No. _____

In The Supreme Court of the United States

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; BOBBY HEATH; MAXINE WHITLEY; and ALAN SWAIN,

Applicants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections; JEFFERSON CARMON III, in his official capacity as a member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Respondents,

&

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Intervenor-Respondents.

On Application for Injunction Pending Appeal from
the United States Court of Appeals for the Fourth Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

October 22, 2020

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Bobby Heath; Maxine Whitley; and Alan Swain. Applicants were the plaintiffs in the district court and the appellants in the Fourth Circuit.

Respondents are Damon Circosta, in his official capacity as Chair of the North Carolina State Board of Elections; Stella Anderson, in her official capacity as a member of the North Carolina State Board of Elections; Jefferson Carmon III, in his official capacity as a member of the North Carolina State Board of Elections; and Karen Brinson Bell, in her official capacity as the Executive Director of the North Carolina State Board of Elections. Respondents were the defendants in the district court and the appellees in the Fourth Circuit.

Intervenor-Respondents are the North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz. Intervenor-Respondents were intervenor-defendants in the district court and intervenor-appellees in the Fourth Circuit.

The Fourth Circuit consolidated Applicants' appeal with *Wise v. Circosta*, No. 20-2104 (4th Cir.). Plaintiffs to that case are Patsy J. Wise; Regis Clifford; Samuel Grayson Baum; Donald J. Trump for President, Inc.; Gregory F. Murphy, U.S. Congressman; Daniel Bishop, U.S. Congressman; Republic National Committee;

National Republican Senatorial Committee; National Republican Congressional Committee; North Carolina Republican Party; and Camille Annette Bambini. These plaintiffs were the appellants in the Fourth Circuit.

Defendants in *Wise* are Damon Circosta, in his official capacity as Chair of the North Carolina State Board of Elections; Stella Anderson, in her official capacity as a member of the North Carolina State Board of Elections; Jefferson Carmon III, in his official capacity as a member of the North Carolina State Board of Elections; Karen Brinson Bell, in her official capacity as the Executive Director of the North Carolina State Board of Elections; and the North Carolina State Board of Elections. These defendants were the appellees in the Fourth Circuit.

Intervenor-Defendants in *Wise* are the North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz. These intervenor-defendants were the intervenor-appellees in the Fourth Circuit.

The proceedings below were:

1. *Wise v. Circosta*, Nos. 20-2104, 20-2107 (4th Cir.) (en banc) – injunction pending appeal denied October 20, 2020

2. *Moore v. Circosta*, No. 20-cv-911 (M.D.N.C.) – judgment entered October 14, 2020

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, no Applicant has a parent company or a publicly held company with a 10 percent or greater ownership interest in it.

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TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Applicants respectfully request an injunction enjoining Numbered Memo 2020-22 (the "Memorandum"), which extends North Carolina's absentee ballot receipt deadline from 5:00 p.m. November 6, 2020 for ballots postmarked on or before election day, to 5:00 p.m. November 12, 2020, pending appeal of the district court's denial of Applicants' motion for a preliminary injunction and, should it be necessary, a petition for certiorari to this Court. Applicants also request that this Court expedite consideration of this motion and enjoin the Memorandum while this motion is being considered. This case involves a "nonrepresentative entit[y] changing election law . . . during a federal election," and "[i]n making those changes, [it has] undone the work of the elected state legislature[]." App. 252 (Wilkinson and Agee, JJ., dissenting). Immediate relief is required to ensure that this unconstitutional usurpation of power and "changing the rules of the game in the middle of an election" is not allowed to stand, App. 253 (Wilkinson and Agee, JJ., dissenting), and to avoid the specter of a post-election dispute over the validity of ballots received during the disputed period in North Carolina.

The Fourth Circuit, sitting en banc, denied Applicants' emergency motion for an injunction pending appeal. App. 233. Judge Wilkinson and Judge Agee, joined by Judge Niemeyer, who was "pleased to join the dissenting opinion written by the panel majority," App. 279 (Niemeyer, J., dissenting),[1] dissented from the grant of a hearing

[1] This case was originally assigned to a panel that resulted in a 2-1 majority in favor of granting the injunction pending appeal. However, "[f]inding that he had been outvoted, the dissenting judge immediately initiated an en banc vote before the panel

en banc and denial of the emergency motion. Decrying the "proliferation of pre-election litigation that creates confusion and turmoil and that threatens to undermine public confidence in the federal courts, state agencies, and the elections themselves," App. 253 (Wilkinson and Agee, JJ., dissenting), those judges determined that Applicants had demonstrated a likelihood of success on the merits of their Elections Clause and Equal Protection claims, that *Purcell v. Gonzalez*, 549 U.S. 1 (2006), required the court to bar the NCSBE from changing the election rules after voting had started through a state-court consent decree, and that an injunction pending appeal was necessary to preserve the status quo—namely, the rules the General Assembly had set for the election in response to the COVID-19 pandemic by exercising its constitutional powers under the Elections Clause, App. 265 (Wilkinson and Agee, JJ., dissenting). And they "urge[d]" Applicants "to take this case up to the Supreme Court immediately," as "this case presents a clean opportunity for the Supreme Court to right the abrogation of a clear constitutional mandate and to impart to the federal elections process a strong commitment to the rule of law." App. 254 (Wilkinson and Agee, JJ., dissenting).

As recognized by the dissent, the requested injunction will maintain the status quo pending appeal. Absent immediate relief, the implementation of the Memorandum will engender substantial confusion among both voters and election officials, create considerable administrative burdens, and produce disparate

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could even circulate its views to the entire court, let alone to the public." App. 279 (Niemeyer, J., dissenting).

treatment of voters in the ongoing election — all after in-person early voting has already started and a mere 12 days from election day. Indeed, after the North Carolina Court of Appeals denied Applicants Moore's and Berger's petition for a writ of supersedeas and motion for a stay pending appeal of a state-court consent judgment incorporating the Memorandum in a parallel state-court case, the North Carolina State Board of Elections ("NCSBE") issued the Memorandum on October 19, 2020, and it is publicly available on its website. Prior to this, the rules of the election were the same as they were since voting started on September 4. Thus, an injunction is necessary to maintain the status quo.

The public interest also favors an injunction pending appeal, as the public interest favors adhering to the rules for the election established by the General Assembly and in place when voting began, not contrary rules that the NCSBE "negotiated . . . secretly" with plaintiffs in litigation "without consulting the legislative leaders," who were intervenor defendants in the litigation but were cut out of the settlement discussions, and implemented well after voting was underway. App. 272 (Wilkinson and Agee, JJ., dissenting). Applicants therefore request that this Court enjoin the Memorandum pending appeal.

OPINIONS BELOW

The Fourth Circuit's en banc order denying an injunction pending appeal is not yet reported but is reproduced at App. 231–80. The district court's opinion denying a preliminary injunction is reported at *Moore v. Circosta*, No. 20-cv-911, 2020 WL 6063332 (M.D.N.C. Oct. 14, 2020), and is reproduced at App. 139–230.

JURISDICTION

The district court denied Applicants' motion for a preliminary injunction. On interlocutory appeal, the Fourth Circuit, sitting en banc, denied Applicants' motion for an injunction pending appeal. This Court has jurisdiction to issue an injunction pending appeal and certiorari. 28 U.S.C. §§ 1254(1), 1651(a).

STATEMENT OF THE CASE

Respondents have engaged in an unprecedented effort to usurp the North Carolina General Assembly's prerogative to regulate federal elections in North Carolina. Disregarding the clear mandate of the Constitution's Elections Clause, which provides that only the "Legislature[s]" of the several states or Congress may prescribe the time, place, and manner of federal elections, U.S. CONST. art. I, § 4, cl. 1, Respondents, through the NCSBE's Executive Director, have issued Number Memo 2020-22 that contravenes the General Assembly's duly enacted statutes after the General Assembly had enacted bipartisan legislation addressing voting during the pandemic this November. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169"). The Memorandum substantially changes North Carolina's duly enacted election laws by extending the absentee ballot receipt deadline from three to nine days after election day and amending the postmark requirements for ballots received after election day. And it does so after over 1.8 million absentee ballots have been cast.[2] Because this Memorandum has been issued while voting is ongoing,

[2] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 21, 2020), *available at* https://bit.ly/33SKzAw.

Respondents are applying different rules to ballots cast by similarly situated voters, thus violating the Equal Protection Clause in two distinct ways: Respondents are administering the election in an arbitrary and nonuniform manner that will result in disparate treatment by inhibiting the rights of voters who cast their absentee ballots before the Memorandum was issued to participate in the election on an equal basis with other citizens in North Carolina, and Respondents are purposefully allowing otherwise unlawful votes to be counted, thereby diluting North Carolina voters' lawful votes.

Respondents are disserving North Carolina voters and sowing considerable confusion through their Memorandum and ever-changing directives. As the district court held, Applicants have established a likelihood of success on their Equal Protection challenges regarding the deadline extension for receipt of ballots. The Fourth Circuit dissenters agreed, further determining that Applicants have established a likelihood of success on their Elections Clause claim as well. For these and the reasons explained below, Applicants respectfully request that the Court grant their emergency motion for an injunction pending appeal and, if necessary, a petition for writ of certiorari to this Court.

I. Facts and Procedural History

On March 26, 2020, Executive Director Bell submitted a letter to Governor Cooper and to legislative leaders recommending several statutory changes to North Carolina's voting requirements in response to the COVID-19 pandemic, including that the General Assembly "[r]educe or eliminate the witness requirement." App. 5.

On June 11, 2020, the General Assembly overwhelmingly passed bipartisan legislation, HB1169, adjusting the voting rules for the November 2020 election, and Governor Cooper signed it into law the next day. HB1169 accepted some, but not all, of what Executive Director Bell recommended. As relevant here, HB1169 reduced the absentee ballot witness requirement to one, requiring that absentee ballots be "marked in the presence of one qualified witness." HB1169 § 1.(a). But it also left unaltered several facets of the State's election procedures. HB1169 did not change the statutory absentee ballot receipt deadline, which requires ballots to be "postmarked" on or before election day and received by the county board of elections no later than three days after election day by 5:00 p.m. to be counted. N.C. GEN. STAT. § 163-231(b)(2)(b). It also left in place the criminal prohibition of any person other than the voter, the voter's near relative, or the voter's verifiable legal guardian from returning a completed absentee ballot. *See id.* § 163-226.3(a)(5).

Several state and federal lawsuits were filed challenging provisions of North Carolina election laws, including, as relevant here, the witness requirement and absentee ballot receipt deadline. First, in *Democracy North Carolina v. North Carolina State Board of Elections*, in ruling on plaintiffs' motion for a preliminary injunction, the federal district court found that the statutory witness requirement was constitutional but enjoined the NCSBE "from the disallowance or rejection, or permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation." *Democracy N.C.*

v. N.C. State Bd. of Elections, No. 20-cv-457, 2020 WL 4484063, at *36, *64 (M.D.N.C. Aug. 4, 2020) (Osteen, J.).

In response to Judge Osteen's August 4 order, on August 21, 2020, the NCSBE released guidance for the procedure county boards were required to use to address deficiencies in absentee ballots. App. 9–17. This Original Numbered Memo 2020-19 sorted ballot deficiencies into two categories: curable and uncurable. App. 12. A ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. App. 12. A ballot could not be cured, and instead was required to be spoiled, in the case of all other listed deficiencies, including a missing signature, printed name, or address of the witness; an incorrectly placed witness or assistant signature; or an unsealed or resealed envelope. App. 12.

Second, in *Chambers v. State*, a three-judge panel of the North Carolina Superior Court also upheld the witness requirement on a full preliminary injunction record. Order on Injunctive Relief at 6–7, *Chambers v. State*, No. 20-CVS-500124 (N.C. Wake Cnty. Super Ct. Sept. 3, 2020). North Carolina began issuing ballots the next day, September 4, 2020, marking the beginning of the election process. On September 11, 2020, the NCSBE directed counties to stop notifying voters of deficiencies in their ballot, as advised in Original Numbered Memo 2020-19, pending further guidance from the NCSBE. App. 25.

On September 22, 2020, over two weeks after the State began issuing ballots, and in connection with a proposed consent judgment filed with the state court in a third case, *North Carolina Alliance for Retired Americans v. North Carolina State*

Board of Elections, the NCSBE issued a Revised Numbered Memo 2020-19, which set forth a variety of new policies not implemented in the Original Numbered Memo 2020-19. Specifically, Revised Numbered Memo 2020-19 modified which ballot deficiencies fell into the curable and uncurable categories. It advised that ballots missing a witness or assistant name or address, as well as ballots with a missing or misplaced witness or assistant signature, could be cured via voter certification. App. 33–35. The only deficiencies that could not be cured by certification, and thus required spoliation, were where the envelope was unsealed or where the envelope indicated the voter was requesting a replacement ballot. App. 34. Under Revised Numbered Memo 2020-19, therefore, voters could have cast absentee ballots in the absence of a witness altogether.

As part of the same proposed consent judgment, the NCSBE also announced (but did not implement) Numbered Memo 2020-22 on September 22, 2020. The Memorandum extends the ballot receipt deadline from three to nine days after election day and redefines the statutory term "postmark" to allow the counting of ballots without a postmark in certain circumstances for purposes of the ballot receipt deadline. App. 310–11.

The single judge of the North Carolina Superior Court in *North Carolina Alliance for Retired Americans* entered that proposed consent judgment negotiated between the plaintiffs and the NCSBE. Through that consent judgment, the NCSBE agreed to extend the deadline for receipt of mail-in absentee ballots mailed on or before election day from three days after election day to nine days after election day

and, despite successfully defending the witness requirement in both State and Federal court, to implement a cure process that vitiated the witness requirement. App. 89–113.

In the *North Carolina Alliance for Retired Americans* state-court litigation, the NCSBE repeatedly advised the court that Revised Numbered Memo 2020-19 was issued to comply with the *Democracy N.C.* injunction. *See* App. 42, 51, 53, 55, 66, 69, 76–77. Moreover, on September 25, 2020, during a status conference before Judge Dever in the District Court for the Eastern District of North Carolina prior to transfer of this case to Judge Osteen, counsel for the NCSBE stated that the NCSBE issued Revised Numbered Memo 2020-19 "in order to comply with Judge Osteen's preliminary injunction in the *Democracy N.C.* action in the Middle District." App. 123. At that time, counsel for the NCSBE indicated that they had not yet submitted the Revised Numbered Memo 2020-19 to Judge Osteen, "but that it was on counsel's list to get [it] done today." App. 123. On September 28, 2020, the NCSBE filed the Revised Numbered Memo 2020-19 with Judge Osteen in the *Democracy N.C.* case, despite telling the *N.C. Alliance* Superior Court that it had already done so on September 22. App. 66.

Applicants filed this lawsuit on September 26, 2020, requesting that the district court enter a preliminary and permanent injunction enjoining Respondents from enforcing and distributing Revised Numbered Memo 2020-19 and Numbered Memo 2020-22 because they violated the Elections Clause and the Equal Protection Clause. Simultaneously, Applicants filed a motion for a temporary restraining order.

On October 3, 2020, the District Court for the Eastern District of North Carolina granted the temporary restraining order motion, determining that Applicants were likely to succeed on the merits of their claims that the Memoranda violated the Equal Protection Clause. App. 114–34. Consequently, although the state court had entered the consent judgment on October 2 requiring the NCSBE to implement the Memorandum, the Memorandum was enjoined the next day, on October 3.

During this period, Respondents issued two other numbered memoranda that altered the election process. First, on October 1, 2020, the NCSBE issued Numbered Memo 2020-27, which was issued in response to the Middle District's order in *Democracy N.C.* regarding the need for the parties to attend a status conference to discuss Revised Numbered Memo 2020-19. App. 86–88 (rescinded Oct. 19, 2020). The Memo advised county boards that the district court did not find Revised Numbered Memo 2020-19 "consistent with the Order entered by [the] Court on August 4, 2020," and therefore instructed that "[c]ounty boards that receive an executed absentee container-return envelope with a missing witness signature shall take no action as to that envelope." App. 88. In all other respects, Revised Numbered Memo 2020-19 remained in effect. Second, on October 4, 2020, in response to Judge Dever's temporary restraining order, the NCSBE issued Numbered Memo 2020-28, which halted all cure procedures until further notice. App. 135–38 (rescinded Oct. 19, 2020).

After Judge Dever transferred the case to Judge Osteen, Applicants filed a motion for a preliminary injunction on October 6, 2020. On October 14, 2020, the district court found that Applicants demonstrated a likelihood of success on the

merits with respect to "their Equal Protection challenge to the Receipt Deadline Extension" implemented through Numbered Memo 2020-22. App. 196. It explained that these changes subjected Applicants Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. App. 191. Notwithstanding the strong merits of Applicants' claims and the unconstitutionality of Respondents' actions, however, the district court declined to issue a preliminary injunction with respect to the ballot deadline extension because of its interpretation of this Court's decision in *Purcell*. App. 206–08.

Also on October 14, 2020, in an order in the *Democracy N.C.* case, Judge Osteen enjoined the NCSBE from implementing the cure process as described in Revised Numbered Memo 2020-19 to the extent it authorized acceptance of an absentee ballot without a witness signature. Memorandum Opinion & Order at 41, Doc. 169, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C. Oct. 14, 2020). Also in this order, Judge Osteen excoriated the NCSBE for mischaracterizing his August 4 order and using that mischaracterization to obtain relief in state court. *Id.* at 24–33. He determined that the NCSBE had frustrated the court's order, that the record "explicitly disprove[d]" that the NCSBE "was not revising [Numbered Memo 2020-19] because it believed those revisions were necessary to comply with" the court's order, *id.* at 24, that the NCSBE had misinformed the state court about having informed Judge Osteen of their revised cure process, *id.* at 25, and that despite citing

his order as the reason for the revised cure process, that process was inconsistent with the order, *id.* at 21, 25.

On October 16, 2020, Applicants filed an emergency motion for an injunction pending appeal in the Fourth Circuit, asking that court to issue an injunction enjoining Numbered Memo 2020-22 and Revised Numbered Memo 2020-19 to the extent it incorporated the extended receipt deadline established by Numbered Memo 2020-22 pending appeal of the district court's denial of Applicants' motion for a preliminary injunction. On October 20, 2020, the Fourth Circuit, sitting en banc, denied that motion. Judge Wilkinson and Judge Agee, joined by Judge Niemeyer, dissented from the grant of a hearing en banc and denial of the emergency motion. They determined that Applicants had demonstrated a likelihood of success on the merits of their Elections Clause and Equal Protection claims, that *Purcell* required the court to bar the NCSBE from changing the election rules after voting had started through a state-court consent decree, and that an injunction pending appeal was necessary to preserve the status quo—namely, the rules the General Assembly had set for the election in response to the COVID-19 pandemic by exercising its constitutional powers under the Elections Clause. App. 265 (Wilkinson and Agee, JJ., dissenting). The dissenters recognized the "insidious formula" that the NCSBE is using "to upend the set rules right in the middle of an election," and decried the "proliferation of pre-election litigation that creates confusion and turmoil and that threatens to undermine public confidence in the federal courts, state agencies, and the elections themselves." App. 253 (Wilkinson and Agee, JJ., dissenting). And they

"urge[d]" Applicants "to take this case up to the Supreme Court immediately," as "this case presents a clean opportunity for the Supreme Court to right the abrogation of a clear constitutional mandate and to impart to the federal elections process a strong commitment to the rule of law." App. 254 (Wilkinson and Agee, JJ., dissenting).

On October 19, 2020, the North Carolina Court of Appeals denied Applicants Moore's and Berger's petition for a writ of supersedeas and motion for a stay pending appeal of the consent judgment entered in *N.C. Alliance*.[3] That same day, Respondents issued a new version of Revised Numbered Memo 2020-19, which removed any reference to the extended receipt deadline and recategorized the absence of a witness or assistant signature as an uncurable defect, issued Numbered Memo 2020-22, and rescinded Numbered Memo 2020-27 and Numbered Memo 2020-28, thereby reinstating the ballot cure process in compliance with Judge Osteen's orders.

REASONS FOR GRANTING THE INJUNCTION PENDING APPEAL

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction in "exigent circumstances" when the "legal rights at issue are indisputably clear" and injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (internal quotation marks and brackets omitted). This Court's discretion is broad: it may issue an

[3] Applicants Moore and Berger are pursuing a petition for a writ of supersedeas and a motion for a stay pending appeal of the consent judgment in the Supreme Court of North Carolina. Should that court deny relief, Moore and Berger plan to seek appropriate relief from this Court, which could be as early as next week.

injunction pending appellate review "based on all the circumstances of the case . . . [without] express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver v. Sebelius*, 571 U.S. 1171 (2014). Here, these factors favor granting the application for an injunction pending appeal.

I. Applicants Face Exigent Circumstances

Without emergency relief from this Court, Applicants will suffer irreparable harm. Applicants Moore and Berger will suffer irreparable harm if the General Assembly's carefully crafted legislation for the upcoming election is upset. Enjoining a "State from conducting [its] elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] [the State]." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). As Chief Justice Roberts has explained, the inability to "employ a duly enacted statute" is an irreparable harm. *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). This irreparable harm is especially injurious in the present case because the General Assembly adopted election rules specifically for this election.

An injunction from this Court will also prevent irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws. As the district court recognized, "[o]nce the election occurs, there can be no do-over and no redress," so "[t]he injury to these voters is real and completely irreparable if nothing is done." App. 205. This rationale extends to the injunction pending appeal context too as the casting of votes under unconstitutional Memorandum even for a short period of time will irreparably harm Heath and

Whitley's right to vote on an equal basis. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for *even minimal periods of time*, unquestionably constitutes irreparable injury." (emphasis added)).

The exigency of Applicants' situation is underscored by the eleventh-hour nature of the NCSBE's ballot receipt deadline extension. Absentee ballots became available to voters on September 4, in-person early voting began on October 15, and election day is just 12 days away. "Allowing the [NCSBE's] changes to go into effect now, two weeks before the election and after [over 1.8 million] people have voted in North Carolina, would cause . . . intolerable chaos." App. 254 (Wilkinson and Agee, JJ., dissenting). An injunction pending appeal will provide certainty to the public on the procedures that apply during the election and promote confidence in the election. It will avoid substantial confusion, among both voters and election officials, by preventing a change to the election rules after the election has already started. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (explaining that this Court "has repeatedly emphasized that lower . . . courts should ordinarily not alter the election rules on the eve of an election"); *Purcell*, 549 U.S. at 4–5. The NCSBE itself admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and cause disparate treatment of voters in the ongoing election. *See* Reply Brief of the State Board Defendants-Appellants at 8, Doc. 103, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020) ("[A]t this point in time, changes to the current [absentee voting] process would run

a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9, 27–35.

In light of the NCSBE's changing the rules of the election at the last minute—"a pernicious pattern [that] is making the courts appear partisan, destabilizing federal elections, and undermining the power of the people to choose representatives to set election rules," thereby "mak[ing] the promise of the Constitution's Elections and Electors Clauses into a farce," App. 277 (Wilkinson and Agee, JJ., dissenting)—Applicants face exigent circumstances.

II. Applicants Have an Indisputably Clear Right to Relief

A. The Memorandum Violates the Elections Clause

The text of the Elections Clause is clear: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Since neither Congress nor the General Assembly promulgated the NCSBE's Memorandum, it is unconstitutional because it overrules the enactments of the General Assembly to regulate the times, places, and manner of holding the ongoing federal election.

The General Assembly is the "Legislature," established by the people of North Carolina. N.C. CONST. art. II, § 1. And the North Carolina Constitution affirmatively states that the grant of legislative power to the General Assembly is exclusive—"[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." *Id.* art. I, § 6; *see also State v. Berger*, 781 S.E.2d 248, 250 (N.C. 2016). With this grant of exclusive legislative power, the General Assembly is vested with the authority to "enact[] laws that protect or promote the health, morals, order, safety, and general welfare of" the State. *Id.* (internal quotation marks omitted). Concurrently, this exclusive grant of legislative power means the U.S. Constitution has assigned the role of regulating federal elections in North Carolina to the General Assembly. By choosing to use the word "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole*, but only to the state's legislative branch, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015), and in North Carolina that is the General Assembly.

The Elections Clause thus mandates that the General Assembly is the only constitutionally empowered state entity to regulate federal elections. As this Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—the state legislatures' power to prescribe regulations for federal elections "cannot be taken." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And courts have long recognized this limitation on the power

of states to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

The NCSBE has clearly violated the Elections Clause by issuing the Memorandum, which purports to adjust the rules of the election that have already been set by statute. But the NCSBE does not have freestanding power under the U.S. Constitution to rewrite North Carolina's election laws and to "prescribe[]" its own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. The North Carolina Constitution is fully consistent with this mandate and states that "[t]he legislative power of the State shall be vested *in the General Assembly*," N.C. CONST. art. II, § 1, and it makes clear that "[t]he legislative, executive, and supreme judicial powers of the State Government shall be forever separate and distinct from each other," *id.* art. I, § 6. Thus, the NCSBE is not the "Legislature" empowered to adjust the rules of the federal election on their own. *See League of Women Voters of Mich. v. Benson*, No. 17-cv-14148, 2019 WL 8106156, at *3 (E.D. Mich. Feb. 1, 2019) (declining to enter a consent decree in a partisan gerrymandering case between the League of Women Voters and the Secretary of State because only the Michigan Legislature had authority to regulate the time, place, and manner of elections). What is more, under North Carolina law, "the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency

which it may create." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (N.C. 1978).

Even if it were permissible in some circumstances for an executive agency like the NCSBE to exercise the authority to prescribe regulations governing the times, places, and manner of federal elections that the Elections Clause assigns exclusively to the legislature (and it is not), *see Cooper v. Berger*, 809 S.E.2d 98, 112 (N.C. 2018), the NCSBE would lack authority to do so here. As the district court and the Fourth Circuit dissenters found, the NCSBE lacked authority to make the extensive alterations to the election laws through the Memorandum under either N.C. GEN. STAT. § 163-22.2 or § 163-27.1. *See* App. 269–73 (Wilkinson and Agee, JJ., dissenting); App. 217–24. Section 163-22.2 does not authorize the NCSBE to implement rules that directly conflict with the General Assembly's duly enacted laws—like the statutory receipt deadline—and the Executive Director did not have the power to redefine the meaning of "natural disaster" under § 163-27.1 to include a pandemic to exercise her emergency powers to make the changes. What is more, § 163-27.1 is inapplicable on its face because it requires "the normal schedule for the election" to have been "disrupted," but the normal schedule for the November 2020 election has not been altered in any way. Furthermore, § 163-27.1 directs the Executive Director to "avoid unnecessary conflict with the provisions of" North Carolina election laws, and in

enacting HB1169, the General Assembly already decided what adjustments to the election laws are necessary to account for the pandemic.[4]

Furthermore, contrary to the district court's determination, *see* App. 211–14, and as the Fourth Circuit dissenters found, App. 262–64 (Wilkinson and Agee, JJ., dissenting), Moore and Berger have standing to raise their Elections Clause claims. Moore and Berger are agents of the General Assembly to protect its institutional right as the "Legislature" of North Carolina to regulate federal elections. This Court has made clear that "a State must be able to designate agents to represent it in federal court." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And North Carolina has made abundantly clear that

> *[w]henever* the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the *subject* of an action in *any* State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate,

[4] Whatever deference this Court would typically afford a state court's interpretation of these statutes governing the authority of the NCSBE, that deference is unwarranted here. Because federal elections "arise from the Constitution itself," any "state authority to regulate election to those offices . . . had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001). When the state legislatures exercise this power, they are exercising a federal constitutional power that cannot be usurped by other branches of state government. *See Ariz. State Legislature*, 576 U.S. at 807–08. Thus, a "significant departure from the [State's] legislative scheme for appointing Presidential electors" or for electing members of the federal Congress "presents a federal constitutional question" this Court must answer. *Bush v. Gore*, 531 U.S. 98, 113 (2000) (Rehnquist, C.J., concurring); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816) (concluding Virginia court misinterpreted state law in order to reach a federal question). The constitutional delegation of power to the state legislature means that "the text of [state] election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush*, 531 U.S. at 112–13 (Rehnquist, C.J., concurring). Accordingly, this Court must analyze state law itself to determine if the federal Constitution was violated; the integrity of federal elections is not a simple state-law matter.

> as agents of the State through the General Assembly, shall be necessary parties . . . .

N.C. GEN. STAT. § 120-32.6(b) (emphases added). In this case, the General Assembly, acting through its agents Moore and Berger, asserts that the validity of its election laws has been usurped by the Memorandum. Since "state law authorizes legislators to represent the State's interests," Moore and Berger "have standing." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

B. The Memorandum Violates the Equal Protection Clause

State election laws may not "deny to any person within" the state's "jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Constitution thus ensures "the right of all qualified citizens to vote, in state as well as in federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). "Obviously included within the right to [vote], secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted . . . ." *United States v. Classic*, 313 U.S. 299, 315 (1941). But the right to vote includes the right to have one's ballot counted "at full value without dilution or discount." *Reynolds*, 377 U.S. at 555 n.29 (internal quotation marks omitted).

To ensure equal weight is afforded to all votes, the Equal Protection Clause further requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush*, 531 U.S. at 105; *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in

his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [this Court's] decisions."). "[T]reating voters different" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001).

At a minimum then, the Equal Protection Clause requires the "nonarbitrary treatment of voters" and forbids voting practices that are "standardless," without "specific rules designed to ensure uniform treatment." *Bush*, 531 U.S. at 103, 105–06; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 477–78 (6th Cir. 2008). Consequently, the "formulation of uniform rules" is "necessary" because the "want of" such rules may lead to "unequal evaluation of ballots." *Bush*, 531 U.S. at 106.

The district court found that Appellants demonstrated a likelihood of success on the merits with respect to "their Equal Protection challenge to the Receipt Deadline Extension" implemented through Numbered Memo 2020-22 because that change subjects Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. App. 191–96. The Fourth Circuit dissenters agreed and further determined that the Memorandum likely violates Heath and Whitley's right to have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29. *See* App. 266–74 (Wilkinson and Agee, JJ., dissenting).

1. Arbitrary and Nonuniform Election Administration

The Memorandum will cause North Carolina to administer its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. North Carolina law requires absentee ballots to be received, at the latest, by 5:00 p.m. three days after election day. The Memorandum, by contrast, allows absentee ballots to be received up to *nine days* after election day. *See* App. 310. This is in violation of the General Assembly's duly enacted statutes but would also be a change in the rules while voting is ongoing. The statutory receipt deadline governed the absentee ballot submission process when Heath and Whitley submitted their ballots. Allowing the Memorandum to go into effect would thus be a sudden about-face on the rules governing the ongoing election that will upend the careful bipartisan framework that has structured voting so far.

Accordingly, under the Memorandum, North Carolina will necessarily be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. *See Bush*, 531 U.S. at 106. Over 150,000 voters cast their ballots before the Memorandum was unveiled on September 22, 2020, including Heath and Whitley, and over 1.8 million voters cast their ballots before the Memorandum was issued on October 19, 2020.[5] Those voters therefore worked to comply with the statutory ballot receipt deadline. By contrast, under the Memorandum, voters whose ballots would otherwise not be counted if received more

[5] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 21, 2020), *available at* https://bit.ly/33SKzAw.

than three days after election day will have an additional six days to return their ballot. The district court found this regime to be an arbitrary procedure that will result in disparate treatment, and therefore violative of Heath's and Whitley's Equal Protection rights, and the Fourth Circuit dissenters agreed. App. 196–98; App. 273–74 (Wilkinson and Agee, JJ., dissenting). Consequently, Applicants have established an indisputably clear right to relief.

2. Vote Dilution

Under the Memorandum the NCSBE will be violating North Carolina voters' rights to have their votes counted without dilution. *Reynolds*, 377 U.S. at 555 n.29. The Memorandum ensures that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in two ways: (1) by allowing absentee ballots to be counted if received up to nine days after election day; and (2) by allowing absentee ballots without a postmark to be counted in certain circumstances if received after election day. *See* App. 310–11. These changes will have the direct and immediate effect of diluting the votes of North Carolina voters by enabling unlawful votes.

Dilution of lawful votes, to any degree, by the casting of unlawful votes violates the right to vote, even if many other voters suffer the same injury. *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals"—be it from malapportioned districts or racial gerrymanders or, as here with Heath and Whitley,

the counting on unlawful ballots—"have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal quotation marks omitted). Indeed, this Court in *Reynolds* made clear that impermissible vote dilution also occurs when there is "ballot-box stuffing," a form of dilution that disadvantages all those who cast lawful ballots. 377 U.S. at 555. Thus, when the NCSBE purposely accepts even a single otherwise late ballot beyond the deadline set by the General Assembly, the NCSBE has accepted votes that dilute the weight of lawful voters like Heath and Whitley. *See Gill*, 138 S. Ct. at 1929; *Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208.

The district court did not address the merits of this claim because it found that Heath and Whitley did not have standing to assert it. App. 179–82. But Heath and Whitley are not asserting merely a generalized right. They are asserting that Respondents are unconstitutionally diluting their votes. Dilution of Heath's and Whitley's lawful votes, to any degree, by the casting of unlawful votes, violates their right to vote, even if many other voters suffer the same injury. *See Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208. And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill*, 138 S. Ct. at 1929 (internal quotation marks omitted). And it is simply not true that every voter in the state has standing to challenge these mid-election rule changes: those voters whose ballots were invalid under the regime that existed at the time

voting commenced, but whose ballots will now be counted, obviously do not have standing to complain of these changes.

III. Injunctive Relief Would Aid This Court's Jurisdiction

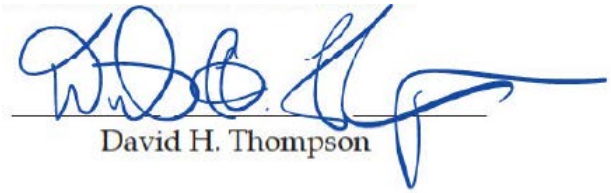
An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910). The Court should exercise this authority here because, without an injunction pending appeal, any request for certiorari will potentially become moot and this Court will forever lose its ability to obtain such review. Early in-person and mail-in voting have commenced in North Carolina, and election day is merely 12 days away. Once the election has come and gone, it will be impossible to repair election results that have been tainted by illegally and belatedly cast or mailed ballots. After all, the Court "cannot turn back the clock and create a world in which [North Carolina] does not have to administer the [2020] election under the strictures of the [Memoranda]." *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015); *see also Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020). Applicants therefore face the risk of irretrievably losing the rights asserted in this case.

CONCLUSION

For these reasons, Applicants respectfully ask this Court to issue an injunction pending disposition of Applicants' appeal in the Fourth Circuit and petition for a writ of certiorari in this Court.

Dated: October 22, 2020

Respectfully submitted,



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