

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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,

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, JEFF 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.

Civil Action
No. 1:20-CV-911

**PLAINTIFFS' MOTION FOR
INJUNCTION PENDING APPEAL, OR,
IN THE ALTERNATIVE, FOR A
TEMPORARY INJUNCTION UNTIL THE
FOURTH CIRCUIT RESOLVES
PLAINTIFFS' IMMINENT MOTION**

Statement

Plaintiffs Timothy K. Moore, Philip E. Berger, Bobby Heath, Maxine Whitley, and Alan Swain, hereby respectfully request, pursuant to Federal Rule of Civil Procedure 62 and Federal Rule of Appellate Procedure 8, that the Court grant an injunction pending appeal to maintain the status quo, or, in the alternative, that

the Court grant a temporary injunction to maintain the status quo while the Fourth Circuit resolves Plaintiffs' motion for an injunction pending appeal, which Plaintiffs plan to file tomorrow. In particular, Plaintiffs ask that the injunction extend to Numbered Memo 2020-22 and Revised Numbered Memo 2020-19 to the extent it incorporates the extended receipt deadline established by Numbered Memo 2020-22. Plaintiffs do not seek an injunction with respect to Numbered Memo 2020-23. And given the injunction issued in *Democracy N.C.* against the witness signature cure procedures in revised Numbered Memo 2020-19, they do not seek a duplicative injunction here.

The requested injunction will maintain the status quo pending appeal. Defendants have, to date, never published Numbered Memo 2020-22 to the State Board of Elections website. And the website continues to instruct voters that they must comply with the statutory receipt deadline. See, e.g., Detailed Instructions for Voting By Mail, Returning a Ballot, <https://bit.ly/2E4ZxL7> (last visited Oct. 15, 2020) (attached hereto as Exhibit 1). The rules of the election remain the same today as they have since voting started. The rules only change if an injunction is *not* entered. And entering an injunction is in the public interest as well. In the event our appeal fails, voters will not be harmed by ensuring their ballots are received by the statutory receipt deadline that was in place when voting began. But absent an injunction, voters

could be harmed if they rely on the Receipt Deadline Extension and *do not* ensure their ballots are received by the statutory receipt deadline and we then succeed on appeal. We therefore ask this Court for an injunction pending appeal.

Question Presented

Whether this Court should issue an injunction pending appeal to maintain the status quo and prevent the issuance and enforcement of Numbered Memo 2020-22 and Revised Numbered Memo 2020-19 to the extent it incorporates the extended receipt deadline established by Numbered Memo 2020-22, or, in the alternative, issue a temporary injunction until the Fourth Circuit resolves Plaintiffs' imminent motion for an injunction pending appeal.

Argument

This Court considers four factors when determining whether to issue a post-judgment injunction pending appeal:

(1) whether the . . . applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent [an injunction pending appeal]; (3) whether issuance of the [injunction] will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987); accord *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *N. Carolina Growers' Ass'n, Inc. v. Solis*, No. 1:09-CV-411, 2011 WL 13344117, at *1 (M.D.N.C. Oct. 31, 2011). These factors counsel in favor of issuing an injunction in this case.

First, Plaintiffs have made a strong showing of the likelihood of success on the merits. As this Court's Memorandum Opinion and Order made clear, "Plaintiffs have demonstrated a likelihood of success on the merits with respect to . . . their Equal Protection challenge to the Receipt Deadline Extension" implemented through Numbered Memo 2020-22. Doc. 74 at 53, 57. As this Court explained, this change, issued by the North Carolina State Board of Elections ("NCSBE"), subjects plaintiffs Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. Doc. 74 at 52-57. These actions are thus clear violations of plaintiffs Heath and Whitley's Equal Protection right to vote on "equal terms" as set out by the Supreme Court. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *see also Gray v. Sanders*, 372 U.S. 368, 379-80 (1963); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

Notwithstanding the strong merits of Plaintiffs' claims and the evident unconstitutionality of Defendants' actions, this Court declined to issue a preliminary injunction with respect to the ballot extension deadline because of its interpretation of the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

On appeal, the Fourth Circuit will review the denial of a preliminary injunction for an abuse of discretion. *Roe v. Dep't of Def.*, 947 F.3d 207, 219 (4th Cir. 2020). "A clear error in factual findings or a mistake of law is grounds for reversal." *Id.*

Plaintiffs submit that whether *Purcell* applies to stay the hand of this Court's equitable power is, at the very least, a close question of law. As such, there is a significant likelihood of reversal of this Court's *Purcell* principle decision on appeal. Thus, an injunction pending appeal or until the Fourth Circuit has an opportunity to rule on Plaintiffs' imminent motion is warranted.

The Supreme Court has repeatedly counseled that lower courts should not *change* or *alter* election rules prior to or during an election. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). This principle seeks to avoid "voter confusion" caused by an election-altering "[c]ourt order[]." *Purcell*, 549 U.S. at 4-5. The *Purcell* principle attempts to ensure federal courts do not disrupt the status quo ante of an ongoing election. See *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. at 1207.

But the relief sought by Plaintiffs in this case is not the election-altering court order that animated the *Purcell* principle. Cf. *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 2951012, at *11 (D.N.D. June 3, 2020) ("The concerns that troubled the Supreme Court in *Purcell* are not present in this instance."). Instead, the relief sought by Plaintiffs is to prevent NCSBE from implementing the unconstitutional Receipt Deadline Extension, which is an election-altering and midstream change likely to cause the very voter confusion that the *Purcell* principle seeks to

prevent. Indeed, Numbered Memo 2020-22, which establishes the Receipt Deadline Extension, has yet to be published on the State Board of Elections' website. See Numbered Memos, <https://bit.ly/2SUK3BS> (last visited Oct. 15, 2020) (attached hereto as Exhibit 2). In this instance, the best means to vindicate the *Purcell* principle is to stop the unconstitutional election-altering change put forward by NCSBE. *Cf. Ely v. Klahr*, 403 U.S. 108, 113 (1971) (affirming district court that, in order to avoid "serious risk of confusion and chaos" chose the "lesser of two evils" for the 1970 elections). In all events, Plaintiffs submit that how *Purcell* applies to Plaintiffs' relief is a close-enough question meriting an injunction while the Fourth Circuit considers Plaintiffs' imminent appeal.

The other three factors support an injunction as well. Plaintiffs will be irreparably harmed absent an injunction. As this Court recognized, "[o]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done." Doc. 74 at 66 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)). This rationale extends to the injunction pending appeal context too as the casting of votes under unconstitutional Numbered Memoranda even for a short period of time will irreparably impinge plaintiff Heath and Whitley's right to vote on an equal basis. *Cf. Elrod v. Burns*, 427 U.S. 347, 373

(1976) (“The loss of First Amendment freedoms, for even *minimal periods* of time, unquestionably constitutes irreparable injury” (emphasis added)).

Next, there is minimal harm to NCSBE for an injunction pending appeal. After all, there can be no harm from an injunction “where the law sought to be enforced is unconstitutional.” *Does 1-5 v. Cooper*, No. 1:13CV711, 2016 WL 10587195, at *3 (M.D.N.C. Mar. 2, 2016) (citing *De Leon v. Perry*, 975 F. Supp. 2d 632, 664 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015)). And the injunction will simply maintain the status quo and the rules as they existed when voting began.

Finally, the public interest will be served by an injunction pending appeal. Without an injunction, NCSBE may seek to immediately issue and enforce the likely unconstitutional Numbered Memo. But the immediate issuance of this Numbered Memo will only add to voter confusion given the likelihood of Plaintiffs’ success. After all, NCSBE has not published Numbered Memo 2020-22 to its website yet. Since it is a close question as to whether relief is warranted under *Purcell*, the best way to provide “public confidence in the integrity of the electoral process” is to issue an injunction to preserve the status quo without the Receipt Deadline Extension in place. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). This is the only way to ensure that NCSBE

does not engage in yet further policy changes and unconstitutional actions that may be halted on appeal.

An injunction also is in the public interest because there is no question that voters who comply with the law, as enacted by the General Assembly, will have their votes count. Thus, it is in the public interest to maintain the status quo while the Fourth Circuit addresses these issues.

Conclusion

For the foregoing reasons, Plaintiffs' motion for an injunction pending appeal or, in the alternative, a temporary injunction until the Fourth Circuit resolves Plaintiffs' motion for injunction pending appeal should be granted.

Dated: October 15, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Plaintiffs' Motion For Injunction Pending Appeal, Or, In The Alternative, For A Temporary Injunction Until The Fourth Circuit Resolves Plaintiffs' Imminent Motion, including body, headings, and footnotes, contains 1574 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 15th day of October, 2020, she electronically filed the foregoing Plaintiffs' Motion For Injunction Pending Appeal, Or, In The Alternative, For A Temporary Injunction Until The Fourth Circuit Resolves Plaintiffs' Imminent Motion with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
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