**No. 20-2107**

# 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-Appellants,*

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-Appellees,*

&

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

*Intervenor-Appellees*.

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

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**Plaintiffs-Appellants' Emergency Motion for an Injunction Pending Appeal**

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October 16, 2020 (counsel listed on reverse)

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## LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), Appellants informed Appellees and Intervenor-Appellees of their intent to seek the relief sought in this motion in the district court. Appellees and Intervenor-Appellees opposed that relief below and presumably will do the same here.

## INTRODUCTION

Appellants, the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, two North Carolina voters who voted absentee before September 22, 2020, and a candidate running to represent North Carolina's 2nd Congressional District, respectfully petition this Court to issue an injunction enjoining 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 (together, the "Memoranda") pending appeal of the district court's denial of Appellants' motion for a preliminary injunction. Appellants also request that this Court expedite consideration of this motion and temporarily enjoin the Memoranda while this motion is being considered. The district court stayed the court's order pending appeal but only until the temporary restraining order currently enjoining the Memoranda expires at 11:59 p.m. today, October 16. App. 176–78.[1]

The district court found that Appellants demonstrated a likelihood of success on the merits with respect to "their Equal Protection challenge to the Receipt

[1] On October 2, 2020, the North Carolina Superior Court entered a consent judgment requiring the North Carolina State Board of Elections to implement, as relevant here, the extended receipt deadline. *See* App. 35–36. On October 15, 2020, the North Carolina Court of Appeals granted a temporary stay of the consent judgment pending that court's ruling on Intervenor-Defendants'—Berger and Moore—petition for a writ of supersedeas. *See* App. 61–62. The court has indicated that it will rule once response briefs are filed on October 19, 2020.

Deadline Extension" implemented through Numbered Memo 2020-22. App. 125. It explained that this change, issued by the North Carolina State Board of Elections ("NCSBE"), subjects Appellants Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. App. 120–25. These actions are thus clear violations of Heath's 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 Appellants' claims and the evident unconstitutionality of Appellees' actions, however, the district 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).

The district court's determinations demonstrate that Appellants have a substantial likelihood of prevailing on the merits in this appeal. And whether *Purcell* applies to stay the hand of this Court's equitable power is, at the very least, a close question of law. The requested injunction will maintain the status quo pending appeal. Appellees have, to date, never published Numbered Memo 2020-22 to the NCSBE's website. And the website continues to instruct voters that they must comply with the statutory receipt deadline. *See, e.g.*, App. 64–68. The rules of the

election remain the same today as they have since voting started on September 4. The rules only change if an injunction is *not* entered.

The public interest also favors an injunction pending appeal, as voters face a greater risk of irreparable harm if the Memoranda are implemented and later vacated than if their implementation is delayed. In the event Appellants' 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 Appellants then succeed on appeal. Appellants therefore request that this Court enjoin the Memoranda pending appeal.

## STATEMENT OF THE CASE

Appellees, members of the NCSBE and the NCSBE's Executive Director, 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, Appellees, through the NCSBE's Executive Director, have created two 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"). The Memoranda will substantially change North Carolina's duly enacted election laws by extending the absentee ballot receipt deadline from three to nine days after election day and amending the postmark requirements for ballots received after election day. And they did so after over 150,000 absentee ballots had been cast.[2] Because these Memoranda will be issued while voting is ongoing, Appellees will be applying different rules to ballots cast by similarly situated voters, thus violating the Equal Protection Clause in two distinct ways: Appellees will be 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 Appellees will be purposefully allowing otherwise unlawful votes to be counted, thereby diluting North Carolina voters' lawful votes.

Appellees are disserving North Carolina voters and sowing considerable confusion through their Memoranda and ever-changing directives. As the district court held, Appellants have established a likelihood of success on their Equal Protection challenges regarding the deadline extension for receipt of ballots. App.

[2] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 16, 2020), *available at* https://bit.ly/33SKzAw.

71. For these and the reasons explained below, Appellants respectfully request that the Court grant their motion for an injunction pending appeal.

## JURISDICTIONAL STATEMENT

The district court denied Appellants' motion for a preliminary injunction on October 14, 2020. App. 69–159. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). On October 15, the district court stayed its ruling through October 16 but otherwise declined to grant Appellants' motion for an injunction pending appeal on October 15, 2020. *See* App. 176–78; FED. R. APP. P. 8(a)(2)(A)(ii).

## ARGUMENT

This Court considers four factors when determining whether to issue an 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). These factors counsel in favor of issuing an injunction in this case.

## I. Appellants Have a Substantial Likelihood of Prevailing on the Merits In This Appeal

### A. The Memoranda Violate 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 [sic] Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Accordingly, there are only two entities that may constitutionally regulate federal elections: Congress and the state "Legislature." Since neither Congress nor the General Assembly promulgated the NCSBE's Memoranda, they are unconstitutional because they overrule 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.

N.C. CONST. art. I, § 6. 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. And as the Supreme Court has explained with respect to the Presidential Electors Clause—the closely analogous provision of Article II, Section 1 that empowers state legislatures to select the method for choosing electors to the Electoral College—the state legislatures' power to prescribe regulations for federal elections "cannot be taken." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). And courts have long recognized this limitation on the power of states to restrain the discretion of state legislatures under the Elections Clause and the Presidential Electors Clause. *See, e.g.*, *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948); *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinion of Justices*, 45 N.H. 595, 601 (1864).

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

places, and manner of federal elections that the Elections Clause assigns exclusively to the legislature (and it is not), *see Cooper v. Berger*, 809 S.E.2d 98, 112 (N.C. 2018), the NCSBE would lack authority to do so here. As the district court found, the NCSBE lacked authority to make the extensive alterations to the election laws through the Memoranda under either N.C. GEN. STAT. § 163-22.2 or § 163-27.1. *See* App. 146–53. Section 163-22.2 does not authorize the NCSBE to implement rules that directly conflict with the General Assembly's duly enacted laws—like the statutory receipt deadline—and the Executive Director did not have the power to redefine the meaning of "natural disaster" under § 163-27.1 to include a pandemic to exercise her emergency powers to make the changes. What is more, § 163-27.1 is inapplicable on its face because it requires "the normal schedule for the election" to have been "disrupted," but the normal schedule for the November 2020 election has not been altered in any way. In enacting HB1169, the General Assembly already decided what adjustments to the election laws are necessary to account for the pandemic.

Furthermore, contrary to the district court's determination, *see* App. 140–43, Moore and Berger have standing to raise their Elections Clause claims. Moore and Berger are agents of the General Assembly to protect its institutional right as the "Legislature" of North Carolina to regulate federal elections. The Supreme Court has made clear that "a State must be able to designate agents to represent it in federal

court." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And North Carolina has made abundantly clear that "[*w*]*henever* the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the *subject* of an action in *any* State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties" N.C. GEN. STAT. § 120-32.6(b) (emphases added). In this case, the General Assembly, acting through its agents Moore and Berger, asserts that the validity of its election laws has been usurped by the Memoranda. Since "state law authorizes legislators to represent the State's interests," Moore and Berger "have standing." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997).

### B. The Memoranda Violate 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*, 372 U.S. at 380 ("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 [the Supreme Court's] decisions."). "[T]reating voters different" thus "violate[s] the Equal Protection Clause" when the disparate treatment is the result of arbitrary, ad hoc processes. *See Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001).

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

The district court found that Appellants demonstrated a likelihood of success on the merits with respect to "their Equal Protection challenge to the Receipt Deadline Extension" implemented through Numbered Memo 2020-22 because that change subjects Heath and Whitley to "arbitrary and disparate treatment" by "contraven[ing] the fixed rules or procedures" established by the General Assembly *before* voting started. App. 120–25. Appellants also submit that the Memoranda violate Heath and Whitley's right to have their ballots counted "at full value without dilution or discount," *Reynolds*, 377 U.S. at 555 n.29.

**1. Arbitrary and Nonuniform Election Administration**

The Memoranda 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 Memoranda, by contrast, allow absentee ballots to be received up to *nine days* after election day. *See* App. 46–54. This is in violation of the General Assembly's duly enacted statutes but would also be a change in the rules while voting is ongoing. The statutory receipt deadline governed the absentee ballot submission process when Heath and Whitley submitted their ballots. Allowing the Memoranda to go into effect would thus be a sudden about-face on the rules governing the ongoing election that will upend the careful bipartisan framework that has structured voting so far.

Accordingly, under the Memoranda, North Carolina will necessarily be administering its election in an arbitrary fashion pursuant to nonuniform rules that will result in the unequal evaluation of ballots. *See Bush*, 531 U.S. at 106. Over 150,000 voters cast their ballots before the Memoranda were unveiled, including Heath and Whitley, and therefore worked to comply with the statutory ballot receipt deadline. By contrast, under the Memoranda, voters whose ballots would otherwise not be counted if received more than three days after election day will have an additional six days to return their ballot. The district court found this regime to be an arbitrary procedure that will result in disparate treatment, and therefore violative of Heath's and Whitley's Equal Protection rights. App. 125–27. Consequently, Appellants have a substantial likelihood of prevailing on the merits of this claim in this appeal.

**2. Vote Dilution**

Under the Memoranda 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 Memoranda ensure 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, *see* App. 46–54; and (2) by allowing absentee ballots without a postmark to be counted in certain circumstances

if received after election day, *id.* These changes will have the direct and immediate effect of diluting the votes of North Carolina voters by enabling unlawful votes.

The consent judgment is a denial of the one-person, one-vote principle affixed in the Supreme Court's jurisprudence. Dilution of lawful votes, to any degree, by the casting of unlawful votes violates the right to vote, even if many other voters suffer the same injury. *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker*, 369 U.S. at 208. And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals"—be it from malapportioned districts or racial gerrymanders or, as here with Heath and Whitley, the counting on unlawful ballots—"have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal quotation marks omitted). Indeed, the Supreme 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 ballot without the required witness, accepts otherwise late ballots beyond the deadline set by the General Assembly, or facilitates the delivery of ballots by unlawful parties, the NCSBE has accepted votes that dilute the weight of lawful voters like Heath and Whitley. *See Gill*, 138 S. Ct. at 1929; *Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208.

The district court did not address the merits of this claim because it found that Heath and Whitley did not have standing to assert it. App. 108–11. But Heath and Whitley are not asserting merely a generalized right. They are asserting that Appellees 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*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208. And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill*, 138 S. Ct. at 1929 (internal quotation marks omitted). And it is simply not true that every voter in the state has standing to challenge these mid-election rule changes: those voters whose ballots were invalid under the regime that existed at the time voting commenced, but whose ballots will now be counted, obviously do not have standing to complain of these changes.

Even if it were true that vote dilution is a viable basis for federal claims only when "the injury is to a specific group of voters," App. 110, Heath and Whitley would still have standing. Heath and Whitley are registered Republican voters who have submitted their absentee ballots,[3] and the North Carolina absentee voting data

[3] Bobby Glen Heath Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; Maxine Barnes Whitley Voter

demonstrates that the Memoranda disproportionately benefit registered Democrat voters over registered Republican voters. As of October 15, 2020, Democrats have requested 628,788 absentee ballots and returned 269,844, while Republicans have requested 258,413 absentee ballots and returned 96,051.[4] That means that 358,944 Democrat absentee ballots remain outstanding, versus 162,362 Republican. Consequently, Democrats will disproportionally benefit from the changes the Memoranda make that unlawfully relax the rules governing absentee voting.

## II. Irreparable Harm and the Public Interest Counsel in Favor of Granting an Injunction Pending Appeal

The two remaining factors this Court must assess in considering Appellants' motion for an injunction pending appeal—irreparable harm and the public interest—counsel in favor of granting that motion.

### A. Irreparable Harm

First, an injunction will *prevent* irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws. As the district court recognized, "[o]nce the election occurs, there can be no do-over and no redress," so "[t]he injury to these voters is real and completely irreparable if nothing is done." App. 134. This rationale extends to the injunction

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Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL.

[4] *North Carolina Early Voting Statistics*, U.S. ELECTIONS PROJECT (Oct. 16, 2020), https://bit.ly/3jcBVCV.

pending appeal context too as the casting of votes under unconstitutional Memoranda even for a short period of time will irreparably harm Heath and Whitley's right to vote on an equal basis. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for *even minimal periods of time*, unquestionably constitutes irreparable injury." (emphasis added)). The Memoranda also inflict irreparable institutional harm to the General Assembly as well 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, an injunction pending appeal will *prevent* irreparable harm, not engender it.[5]

[5] What is more, at least five of the individual Intervenor-Appellees—Barker Fowler, Tom Kociemba, Rosalyn Kociemba, Rebecca Johnson, and Sandra Malone—*have already voted*. *See* Susan Barker Fowler Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL; 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; Sandra Jones Malone, Voter Record, *Voter Search*, N.C. STATE BD. OF ELECTIONS, *available at* https://bit.ly/2HNjzLL. Consequently, enjoining the Memoranda pending appeal would not injure them whatsoever.

### B. The Public Interest

Second, the public interest would be served by granting an injunction pending appeal. 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, enjoining them "is where the public interest lies." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (2020) (internal quotation marks omitted).

Without an injunction, and if the state court stay is lifted, the NCSBE may seek to immediately issue and enforce the likely unconstitutional Memoranda. But the immediate issue of the Memoranda will only add to voter confusion given the likelihood of Appellants' success. After all, the NCSBE has not yet published Numbered Memo 2020-22 to its website. 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.*, 552 U.S. 181, 197 (2008) (controlling opinion of Stevens, J.). This is the only way to ensure that the NCSBE does not engage in yet further policy changes and unconstitutional actions that may be halted on appeal.

Furthermore, an injunction pending appeal will provide certainty to the public on the procedures that apply during the election and promote confidence in the

election. It will avoid substantial confusion, among both voters and election officials, by preventing a change to the election rules after the election has already started. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (explaining that the Supreme Court "has repeatedly emphasized that lower . . . courts should ordinarily not alter the election rules on the eve of an election"); *Purcell*, 549 U.S at 4–5. The NCSBE itself admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and cause disparate treatment of voters in the ongoing election. *See* Reply Brief of the State Board Defendants-Appellants at 8, Doc. 103, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020) ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9, 27–35.

Finally, contrary to the district court's determination, *see* App. 135–37, *Purcell* does not apply to stay the hand of this Court's equitable power. 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.*, 140 S. Ct. at 1207. 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.*, 140 S. Ct. at 1207.

But the relief Appellants seek in this case is not the election-altering court order that animated the *Purcell* principle. *Cf. Self Advocacy Sols. N.D. v. Jaeger*, No. 20-cv-71, 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 Appellants seek is to prevent the NCSBE from implementing the unconstitutional Receipt Deadline Extension and alteration of the postmark requirement, which are election-altering and midstream changes 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 NCSBE's website, *see* App. 161–75, and NCSBE continues to instruct voters to adhere to the statutory receipt deadline and postmark requirements, App. 64–68. In this instance, the best means to vindicate the *Purcell* principle is to stop the unconstitutional election-altering change put forward by the NCSBE. *Cf. Ely v. Klahr*, 403 U.S. 108, 113 (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 any event, Appellants submit that how *Purcell* applies to Appellants' requested relief is a close enough question to merit an injunction while this Court considers Appellants' appeal.

Accordingly, irreparable harm and the public interest weigh in favor of granting Appellants' motion.

## CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant their motion for a temporary injunction pending appeal. Appellants also request that this Court expedite consideration of this motion and temporarily enjoin the Memoranda while this motion is being considered.

Dated: October 16, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(a). The motion is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 4,895 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 16, 2020, I electronically filed the foregoing motion 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