No. 20-2062

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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,

Plaintiffs-Appellees,

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,

Defendants-Appellants,

Appeal from the United States District Court
for the Middle District of North Carolina

Plaintiffs-Appellees' Response in Opposition to Defendants-Appellants' Emergency Motion for a Temporary Administrative Stay

October 6, 2020 (counsel listed on reverse)

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Defendants, the members of the North Carolina State Board of Elections and its Executive Director, have engaged in an unprecedented effort to usurp the General Assembly's prerogative to regulate federal elections in North Carolina. Disregarding the clear mandate of the U.S. Constitution's Election 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, Defendants, through Executive Director Karen Brinson Bell, issued three Memoranda directly contravening the General Assembly's duly enacted statutes after the General Assembly had enacted bipartisan legislation specifically addressing voting during the pandemic this November and after over 150,000 absentee ballots had been cast. Because these ad-hoc Memoranda have been issued while voting is ongoing Defendants are applying different rules to ballots cast by similarly situated voters, thus violating the Equal Protection Clause in two distinct ways: Defendants are administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast their absentee ballots before the Memoranda were announced to participate in the election on an equal basis with other citizens in North Carolina, and Defendants are purposefully allowing otherwise unlawful votes to be counted, thereby deliberately diluting and debasing North Carolina voters' lawful votes.

Defendants attempt to minimize their naked attempt to use the courts to enact programmatic, substantial changes to North Carolina's election laws as "modest procedural changes" resulting from a "good-faith effort" to resolve pending litigation; as bringing "clarity and certainty to the State's election procedures"; and as "a few minor changes." Emergency Mot. for a Temporary Administrative Stay at 2, Doc. 3 (Oct. 5, 2020) ("Defs.' Br."). This Court must not be deceived. Through the numbered memoranda that are the subject of the district court's temporary restraining order ("TRO"), Defendants vitiated the absentee ballot witness requirement after it had survived attack in both state and federal court, extended the absentee ballot receipt deadline from three to nine days after election day, amended the postmark requirements for ballots received after election day, undermined the General Assembly's criminal prohibition of the unlawful delivery of completed ballots, and provided a clear avenue for ballot harvesters to submit absentee ballots in unmanned drop boxes after hours that will nevertheless be counted.

As explained below, this Court lacks jurisdiction to consider Defendants' appeal of the district court's TRO and therefore should deny Defendants' emergency motion for a temporary administrative stay. But what is more, the district court's order is rightly decided. First, issue preclusion does not bar the TRO because that doctrine cannot be asserted against a party that lacked a full and fair opportunity to litigate the issue in the prior proceeding. *See In re Microsoft Corp. Antitrust Litig.*,

355 F.3d 322, 326 (4th Cir. 2004). Three of the Plaintiffs in this case—Heath, Whitley, and Swain—were not parties to the state court litigation, so they cannot be barred by issue preclusion. Second, Plaintiffs do have standing to bring their Equal Protection claims because they have suffered harm to their right to vote. Defendants unilaterally changed the election rules during an ongoing election wherein Heath and Whitley had already complied with the now-eviscerated requirements, and by allowing for the casting of unlawful votes, Defendants are diluting Heath's and Whitley's lawful votes, violating their individual right to vote. And third, Plaintiffs' claims are not an impermissible collateral attack on a final state-court order, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), because Plaintiffs are simply challenging the constitutionality of the numbered memoranda under the federal Constitution.

Furthermore, the district court's reasoning on the merits of Plaintiffs' Equal Protection claims is correct, and the court properly recognized that Defendants' arbitrary, nonuniform procedures are subjecting North Carolina's electorate to different treatment and allowing for the casting of unlawful votes in contravention of the duly enacted North Carolina General Statutes, diluting their votes.

For these reasons and the reasons explained below, Plaintiffs respectfully request that the Court deny Defendants' motion to issue an immediate and temporary administrative stay of the decision below.

ARGUMENT

I. This Court Lacks Jurisdiction to Hear Defendants' Appeal Because a TRO Is Not Appealable

This Court lacks jurisdiction to hear an appeal of the district court's TRO and therefore must deny Defendants' motion. Orders granting or denying temporary restraining orders are not generally appealable. *See Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1029–30 (4th Cir. 1976). Although Defendants attempt to recharacterize the TRO as a preliminary injunction, thereby rendering it subject to immediate appeal, each of their arguments fail. Neither the TRO's practical effects, procedural history, nor purported disruption of the status quo counsel in favor of treating the TRO as a preliminary injunction.

First, the practical effect of the TRO will not be to irreparably harm Defendants. The TRO is in fact preventing irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws. The numbered memoranda wreak havoc to the General Assembly's duly enacted laws, including by vitiating the witness requirement and extending the absentee ballot receipt deadline from three to nine days after election day, in violation of the Constitution's Elections Clause and Equal Protection Clause. Accordingly, the TRO is preventing irreparable harm, not engendering it.

Moreover, Defendants miss the mark on timing. *See* Defs.' Br. at 10. Although it is true that the TRO is set to expire on October 16, 2020, the district court has

scheduled a hearing for October 8, 2020, to consider Plaintiffs' motion for a preliminary injunction. *See* Minute Entry, *Moore v. Circosta*, No. 20-911 (M.D.N.C. Oct. 5, 2020). The district court is proceeding with alacrity, so Defendants' protestations regarding how long the TRO will remain in effect ring hollow.

Second, the process leading up to and following the entry of the temporary restraining order does not justify recharacterizing it as a preliminary injunction. Briefing on the TRO was completed in less than a week. The district court did not issue findings of fact or conclusions of law. While the district court did find that Plaintiffs were likely to succeed on the merits of their Equal Protection claims, it left unaddressed Plaintiffs' Elections Clause claims. And the district court has scheduled a preliminary injunction hearing for October 8, refuting any contention that it already has entered a preliminary injunction.

Third, Defendants entirely misconstrue the proper status quo ante through which to view the State's election procedures. On August 4, 2020, the District Court for the Middle District of North Carolina issued a comprehensive, 188-page opinion enjoining Defendants from disallowing or rejecting any ballots until they implemented a cure process that comported with due process. *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457, 2020 WL 4484063, at *64 (M.D.N.C. Aug. 4, 2020). But the Court also rejected an attempt to enjoin the absentee ballot witness requirement. *See id.* at *36. Subsequently, on August 21, 2020, Defendants

issued the original Numbered Memo 2020-19, which set forth a cure process and categorized deficiencies related to the witness requirement as non-curable. The Memo made no changes to the absentee ballot receipt deadline, the postmark rules, or the prohibition on ballot harvesting. This was the regime in place when absentee ballot voting opened on September 4. It was only on September 22, with the issuance of revised Numbered Memo 2020-19 entirely unprompted by any material changes to election circumstances requiring updates to election procedures, that Defendants altered the election framework to what they ask this Court now to return it to. Defendants initially made the implausible argument that the evisceration of the witness requirement was done to "comply with" the *Democracy N.C.* court's preliminary injunction order refusing to enjoin that requirement, Defs.' App'x at App. 9, Doc. 4 (Oct. 5, 2020), but that court has now confirmed that Defendants' action is not even "consistent with" that order, *id.* at App. 10.

The district court's TRO preserves the status quo as it was when absentee voting began on September 4. Defendants cannot retreat to the state court's entry of the consent judgment as evidence of the status quo—not only was it entered on October 2, well over a month after the original Numbered Memo 2020-19 was issued, but it was entered less than 24 hours before the district court issued the TRO, hardly enough time to represent a status quo ante.

Defendants further contend that the TRO "introduced confusion into the State's election process," Defs.' Br. at 13, but they fail to mention that they themselves have altered, realtered, and altered again the State's election procedures over the past several weeks, and that they have the authority to return the State to the status quo ante. Nothing in the district court's TRO modifies the original Numbered Memo 2020-19 or prevents Defendants from reimplementing its procedures. It is only by their own choice that there is no cure process in place right now.

II. The Supremacy Clause Answers Defendants' Conflicting Court Orders Argument

Defendants make much of their supposedly being between Scylla and Charybdis, namely, that they are "subject to directly conflicting legal obligations" in the form of the consent judgment entered by the Wake County Superior Court and the TRO entered by the district court below. Defs.' Br. at 4. But a foundational principle of our federal republic is that the "Constitution, and the laws of the United States" are "the supreme law of the land" by which "the [j]udges in every [s]tate shall be bound[,] any Thing in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The State Superior Court entered its consent judgment pursuant to its (flawed) interpretation of the North Carolina Constitution and General Statutes. The district court, on the other hand, determined that Plaintiffs were likely to succeed on the merits of their claim that the numbered

memoranda—the same numbered memoranda that comprise the consent judgment—violate the federal Constitution's Equal Protection Clause. Defendants are under no conflicting court orders because, here, the district court's TRO controls. *See Gen. Atomic Co. v. Felter*, 434 U.S. 12, 15 (1977) (federal law takes precedence over state law injunctions).

III. A Writ of Mandamus Should Not Issue

Perhaps recognizing that this Court does not have jurisdiction to hear their appeal of the TRO, Defendants request in the alternative that this Court treat their appeal as a petition for writ of mandamus. But Defendants cannot establish that there is no other adequate means to attain the relief they seek. *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018). The district court has scheduled a hearing on the motion for a preliminary injunction for this Thursday, October 8, and there is every reason to believe that it will rule with haste. A temporary administrative stay from this Court will only worsen the ping-ponging to which Defendants have been subjecting the State's election procedures—within the span of one week, North Carolina will have gone from being under the thumb of the numbered memoranda at issue, to being free from their unconstitutional requirements, to being back under their control. This Court must not countenance such actions, especially in light of the Supreme Court's repeated admonition that courts are not to tamper with election procedures on the eve of an election. *See Andino v. Middleton*, No. 20A55, slip op.

at 2 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring in grant of application for stay) (staying district court's injunction enjoining South Carolina's witness requirement for absentee ballots for the independently sufficient reason that "federal courts ordinarily should not alter state election rules in the period close to an election"); *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 federal courts should ordinarily not alter the election rules on the eve of an election").

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' motion for a temporary administrative stay of the order below.

Dated: October 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(a). The response is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 1,998 words (exclusive of the parts of the document exempted by Federal Rule of Appellate Procedure 32(f)), as measured by Microsoft Word.

/s/ David H. Thompson
David H. Thompson

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and Local Rule 25(b)(2), I hereby certify that on October 6, 2020, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties has been accomplished via ECF.

/s/ David H. Thompson
David H. Thompson