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,

&

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

Intervenor-Appellants.

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

Plaintiffs-Appellees' Response in Opposition to Intervenor-Appellants' Motion for Emergency Stay Pending Appeal

October 13, 2020 (counsel listed on reverse)

David H. Thompson
Peter A. Patterson
Nicole J. Moss
COOPER & KIRK PLLC
1523 New Hampshire Ave., NW
Washington, DC 20036
Telephone: (202) 220-9636
Fax: (202) 220-9601
dthompson@cooperkirk.com

Nathan A. Huff
PHELPS DUNBAR LLP
4140 ParkLake Avenue, Suite 100
Raleigh, NC 27612
Telephone: (919) 789-5300
Fax: (919) 789-5301

Counsel for Plaintiffs-Appellees

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Constitutions and Statutes

Other Authorities

STATEMENT OF THE CASE

Intervenor-Appellants, the North Carolina Alliance for Retired Americans and seven individual North Carolina voters (together, "the Alliance"), have joined with Appellants, members of the North Carolina State Board of Elections ("NCSBE") and the NCSBE's Executive Director, to usurp the North Carolina General Assembly's prerogative to regulate federal elections in North Carolina. Disregarding the clear mandate of the U.S. 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, Appellants, through the NCSBE's Executive Director, issued three Memoranda contravening 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"). And they did so after over 150,000 absentee ballots had been cast.[1] Because these Memoranda have been issued while voting is ongoing, Appellants are applying different rules to ballots cast by similarly situated voters, thus violating the Equal Protection Clause in two distinct ways: Appellants are administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast

[1] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 13, 2020), *available at* https://bit.ly/33SKzAw.

their absentee ballots before the Memoranda were announced to participate in the election on an equal basis with other citizens in North Carolina, and Appellants are purposefully allowing otherwise unlawful votes to be counted, thereby diluting North Carolina voters' lawful votes.

On October 8, 2020, the district court granted the Alliance's motion to intervene and the Alliance now seeks to defend Appellants' unconstitutional Memoranda that substantially change North Carolina's election laws. Through the Memoranda, Appellants 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, and undermined the General Assembly's criminal prohibition of the unlawful delivery of completed ballots. Moreover, since August 21, Appellants have wreaked turmoil in the State's election procedures, zigzagging between different election procedures under the guise of providing certainty to voters.

The Alliance's motion suffers from a more fundamental problem: the temporary restraining order ("TRO") is not an appealable order and this appeal is about to become moot in any event. The district court is moving with alacrity and held a preliminary injunction hearing last Thursday, October 8. Moreover, the district court today informed the parties that a ruling on the motion for a preliminary

injunction will be issued by 2:00 p.m. tomorrow. Text Order, *Moore v. Circosta*, No. 20-cv-911 (M.D.N.C. Oct. 13, 2020). Appellees therefore respectfully request that the Court deny the Alliance's motion for an emergency stay of the district court's TRO pending appeal.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to hear the Alliance's appeal because a TRO is generally not appealable and the Alliance has failed to establish that the TRO fits into an exception rendering it subject to immediate appeal. *See Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1029–30 (4th Cir. 1976). Although the Alliance attempts to recharacterize the TRO as a preliminary injunction, 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 is preventing irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws through the Memoranda. Second, the process leading up to and following the entry of the TRO—briefing was completed in less than a week; the district court did not issue findings of fact or conclusions of law; the district court did not address the merits of Appellees' Elections Clause claims; and a separate preliminary injunction hearing has occurred—does not justify recharacterizing it as a preliminary injunction. And third, the proper status quo ante through which to view

the State's election procedures is the regime in place when absentee ballot voting opened on September 4 with the original Numbered Memo 2020-19 in effect. This Court thus lacks jurisdiction to hear the Alliance's appeal.

Even if this Court ever had jurisdiction over this appeal (and it did not), it is about to lose it through mootness. The district court has stated that it will rule on the motion for a preliminary injunction by 2:00 p.m. tomorrow, October 14, thus superseding the TRO. "[A]n interlocutory appeal from a since-expired or vacated temporary restraining order . . . is the paradigm of a moot appeal." *Video Tutorial Servs., Inc. v. MCI Telecomms. Corp.*, 79 F.3d 3, 5 (2d Cir. 1996). And a moot appeal must be dismissed for lack of jurisdiction. *See Int'l Brotherhood of Teamsters, Loc. Union No. 639 v. Airgas, Inc.*, 885 F.3d 230, 235 (4th Cir. 2018).

ARGUMENT

The factors this Court must assess in considering a motion to stay pending appeal are the applicant's (1) "strong showing that he is likely to succeed on the merits," (2) irreparable injury to the applicant in the absence of a stay, (3) substantial injury to the nonmoving party if a stay is issued, and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the most critical, but a stay "is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (internal quotation marks omitted). Instead, a stay pending appeal is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden

of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34 (internal quotation marks omitted). Where likelihood of success is "totally lacking, the aggregate assessment of the factors bearing on issuance of a stay pending appeal cannot possibly support a stay." *Uniformed Fire Officers Ass'n v. de Blasio*, 973 F.3d 41, 49 (2d Cir. 2020).

I. The Alliance Cannot Make a Strong Showing That It Is Likely to Succeed on the Merits of Its Appeal

A. The District Court Appropriately Declined to Abstain from Hearing this Case

The Supreme Court has repeatedly counseled that the various "abstention" doctrines are "the exception, not the rule." *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention is only warranted in "exceptional" circumstances because federal courts have an "obligation to hear and decide a case" that "is virtually unflagging." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73, 77 (2013) (internal quotation marks omitted); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Abstention is not warranted "simply because a pending state-court proceeding involves the same subject matter" as a federal proceeding. *Sprint*, 571 U.S. at 72. And abstention is to be avoided especially in areas where Congress has given concurrent jurisdiction—such as with Appellees' 42 U.S.C. § 1983 claims—to both federal and state courts. *See Pittman v. Cole*, 267 F.3d 1269, 1286 (11th Cir. 2001). Accordingly, under these principles, the district

court did not abuse its discretion in refusing to abstain under any of the various abstention doctrines that the Alliance raises.

1. *Pennzoil* Does Not Preclude this Suit

The Alliance claims that Appellees' claims are precluded under *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), because their lawsuit allegedly "seeks to render the State Court's adjudication nugatory by enjoining enforcement of the Consent Judgment." Intervenor-Appellants' Motion for Emergency Stay Pending Appeal at 7, Doc. 22 (Oct. 9, 2020) ("Alliance's Br."). But Appellees do not seek to enjoin enforcement of the Consent Judgment entered by the Wake County Superior Court in this case; they seek to enjoin enforcement of Numbered Memos 2020-19, 2020-22, and 2020-23 as violations of the federal Constitution's Elections Clause and Equal Protection Clause. Furthermore, there is no order, such as a contempt proceeding or bond requirement, that Appellees seek to circumvent. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977); *Pennzoil*, 481 U.S. at 10. Abstention is not warranted by the mere fact that a "pending state-court proceeding involves the same subject matter" as this federal proceeding. *Sprint*, 571 U.S. at 72.

2. *Pullman* Has No Application to this Suit

The Alliance next argues that the district court should have abstained under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), but *Pullman* has no application to this case. For a federal court to abstain under *Pullman*, there

must be (1) an "unclear issue of state law" and (2) the resolution of that state-law question must "moot or present in a different posture the federal constitutional issue." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983). Yet when "there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal constitutional claim." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). And here there is no ambiguity in any of the North Carolina statutes. HB1169 § 1.(a) clearly requires at least one qualified individual to witness an absentee ballot. North Carolina General Statutes § 163-231(b)(2)(b) clearly provides a receipt deadline of three days after election day. And North Carolina General Statutes § 163-226.3 clearly criminalizes unauthorized delivery of completed absentee ballots. There is simply no ambiguity.

The Alliance tries to introduce ambiguity by arguing state law regarding whether the NCSBE has authority to rewrite duly enacted statutes. But whether the NCSBE has such authority is fundamentally a predicate question of *federal* constitutional law. By using the term "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. U.S. CONST. art. I, § 4, cl. 1; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015). In North Carolina, the "Legislature" is not the NCSBE—it is unequivocally the General Assembly. N.C. CONST. art. II, § 1. Thus, unlike states where the state

constitution divides the "legislative authority" among multiple entities, *see Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 814, North Carolina has exclusively granted legislative authority to the General Assembly. The General Assembly is thus the only North Carolina entity that can constitutionally regulate federal elections—it is the only "Legislature thereof." There is no delegation of legislative authority under the Constitution.

Even if such delegation were constitutionally permissible (it is not), there is no state law ambiguity as to the NCSBE's authority that would merit *Pullman* abstention. *See Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967). The statutes creating and regulating the NCSBE show the General Assembly has *expressly withheld* any authority to issue these Memoranda to rewrite statutes. North Carolina General Statutes § 163-22(a) grants the NCSBE the power to "supervis[e] . . . the primaries and elections in the State," and the "authority to make such reasonable rules and regulations . . . as it may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See id.* (emphasis added). Thus, the General Assembly has not granted the NCSBE any power to overrule the duly enacted statutes governing elections or given it any form of legislative power.

To be sure, Executive Director Bell has limited statutory authority to make necessary changes to election procedures in districts "where the normal schedule for the election is disrupted" by "[a] natural disaster." N.C. GEN. STAT. § 163-27.1. But

the current pandemic is not a "natural disaster" under the statute and its implementing regulations "describing the emergency powers and the situations in which the emergency powers will be exercised," *id.* § 163-27.1(a); *see* N.C. ADMIN. CODE 1.0106, the normal schedule for the election has not been disrupted, and the North Carolina Rules Review Commission unanimously rejected an earlier attempt by Executive Director Bell to extend her emergency powers to the pandemic, *see* App'x at 171, Doc. 5-1 (Oct. 5, 2020).

3. *Rooker-Feldman* Does Not Bar this Suit

The Alliance contends that Appellees' claims "run afoul of *Rooker-Feldman*." Alliance's Br. at 9. But *Rooker-Feldman* is an *extraordinarily* narrow rule barring the appeal of state court judgments to lower federal courts. *See Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 414 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). The Supreme Court has counseled against lower courts' reliance on this doctrine because it has wrongly "been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005). To that end, *Rooker-Feldman* only applies when (1) the "losing party in state court" (2) "filed suit in federal court" (3) "*after* the state proceedings ended" (4) "complaining of an injury

caused by the state-court judgment" and (5) "seeking review and rejection of that judgment." *Id.* at 291 (emphasis added).

This doctrine does not apply here. This case was filed *before* the state court entered the Consent Judgment and it includes plaintiffs who were not parties to the state court case. Accordingly, *Rooker-Feldman* does not apply. "Neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." *Id.* at 292; *see also VanderKodde v. Mary Jane M. Elliott, P.C.*, 951 F.3d 397, 406 (6th Cir. 2020) (Sutton, J., concurring).

4. *Colorado River* Does Not Apply to this Suit

The Alliance last asserts that *Colorado River* "counsels abstention to permit resolution of parallel state court proceedings." Alliance's Br. at 10. "Only the clearest of justifications" can support *Colorado River* abstention. *See Colo. River Water Conservation Dist.*, 424 U.S. at 819. *Colorado River* abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005) (internal quotation marks omitted). "Exceptional circumstances allowing for abstention under *Colorado River* do not exist when state and federal cases are not *duplicative*, but merely raise similar or overlapping issues." *VonRosenberg v. Lawrence*, 849 F.3d 163, 169 (4th Cir. 2017) (emphasis added).

To determine if such extraordinary circumstances are met, Fourth Circuit precedent calls for a two-step inquiry, and the Alliance's argument for abstention fails at both steps.

First, the court must decide if the litigation is parallel with the state court proceedings, a requirement that is only satisfied if "substantially the same parties litigate substantially the same issues." *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991). This requirement is "strictly construed . . . requiring that the parties involved be almost identical." *Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 208 (4th Cir. 2006). Not only are the issues before the state court different (including numerous state law claims that do not overlap with the issues in this case), but so too are the parties different. Plaintiffs Swain, Heath, and Whitley are in no way involved in any parallel state court proceedings.

But even if the Court proceeded to the second step, the litany of *Colorado River* factors do not counsel in favor of refusing to exercise jurisdiction. *See Chase Brexton Health Servs.*, 411 F.3d at 463–64. For example, the state court case was filed only in late August, *cf. New Beckley*, 946 F.2d at 1074 ("The order in which the courts obtained jurisdiction matters little, since [the plaintiff[filed the suits in March and December of the same year."), there is no reason to think a federal forum in the Middle District of North Carolina is inconvenient to hear the Elections Clause

and Equal Protection claims, and this case does not involve property or *in rem* jurisdiction, *see Chase Brexton Health Servs.*, 411 F.3d at 465–66.

B. Plaintiffs Heath and Whitley Have Standing to Assert Their Equal Protection Claims

The Alliance argues that Heath and Whitley lack standing to assert their Equal Protection claims because they allege merely a generalized grievance of vote dilution that could be raised by any voter in North Carolina, Alliance's Br. at 12–13; they have not established an injury because allowing other lawful voters to cure issues with their absentee ballots does not infringe on Heath's and Whitley's right to vote or have their vote counted, *id.* at 13; and they fail to plead any facts that could establish causation because they merely speculate that ballot harvesting will occur by non-party actors, *id.* at 14. None of these contentions have merit.

First, Heath and Whitley are not asserting merely a generalized right. They are asserting that Appellants are violating the one-person, one-vote principle. 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 v. Sims*, 377 U.S. 533, 555 (1964); *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 have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (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.

Second, the Alliance fundamentally misconstrues Heath's and Whitley's injuries. They have been injured by the Memoranda because, through them, Appellants changed the election rules during an ongoing election and Heath and Whitley had already complied with the now eviscerated requirements. Both Heath and Whitley had a qualified adult witness their absentee ballots and submitted them well before the statutory deadline of 5:00 p.m. on the third day after election day. Under the Memoranda, North Carolina voters who submit absentee ballots can avoid these requirements. Therefore, the implementation of the Memoranda subject Heath and Whitley to one set of rules, and another set of voters to a different set of rules *during the same, ongoing election*.

Third, Heath's and Whitley's "theory of harm" is not based on "an attenuated chain of causation based entirely on conjecture about 'ballot harvesting.'" Alliance's Br. at 14. Instead, the Memoranda injure Heath and Whitley in two ways. First, the NSCBE is administering the election in an arbitrary and nonuniform manner that will inhibit Heath's and Whitley's right to participate in the election on an equal basis with other citizens in North Carolina. Second, the NCSBE is purposefully

allowing otherwise unlawful votes to be counted, thereby diluting North Carolina voters' lawful votes. Allowing invalid votes to count dilutes the strength of lawful votes in just the same way ballot-box stuffing does. *See Reynolds*, 377 U.S. at 555 (citing *Ex parte Siebold*, 100 U.S. 371 (1879); *United States v. Saylor*, 322 U.S. 385 (1944)).

C. Appellees' Equal Protection Claims Are Meritorious

The Alliance first maintains that Appellees are unlikely to succeed on their Equal Protection claim based on Appellants' administering the election in an arbitrary and nonuniform manner because the Memoranda "apply equally to all voters." Alliance's Br. at 15. Again, however, the Alliance fundamentally misconstrues Appellees' claim. Over 150,000 voters cast their ballots before issuance of the Memoranda on September 22, 2020, and therefore worked to comply with the witness requirement and the lawful ballot delivery requirements. But under the Memoranda, the witness requirement is nullified, and absentee ballots can be received up to nine days after election day. Consequently, under the Memoranda, North Carolina will be administering its election in a *different manner* than before September 22, subjecting its electorate to arbitrary and disparate treatment.

The Alliance further contends that Appellees' arbitrary and nonuniform administration claim is unlikely to succeed because "[e]lection procedures are regularly changed after voting has started to ensure that the fundamental right to vote

is protected." *Id.* at 17. The Alliance's examples of federal courts enjoining unconstitutional election procedures, however, have no bearing here, where Appellees' claims challenge the NCSBE's decisions to unconstitutionally change election procedures during an ongoing election. In each of the Alliance's examples, the federal courts were enjoining unconstitutional procedures, not perpetuating them. And as a factual matter, it is not commonplace for states to take ballots that were invalid when cast and transform them into valid ballots.

Second, the Alliance maintains that Appellees are unlikely to succeed on their Equal Protection claim based on vote dilution because they have not alleged that the Consent Judgment or the Memoranda value some other group of votes over their own. *Id.* at 18–19. This argument fails to account for the Supreme Court's most recent vote-dilution case, *Gill v. Whitford*, 138 S. Ct. 1916 (2016). In *Gill*, the Court addressed whether plaintiffs had standing to challenge legislative districts as political gerrymanders. *See id.* at 1929–33. It ultimately held that the plaintiffs there had not established standing because they failed to introduce evidence at trial that they lived in a politically gerrymandered district. *Id.* at 1931–32. In doing so, the Court emphasized that "a person's right to vote is 'individual and personal in nature,'" *id.* at 1929 (quoting *Reynolds*, 377 U.S. at 561), such that "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage," *id.* (quoting *Baker*, 369 U.S. at 206). To avoid

confusion, it repeated that "the holdings of *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were 'individual and personal in nature,'" *id.* at 1930 (quoting *Reynolds*, 377 U.S. at 561), "because the claims were brought by voters who alleged 'facts showing disadvantage to themselves as individuals,'" *id.* (quoting *Baker*, 369 U.S. at 206).

The Court's repeated, unmistakable focus on individual voting rights as the basis for vote-dilution claims makes clear that the racial gerrymandering and one-person, one-vote cases discussed in *Gill* and cited by the Alliance are examples of—not limits on—cognizable vote-dilution claims. "Thus, '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 of unlawful ballots—"'have standing to sue' to remedy that disadvantage." *Id.* at 1929 (quoting *Baker*, 369 U.S. at 206). Indeed, the Supreme Court in *Reynolds v. Sims* 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. And Heath and Whitley will be disadvantaged because the Memoranda ensure that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in four ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Doc. 45-1 at 29–34, *Moore v. Circosta*, No. 20-cv-911 (M.D.N.C. Oct. 2, 2020); (2) by allowing

absentee ballots to be received up to nine days after election day, *see id.*; *see also id.* at 26–27; (3) by allowing absentee ballots without a postmark to be counted if received after election day in certain circumstances, *id.* at 26–27; and (4) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see id.* at 36–40. When Appellants purposely accept even a single ballot without the required witness, accept otherwise late ballots beyond the deadline set by the General Assembly, or facilitate delivery of ballots by unlawful parties, they have 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.

D. Appellees' Election Clause Claims Are Meritorious

Appellees' Election Clause claims are meritorious and provide an independent basis to deny the Alliance's motion. The text of the Elections Clause is clear: 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. North Carolina's Constitution establishes that the General Assembly is the "Legislature" of North Carolina and vests the legislative authority exclusively in the General Assembly. N.C. CONST. art. II, § 1. And this exclusive grant of authority is encapsulated in North Carolina's robust nondelegation doctrine: "[T]he 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 (1978). Consequently, since neither Congress nor the General Assembly promulgated Appellants' Memoranda, the Memoranda are unconstitutional.

E. Irreparable Harm and the Public Interest Counsel in Favor of Denying the Alliance's Motion

The two remaining factors—irreparable harm and the public interest—counsel in favor of denying the Alliance's motion. First, the TRO is *preventing* irreparable harm from occurring to the Alliance and its members by preventing unconstitutional changes to the State's election laws. The Memoranda substantially change the General Assembly's duly enacted laws, in violation of the Constitution's Elections Clause and Equal Protection Clause. The Memoranda also inflict irreparable institutional harm to the General Assembly by nullifying its statutes and depriving it of its prerogative under the Elections Clause. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018); *see also New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers); *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers). Consequently, the TRO is *preventing* irreparable harm, not engendering it.

What is more, at least three of the individual voter Intervenor-Appellants—Tom Kociemba, Rosalyn Kociemba, and Rebecca Johnson—*have already voted*.[2] Consequently, this Court can provide them with no relief.

The Alliance's assertion that granting a stay would "provide election administrators throughout the State with clear guidance" is false. Alliance's Br. at 21. Because the district court's TRO does not restrain the original Numbered Memo 2020-19, and because the Supremacy Clause gives the district court's TRO priority over the state-court Consent Judgment, *see N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971), Appellants are free to return to their original cure process, which has never been found unconstitutional by any court. It therefore is Appellants who have confused the State's election procedures and decided to halt all curing. And there undoubtedly will be harm if this Court grants the Alliance's motion, including substantial confusion among voters and poll workers, who have been whiplashed back and forth between Appellants' numerous directives over the past few weeks. This Court must not countenance Appellants' actions by granting the Alliance's motion.

[2] *See* Thomas John Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Rosalyn Cotter Kociemba Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Rebecca Kay Johnson Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL.

Second, the public interest would be served by *denying* a stay. The public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members and civil litigants. Also, because the Memoranda unconstitutionally alter duly enacted election laws, leaving the TRO in place "is where the public interest lies." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (2020) (internal quotation marks omitted); *see also 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).

Furthermore, a stay would not provide certainty to the public on the procedures that apply during the election. Instead, it will engender substantial confusion 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). To date, voters have requested 1,321,515 absentee ballots and cast 492,825 absentee ballots.[3] These ballots require a witness signature on their face, so eliminating that requirement now would render the instructions on hundreds of thousands, if not over a million, absentee ballots inaccurate. The

[3] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 13, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 12, 2020).

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.

Additionally, the Memoranda undermine confidence in the election by eliminating safeguards that protect against ineligible and fraudulent voting and that protect vulnerable voters. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (controlling opinion of Stevens, J.); App'x at 210–11. For example, eliminating the witness requirement that the General Assembly specifically retained (in a relaxed form) could cause some to question the integrity of the election, particularly when the NCSBE also has barred signature matching for absentee ballots. Indeed, eliminating the witness requirement will create particularly acute risks for vulnerable populations. The witness requirement "protects the most vulnerable voters," such as nursing home residents, against being taken advantage of by caregivers or other parties by "provid[ing] assurances to family members that

their loved ones were able to make their own vote choices" and were not victims of absentee ballot abuse. *Id.* at 211.

Accordingly, irreparable harm and the public interest weigh in favor of denying the Alliance's motion.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that this Court deny the Alliance's motion to stay the TRO pending appeal.

Dated: October 13, 2020

Respectfully submitted,

/s/ David H. Thompson
David H. Thompson
COOPER & KIRK, PLLC
Peter A. Patterson
Nicole J. Moss (State Bar No. 31958)
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600 / (202) 220-9601
dthompson@cooperkirk.com

Nathan A. Huff
Phelps Dunbar LLP
4140 ParkLake Avenue, Suite 100
Raleigh, NC 27612
Telephone: (919) 789-5300
Fax: (919) 789-5301

Counsel for Plaintiffs-Appellees

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 5,114 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 13, 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