No. ______

In The Supreme Court of the United States

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

Applicants,

v.

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

Plaintiff Respondents,

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections,

Defendant Respondents,

&

REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; DONALD J. TRUMP FOR PRESIDENT, INC.; and NORTH CAROLINA REPUBLICAN PARTY,

Intervenor Defendants.

On Application for Stay Pending Appeal from the Supreme Court of North Carolina

EMERGENCY APPLICATION FOR STAY PENDING APPEAL

October 27, 2020 (Counsel listed on next page)

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives. Applicants were intervenor-defendants in the North Carolina Superior Court for the County of Wake, intervenor-petitioners in the North Carolina Court of Appeals, and intervenor-petitioners in the Supreme Court of North Carolina.

Plaintiff Respondents are the North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz (together, "Alliance Respondents"). Alliance Respondents were the plaintiffs in the Superior Court, respondents in the Court of Appeals, and respondents in the Supreme Court of North Carolina.

Defendant Respondents are the North Carolina State Board of Elections; and Damon Circosta, in his official capacity as Chair of the North Carolina State Board of Elections (together, "State Respondents").

Intervenor Defendants are the Republican National Committee; the National Republican Senatorial Committee; the National Republican Congressional Committee; Donald J. Trump for President, Inc.; and the North Carolina Republican Party. Intervenor Defendants were intervenor-defendants in the Superior Court, intervenor-petitioners in the Court of Appeals, and intervenor-petitioners in the Supreme Court of North Carolina.

The state-court proceedings were:

1. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 440P20-1 (N.C. Oct. 26, 2020) – petition for writ of supersedeas denied

2. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 440P20-1 (N.C. Oct. 23, 2020) – motion for temporary stay of Consent Judgment denied

3. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. P20-513 (N.C. Ct. App. Oct. 19, 2020) – petition for writ of supersedeas denied and temporary stay of Consent Judgment entered on October 15, 2020 dissolved

4. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Wake Cnty. Super. Ct. Oct. 16, 2020) – motion for a stay of Consent Judgment pending appeal denied

5. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. P20-513 (N.C. Ct. App. Oct. 15, 2020) – motion for a temporary stay of Consent Judgment granted

6. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Wake Cnty. Super. Ct. Oct. 5, 2020) – findings of fact and conclusions of law supporting October 2, 2020 order granting joint motion for entry of Consent Judgment entered

7. *N.C. All. for Retired Ams. v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (N.C. Wake Cnty. Super. Ct. Oct. 2, 2020) – Plaintiffs' and Executive Defendants' Joint Motion for Entry of a Consent Judgment granted and Consent Judgment entered

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.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS i

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 4

JURISDICTION 4

STATEMENT OF THE CASE 5

I. Facts and Procedural History 6

REASONS FOR GRANTING THE STAY PENDING APPEAL 15

I. There Is a Reasonable Probability that Four Justices Will Vote to Grant Certiorari and a Fair Prospect that Five Justices Will Vote to Reverse. 15

A. The Consent Judgment Violates the Elections Clause 16

B. The Consent Judgment Violates the Equal Protection Clause 21

1. Vote Dilution 23

2. Arbitrary and Nonuniform Election Administration 24

II. Applicants Will Suffer Irreparable Harm Without a Stay 25

III. The Balance of Harms and the Public Interest Favor a Stay. 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases **Page**

Abbott v. Perez, 138 S. Ct. 2305 (2018) 15, 25, 26

Adams v. N.C. Dep't of Nat. & Econ. Res.,
249 S.E.2d 402 (N.C. 1978) 19

Anderson v. United States, 417 U.S. 211 (1974) 24

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
576 U.S. 787 (2015) 17, 20

Baker v. Carr, 369 U.S. 186 (1962) 24

Bush v. Gore, 531 U.S. 98 (2000) 20, 21, 22, 25

CBS Inc. v. Davis, 510 U.S. 1315 (1994) 4, 15

Chambers v. State, No. 20-CVS-500124
(N.C. Wake Cnty. Super Ct. Sept. 3, 2020) 8

Charfauros v. Bd. of Elections, 249 F.3d 941 (9th Cir. 2001) 22

Commonwealth ex rel. Dummit v. O'Connell,
181 S.W.2d 691 (Ky. Ct. App. 1944) 17, 18

Cook v. Gralike, 531 U.S. 510 (2001) 20

Cooper v. Berger, 809 S.E.2d 98 (N.C. 2018) 19

Democracy N.C. v. N.C. State Bd. of Elections, No. 20-cv-457,
2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) 7, 8

Democracy N.C. v. N.C. State Bd. of Elections, No. 20-cv-457,
2020 WL 6058048 (M.D.N.C. Oct. 14, 2020) 2, 5, 6, 13, 14

Democratic Nat'l Comm. v. Wisc. State Legislature,
No. 20A66 (U.S. Oct. 26, 2020) 1, 3, 16, 18, 27, 28

Dunn v. Blumstein, 405 U.S. 330 (1972) 22

Elrod v. Burns, 427 U.S. 347 (1976) 26

Fleming v. Gutierrez, 785 F.3d 442 (10th Cir. 2015) 29

Gill v. Whitford, 138 S. Ct. 1916 (2018) 24

Gray v. Sanders, 372 U.S. 368 (1963) 22

Hollingsworth v. Perry, 558 U.S. 183 (2010) 15

In re Opinions of Justices, 45 N.H. 595 (1864) 18

In re Plurality Elections, 8 A. 881 (R.I. 1887) 18

INS v. Legalization Assistance Project of the L.A. Cnty. Fed'n of Lab.,
510 U.S. 1301 (1993) 15

League of United Latin Am. Citizens, Council No. 4434 v. Clements,
999 F.2d 831 (5th Cir. 1993) 21

League of Women Voters of Mich. v. Benson, No. 17-cv-14148,
2019 WL 8106156 (E.D. Mich. Feb. 1, 2019) 18

League of Women Voters of Ohio v. Brunner, 548 F.3d 463 (6th Cir. 2008) 22

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304 (1816) 20

Maryland v. King, 567 U.S. 1301 (2012) 26

McPherson v. Blacker, 146 U.S. 1 (1892) 17

Moore v. Circosta, No. 20-cv-507,
2020 WL 5880129 (E.D.N.C. Oct. 3, 2020) 11, 12, 23

Moore v. Circosta, Nos. 20-cv-911, 20-cv-912, 2020 WL 6063332
(M.D.N.C. Oct. 14, 2020) 6, 19, 23, 25, 26

Moore v. Circosta, No. 20A72 (U.S. Oct. Oct. 22, 2020) 15

Pavek v. Donald J. Trump for President, Inc.,
967 F.3d 905 (8th Cir. 2020) 29

Purcell v. Gonzalez, 549 U.S. 1 (2006) 27

Republican Nat'l Comm. v. Democratic Nat'l Comm.,
140 S. Ct. 1205 (2020) 27

Respect Me. PAC v. McKee, 622 F.3d 13 (1st Cir. 2010) 27

Reynolds v. Sims, 377 U.S. 533 (1964) 21, 23, 24

State ex rel. Beeson v. Marsh, 34 N.W.2d 279 (Neb. 1948) 17

State v. Berger, 781 S.E.2d 248 (N.C. 2016) 17

Tex. Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020) 1, 27

Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020) 27

United States v. Classic, 313 U.S. 299 (1941) 21

Wise v. Circosta, Nos. 20-2104, 20-2107, 2020 WL 6156302
(4th Cir. Oct. 20, 2020) 2, 3, 6, 19, 23, 25

Constitutions, Statutes, and Rules

U.S. CONST. amend. XIV, § 1 21

U.S. CONST. art. I, § 4, cl. 1 .... 5, 16, 18

N.C. CONST. art. I, § 6 17

N.C. CONST. art. II, § 1 .... 16, 18

28 U.S.C. § 1257(a) 4

28 U.S.C. § 1651(a) 4

N.C. GEN. STAT. § 1A-1, Rule 24 9

N.C. GEN. STAT. § 1-72.2(b) 9

N.C. GEN. STAT. § 163-22.2 19

N.C. GEN. STAT. § 163-27.1 .... 19, 20

N.C. GEN. STAT. § 163-226.3(a)(5) 7

N.C. GEN. STAT. § 163-231(b)(2)(b) 7

Other Authorities

Absentee Data, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/33SKzAw 5, 23, 25, 28

Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169") § 1.(a) 5, 7

Numbered Memo 2020-19, N.C. State Bd. of Elections (Oct. 17, 2020), https://tinyurl.com/yx92falf 14

Reply Brief of the State board Defendants-Appellants, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 28

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

Applicants respectfully request a stay of the North Carolina Superior Court for the County of Wake's October 2, 2020 Consent Judgment pending appeal in the state courts and, should it be necessary, a petition for certiorari to this Court. "The Constitution provides that state legislatures — not . . . state judges, not state governors, not other state officials — bear primary responsibility for setting election rules." *Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, slip op. at 3 (U.S. Oct. 26, 2020) (Gorsuch, J., concurring in denial of application to vacate stay). An immediate stay is needed to vindicate this principle. Indeed, the activity at issue here is remarkable: it involves unelected state bureaucrats teaming up with state-court plaintiffs to secure a state-court consent judgment substantially changing the rules the legislature set specifically for this election *weeks after voting started*. To add to the audacity of this action, Respondents are likely to tell this Court that it is simply too late to correct their unlawful behavior given the closeness of election day. This "reminds us of the legal definition of chutzpah: a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020) (cleaned up). It also would provide a roadmap for other state election officials seeking to change election rules to their own liking — simply wait until close to (or after) voting starts to act and then insist it is too late for this Court to do anything about it. This type of activity must be rejected before it is given a chance to take root.

The Consent Judgment alters North Carolina election law in substantial ways. Principally at issue before this Court is the extension of North Carolina's generous statutory absentee ballot receipt deadline of 5:00 p.m. November 6, 2020 for ballots postmarked on or before election day, which under the Consent Judgment can now be counted if received by 5:00 p.m. November 12, 2020 and, in certain circumstances, without bearing a postmark. The Consent Judgment also blessed the vitiation of the statutory requirement that absentee ballots be witnessed, after the witness requirement had twice survived attack in litigation, by allowing a voter to cure a ballot cast without a witness with a simple voter affidavit. That aspect of the Consent Judgment has already been repudiated by Judge Osteen of the Middle District of North Carolina, who found that State Respondents had "mischaracteriz[ed]" an order of his *upholding* the witness requirement "to obtain contradictory relief in another court frustrat[ing] and circumvent[ing]" that order. *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 6058048, at *7 (M.D.N.C. Oct. 14, 2020). Applicants request that this Court expedite consideration of this motion and stay the Consent Judgment while this application is being considered. This case involves "nonrepresentative entities changing election law . . . during a federal election," and "[i]n making those changes, they have undone the work of the elected state legislature[]." *Wise v. Circosta*, Nos. 20-2104, 20-2107, 2020 WL 6156302, at *9 (4th Cir. Oct. 20, 2020) (en banc) (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, *id.*, and to

avoid the specter of a post-election dispute over the validity of ballots received during the disputed period in North Carolina.

The Supreme Court of North Carolina denied Applicants' petition for a writ of supersedeas and motion for a temporary stay without opinion. App. 1–3. This Court should stay the Consent Judgment pending appeal. A stay is 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. Those rules were in place when voting started in North Carolina on September 4 and were only displaced when the North Carolina State Board of Elections ("NCSBE") gave effect to numbered memoranda implementing the Consent Judgment on October 19, 2020. Thus, a stay is necessary to return to the statutory status quo that prevailed when voting began.

The public interest also favors a stay 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 the North Carolina Alliance Respondents "without consulting the legislative leaders" and implemented well after voting was underway. *Wise*, 2020 WL 6156302, at *17 (Wilkinson and Agee, JJ., dissenting); *see also Democratic Nat'l Comm.*, No. 20A66, slip op. at 3 (Kavanaugh, J., concurring in denial of application to vacate stay). Applicants therefore request that this Court stay the Consent Judgment pending appeal.

OPINIONS BELOW

The Supreme Court of North Carolina's order denying Applicants' petition for a writ of supersedeas is reproduced at App. 1–3 and its order denying Applicants' motion for a temporary stay is reproduced at App. 220–22. The Court of Appeals' order denying Applicants' petition for a writ of supersedeas and dissolving the temporary stay of the Consent Judgment is reproduced at App. 4–6. The Court of Appeals' order granting Applicants' motion for a temporary stay of the Consent Judgment is reproduced at App. 12–14. The Superior Court's Consent Judgment is reproduced at App. 27–50, its Findings of Fact and Conclusions of Law supporting that Consent Judgment are reproduced at App. 15–26, and its order denying Applicants' motion for a stay of the Consent Judgment pending appeal is reproduced at App. 7–11.

JURISDICTION

The Supreme Court of North Carolina denied Applicants' petition for a writ of supersedeas seeking that the court stay the Consent Judgment pending appeal. This Court has jurisdiction to issue a stay pending appeal of the Consent Judgment pursuant to the All Writs Act, 28 U.S.C. § 1651(a), *see CBS Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers) (relying on the All Writs Act to stay a state court preliminary injunction). Furthermore, this Court has jurisdiction because Applicants assert that the Consent Judgment violates the Elections Clause and the Equal Protection Clause of the federal Constitution. 28 U.S.C. § 1257(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 entered into a Consent Judgment 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 Consent Judgment substantially changes North Carolina's duly enacted election laws by extending the absentee ballot receipt deadline from three to nine days after election day; amending the postmark requirements for ballots received after election day; and allowing for the counting of ballots anonymously delivered to unmanned boxes at polling sites.[1] And it did so after over 319,000 absentee ballots had been cast.[2] Because the Consent Judgment was entered while voting was ongoing, State Respondents are applying different rules to ballots cast by similarly situated voters,

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[1] Although the Consent Judgment also purported to bless the NCSBE's effort to vitiate the witness requirement through Revised Numbered Memo 2020-19, 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. *Democracy N.C.*, 2020 WL 6058048, at *13. Staying the Consent Judgment will not interfere with a cure procedure consistent with Judge Osteen's injunction.

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

thus violating the Equal Protection Clause in two distinct ways: State 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 Consent Judgment was entered to participate in the election on an equal basis with other citizens in North Carolina, and State 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 Consent Judgment and ever-changing directives. As the federal courts have explained in related cases challenging aspects of the changes to North Carolina's election laws that the Consent Judgment requires, Applicants have established a likelihood of success on their Elections Clause and Equal Protection challenges. *See Democracy N.C.*, 2020 WL 6058048, at *13; *Moore v. Circosta*, Nos. 20-cv-911, 20-cv-912, 2020 WL 6063332, at *1 (M.D.N.C. Oct. 14, 2020); *Wise*, 2020 WL 6156302, at *15–18 (Wilkinson and Agee, JJ., dissenting). For these and the reasons explained below, Applicants respectfully request that the Court grant their emergency motion for a stay pending appeal and, if necessary, a petition for writ of certiorari to this Court.

I. Facts and Procedural History

On March 26, 2020, NCSBE Executive Director Karen Brinson 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. 54. 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. 58–65. This Original Numbered Memo 2020-19 sorted ballot deficiencies into two categories: curable and uncurable. App. 60. A ballot could be cured via voter affidavit alone if the voter failed to sign the certification or signed in the wrong place. App. 60. 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. 60.

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. 71.

Third, Alliance Respondents filed this suit in the North Carolina Superior Court for the County of Wake on August 10, 2020, nearly two months after HB1169 was signed into law, alleging that several provisions of North Carolina's election laws

are unconstitutional during the COVID-19 pandemic as violations of the North Carolina Constitution. Specifically, Alliance Respondents challenged

> (1) limitations on the number of days and hours of early voting that counties may offer, N.C.G.S. § 163-227.2(b); (2) the requirement that all absentee ballot envelopes must be signed by a witness, . . . [HB1169] § 1.(a)[;] (3) the State's failure to provide pre-paid postage for absentee ballots and ballot request forms during the pandemic, *id.* § 163-231(b)(1)[;] (4) laws requiring county boards of elections to reject absentee ballots that are postmarked by Election Day but delivered to county boards more than three days after the election, . . . *id.* § 163-231(b)(2)[;] (5) the practice in some counties of rejecting absentee ballots for signature defects, or based on an official's subjective determination that the voter's signature on the absentee ballot envelope does not match the signature on file with election authorities, without providing sufficient advance notice and an opportunity to cure[;] (6) laws prohibiting voters from receiving assistance from the vast majority of individuals and organizations in completing or submitting their absentee ballot request forms, 2019 N.C. Sess. Laws 2019-239 § 1.3(a)[;] and (7) laws severely restricting voters' ability to obtain assistance in delivering their marked and sealed absentee ballots to county boards, and imposing criminal penalties for providing such assistance, N.C.G.S. § 163-226.3(a)(5).

App. 79.

Alliance Respondents named as defendants the State of North Carolina, the NCSBE, and Damon Circosta, in his official capacity as chair of the NCSBE. On August 12, 2020, Applicants noticed their intervention as of right as agents of the State on behalf of the General Assembly under N.C. GEN. STAT. §§ 1A-1, Rule 24 and 1-72.2(b). On August 18, 2020, Alliance Respondents filed an Amended Complaint that dropped the State of North Carolina as a defendant and on the same day moved for a preliminary injunction of the various election laws and requirements at issue. Not until September 4, however, did Alliance Respondents file their brief and supporting evidence — nearly a month after filing suit.

On September 22, 2020, over two weeks after the State began issuing ballots, Alliance Respondents and State Respondents jointly moved the Superior Court for entry of a proposed consent judgment secretly negotiated between them. App. 119–61. 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, to implement a cure process that vitiated the witness requirement, despite successfully defending the witness requirement in both state and federal court, and to establish "a separate absentee ballot drop-off station at each one-stop early voting location and at county board offices." App. 138–40.

That same day, without waiting for entry of the Consent Judgment, 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. 151–53. 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. 152. Under Revised Numbered Memo 2020-19, therefore, voters could have cast absentee ballots in the absence of a witness altogether.

On September 22, 2020, as part of the proposed consent judgment, the NCSBE also announced (but did not implement) Numbered Memo 2020-22 and Numbered Memo 2020-23. Numbered Memo 2020-22 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. 147–48. Numbered Memo 2020-23 allows for the counting of ballots anonymously delivered to unmanned boxes at polling sites. App. 157–61 (explaining that, if an early voting location has "a drop box, slot, or similar container at their office," the container must have "a sign indicating that absentee ballots may not be deposited in it," but emphasizing that "a county board may not disapprove a ballot solely because it is placed in a drop box").

The Superior Court heard argument on the motion on October 2, 2020, and it entered an order granting the motion the same day. App. 28–50. The NCSBE repeatedly advised the court that Revised Numbered Memo 2020-19 was issued to comply with the *Democracy N.C.* injunction. *See* App. 176, 185, 187, 189, 200, 203, 210–11. Moreover, on September 25, 2020, during a status conference in *Moore v. Circosta* before Judge Dever in the District Court for the Eastern District of North Carolina prior to transfer of the 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." *Moore v. Circosta*, No. 20-cv-507, 2020 WL 5880129, at *4 (E.D.N.C. Oct. 3, 2020). 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." *Id.* 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. 200.

The Superior Court entered findings of fact and conclusions of law supporting the order entering the Consent Judgment on October 5. As relevant here, the court determined that the Consent Judgment and the numbered memoranda through which the NCSBE would implement it were consistent with the federal Constitution, neither violating the Elections Clause nor the Equal Protection Clause. App. 24. Applicants appealed from the Superior Court's judgment on October 6, 2020. App. 162–65.

On October 3, 2020, Judge Dever granted a temporary restraining order enjoining enforcement of Revised Numbered Memo 2020-19, Numbered Memo 2020-22, and Numbered Memo 2020-23, determining that plaintiffs there, including Applicants Berger and Moore, were likely to succeed on the merits of their claims that the numbered memoranda violated the Equal Protection Clause. *Moore*, 2020 WL 5880129. Consequently, although the Superior Court had entered the consent judgment on October 2 requiring the NCSBE to implement the memoranda, the memoranda were enjoined the next day, on October 3.

During this period, State 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 of North Carolina's order in *Democracy North Carolina* regarding the need for the parties to attend a status conference to discuss Revised Numbered Memo 2020-19. App. 166–67 (rescinded Oct. 19, 2020). The Memorandum advised county boards that Judge Osteen 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. 167. 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. 168–70 (rescinded Oct. 19, 2020).

Applicants moved the Superior Court to stay enforcement of the Consent Judgment pending appeal, and the court denied that motion on October 16, 2020 after a hearing. App. 7–11. Concurrently, Applicants filed a petition for writ of supersedeas and motion for temporary stay with the North Carolina Court of Appeals. On October 15, 2020, the Court of Appeals granted it in part, temporarily staying the consent judgment pending a ruling on the petition for a writ of supersedeas. App. 13.

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. *Democracy N.C.*, 2020 WL 6058048, at *13. 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 *8–11. 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 *8, that the NCSBE had misinformed the state court about having informed Judge Osteen of their revised cure process, *id.*, and that despite citing his order as the reason for the revised cure process, that process was inconsistent with the order, *id.* at *7–8.

On October 19, 2020, the North Carolina Court of Appeals denied Applicants' petition for a writ of supersedeas and motion for a stay pending appeal of the consent judgment. App. 5. That same day, State Respondents issued a new version of Revised Numbered Memo 2020-19, which recategorized the absence of a witness or assistant signature as an uncurable defect,[3] issued Numbered Memo 2020-22 and Numbered Memo 2020-23, and rescinded Numbered Memo 2020-27 and Numbered Memo 2020-28, thereby reinstating the ballot cure process.

On October 21, 2020, Applicants filed a petition for a writ of supersedeas and motion for temporary stay with the Supreme Court of North Carolina. The court

[3] Numbered Memo 2020-19, N.C. State Bd. of Elections (Oct. 17, 2020), https://tinyurl.com/yx92falf.

denied the motion for a temporary stay on October 23, 2020, App. 221, and denied the petition for a writ of supersedeas, without opinion, on October 26, 2020, App. 2.[4]

REASONS FOR GRANTING THE STAY PENDING APPEAL

To obtain a stay pending appeal from this Court, an applicant must show that there is (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. *See CBS Inc.*, 510 U.S. at 1318; *INS v. Legalization Assistance Project of the L.A. Cnty. Fed'n of Lab.*, 510 U.S. 1301, 1304 (1993) (O'Connor, J., in chambers); *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Sometimes this Court will also "balance the equities and weigh the relative harms to the applicant[s] and to the respondent[s]." *Id.* Here, these factors favor granting the application for a stay pending appeal.

I. There Is a Reasonable Probability that Four Justices Will Vote to Grant Certiorari and a Fair Prospect that Five Justices Will Vote to Reverse.

The Consent Judgment effectively nullifies statutes enacted by the North Carolina General Assembly while depriving the State of its ability to "enforce its duly enacted" laws. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). It violates two provisions of the federal Constitution that protect North Carolina's elections and the

[4] In *Moore v. Circosta*, No. 20A72 (U.S. Oct. Oct. 22, 2020), Applicants Berger and Moore, together with individual applicants, requested an injunction enjoining Numbered Memo 2020-22 pending appeal of the Middle District of North Carolina's denial of their motion for a preliminary injunction and a petition for certiorari to this Court. The application remains pending.

right to vote: the Elections Clause and the Equal Protection Clause. These are profoundly important issues that this Court likely will agree to review if the Consent Judgment ultimately is sustained on the merits by the North Carolina Supreme Court. And if it does agree to review the case in that posture, this Court likely will reverse.

A. The Consent Judgment 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). "The Constitution provides that state legislatures — not federal judges, not state judges, not state governors, not other state officials — bear primary responsibility for setting election rules." *Democratic Nat'l Comm.*, No. 20A66, slip op. at 2–3 (Gorsuch, J., concurring in denial of application to vacate stay). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Since neither Congress nor the General Assembly enacted the Consent Judgment, 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 Opinions of Justices*, 45 N.H. 595, 601 (1864).

The NCSBE has clearly violated the Elections Clause by agreeing to the Consent Judgment, which purports to adjust the rules of the election that have already been set by statute, and the North Carolina Superior Court did the same by entering it. But neither the NCSBE nor the North Carolina courts have freestanding power under the U.S. Constitution to rewrite North Carolina's election laws and to "prescribe[]" their own preferred "[r]egulations." U.S. CONST. art. I, § 4, cl. 1. "It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences," but "[i]t is quite another thing" for a state agency or state court "to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent." *Democratic Nat'l Comm.*, No. 20A66, slip op. at 3 (Kavanaugh, J., concurring in denial of application to vacate stay); *see also id.* at 9 n.1 (recognizing that "state courts do not have a blank check to rewrite state election laws for federal elections"). 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. Thus, neither the NCSBE nor the North Carolina courts are 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 Judge Osteen and three Fourth Circuit judges found in *Moore*, the NCSBE lacked authority to make the extensive alterations to the election laws through the Consent Judgment under either N.C. GEN. STAT. § 163-22.2 or § 163-27.1. *Moore*, 2020 WL 6063332, at *26–28; *Wise*, 2020 WL 6156302, at *16–18 (Wilkinson and Agee, JJ., dissenting). Properly interpreted, Section 163-22.2 authority only kicks in when a state election law has been held unconstitutional or invalid, which has not happened here, and even then the statute does not authorize the NCSBE to implement rules that directly conflict with the General Assembly's duly enacted laws — including 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.

In petitioning the North Carolina courts for a stay of the Consent Judgment, Applicants made this argument, but the state courts denied relief. Nevertheless, 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, 511, 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.

The Consent Judgment replaces the judgment of the General Assembly with that of the NCSBE. But "[c]onsent is not enough when litigants seek to grant themselves powers they do not hold outside of court." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993). The federal Constitution delegated to a single North Carolina entity the power to regulate federal elections: the General Assembly. Thus, because the Consent Judgment purports to alter the time, place, and manner for holding the ongoing federal election in a manner that contravenes the General Assembly's duly enacted statutes, it violates the Elections Clause.

B. The Consent Judgment 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.

As Judge Dever and Judge Osteen held was likely the case, aspects of the consent judgment violate these constitutional requirements, thereby infringing on the Equal Protection rights of those 153,664 North Carolina voters who had already

cast their absentee ballots before the Consent Judgment was announced[5] by subjecting them to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. *Moore*, 2020 WL 6063332, at *17–19; *Moore*, 2020 WL 5880129, at *5–7. And as three Fourth Circuit judges determined (in dissent), aspects of the Consent Judgment also violate the Equal Protection right of North Carolina voters who lawfully submitted their ballots before the Consent Judgment to have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29. *See Wise*, 2020 WL 6156302, at *15–18 (Wilkinson and Agee, JJ., dissenting).

1. Vote Dilution

Under the Consent Judgment 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 Consent Judgment 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. 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.

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[5] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Sept. 22, 2020), *available at* https://bit.ly/33SKzAw.

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, the counting of 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' votes. *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.

2. Arbitrary and Nonuniform Election Administration

The Consent Judgment 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 requires absentee ballots to be received, at the latest, by 5:00 p.m. three days after election day. The Consent Judgment, by contrast, allows absentee ballots to be received up to *nine days* after election day. *See* App. 41, 147. The General Assembly's duly enacted statutes governed the absentee ballot submission process for over 319,000 voters who had already cast their absentee

ballots before the Consent Judgment was entered.[6] And they continued to govern until the Consent Judgment was effectuated on October 19, by which time over 1.5 North Carolinians had voted.[7] The Consent Judgment thus caused a sudden about-face on the rules governing the ongoing election that upended the careful bipartisan framework that structured voting at the outset of the election.

Accordingly, under the Consent Judgment, 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 1.5 million voters cast their ballots before the Consent Judgment was effectuated on October 19, 2020. Those voters therefore worked to comply with the statutory receipt deadline. There is no justification for subjecting North Carolina's electorate to this arbitrary and disparate treatment. Indeed, Judge Osteen found that the Consent Judgment's extension of the absentee ballot receipt deadline would result in arbitrary and disparate treatment, *Moore*, 2020 WL 6063332, at *17–19, and the Fourth Circuit dissenters agreed, *Wise*, 2020 WL 6156302, at *15–18 (Wilkinson and Agee, JJ., dissenting).

II. Applicants Will Suffer Irreparable Harm Without a Stay

Applicants will suffer irreparable harm if the General Assembly's carefully crafted legislation for the upcoming election is upset. Enjoining a "State from

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[6] *Absentee Data*, N.C. State Bd. of Elections (Oct. 2, 2020), *available at* https://bit.ly/33SKzAw.

[7] *Absentee Data*, N.C. State Bd. of Elections (Oct. 19, 2020), *available at* https://bit.ly/33SKzAw.

conducting [its] elections pursuant to a statute enacted by the Legislature . . . seriously and irreparably harm[s] [the State].” *Abbott*, 138 S. Ct. at 2324. 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.

A stay 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 Judge Osteen recognized in a related case, “[o]nce the election occurs, there can be no do-over and no redress.” *Moore*, 2020 WL 6063332, at *22 (internal quotation marks omitted). The casting of votes under the unconstitutional Consent Judgment will irreparably harm the right to vote on an equal basis of North Carolina voters who submitted their absentee ballots before the Consent Judgment was implemented in compliance with the General Assembly’s duly enacted laws. *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)).

III. The Balance of Harms and the Public Interest Favor a Stay

The balance of harms and the public interest favor granting a stay of the Consent Judgment. First, the public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members, civil litigants, and courts.

Second, because the challenged election laws are constitutional, vacating the consent judgment "is where the public interest lies." *Tex. Democratic Party*, 961 F.3d at 412 (internal quotation marks omitted); *see also Democratic Nat'l Comm.*, No. 20A66, slip op. at 6 (Kavanaugh, J., concurring in denial of application to vacate stay) (explaining that "[t]his Court has long recognized that a State's reasonable deadlines for . . . submitting absentee ballots . . . raise no federal constitutional issues under the traditional *Anderson-Burdick* balancing test"). Courts should not "lightly tamper with election regulations," so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact." *Thompson v. DeWine*, 959 F.3d 804, 812 (6th Cir. 2020). This is especially true in the context of an ongoing election. *Id.* at 813; *Respect Me. PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). And it remains true even though the NCSBE chose to capitulate to Alliance Respondents' demands instead of defending the General Assembly's duly enacted election laws. Allowing the Consent Judgment to be enforced, therefore, would undermine the constitutional election laws.

Third, the Consent Judgment will engender substantial confusion, among both voters and election officials, by changing 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 the Supreme Court "has repeatedly emphasized that lower . . . courts should ordinarily not alter the election rules on the eve of an election"); *Purcell v. Gonzalez*, 549 U.S 1, 4–5 (2006). As of October 25, 3,171,218

North Carolinians have already voted.[8] 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 engender disparate treatment of voters in the ongoing election. *See* Reply Brief of the State Board Defendants-Appellants at 8, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020), ECF No. 103 ("[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.

Fourth, the eleventh-hour nature of the NCSBE's Consent Judgment does not serve the public interest. Absentee ballots became available to voters on September 4, in-person early voting began on October 15, and election day is just 7 days away. A stay of the Consent Judgment pending appeal will provide certainty to the public on the procedures that apply during the election and promote confidence in the election. *See Democratic Nat'l Comm.*, No. 20A66, slip op. at 3 (Kavanaugh, J., concurring in denial of application to vacate stay).

Fifth, 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

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[8] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 26, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 25, 2020).

[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, and the balance of harms and the public interest therefore favor granting a stay.

CONCLUSION

For these reasons, Applicants respectfully ask this Court to stay the Consent Judgment pending disposition of Applicants’ appeal in the North Carolina state courts and petition for a writ of certiorari in this Court.

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