Days; 3 weeks)
-  Geocode changes should not occur during this time period

56. The need for jurisdiction files early in the process is not significantly affected by the presence or absence of absentee voting because the beginning of one-stop early voting requires the completion of all tasks relating to tabulation and systems testing—administrative tasks that would have been occurring concurrently with the absentee voting period.

Unanticipated Costs to Counties

57. Early voting during an unanticipated election poses significant difficulties for the county boards of elections, which are funded by their county commissioners.

In 2013, the General Assembly enacted the Voter Information Verification Act, 2013 Session Laws 381, which introduced new requirements for early voting. S.L. 2013-381, § 25.2. At a minimum, counties are now required to offer one-stop early voting consistent with the following formula, unless hours reductions are approved unanimously by the county board of elections and by the State Board: One-stop early voting hours for a primary without a presidential contest must meet or exceed cumulative early voting hours for the 2010 primary (19,901 hours statewide).


58. While the scope of redistricting is not known, statewide budget data collected by the State Board following the 2014 general election suggests that the county-level costs associated with matching hours one-stop hours could exceed \$2 million, with total costs to the counties perhaps exceeding \$9 million. The State Board temporarily suspended the hours-matching requirement for the June Primary pursuant to special authorization contained in S.L. 2016-2. Given the unanticipated and unbudgeted nature of a Third Primary, it is likely that the hours-matching requirement would prove highly burdensome for county elections officials, who must scout locations, hire poll workers, and secure funding from their county commissioners.

59. The 2016 Election Cycle has been characterized by a number of changes affecting the voters' experience in our state. Designating a Third Primary to be held between the June Primary and the November General Election may contribute to voter confusion and result in depressed turnout.

60. A stand-alone congressional primary in September 1998 drew roughly 3.6% of registered voters. Comparable turnout in a Special Primary would reduce participation to roughly 1/10th of that in the March Primary.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of May, 2016.



Kim Westbrook Strach
Executive Director
North Carolina State Board of Elections

24744300.1