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, 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-Appellants.

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

EMERGENCY MOTION TO STAY TEMPORARY RESTRAINING ORDER PENDING APPEAL

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Appellants, members of the North Carolina State Board of Elections and the Board's Executive Director, respectfully request that this Court stay the order below pending appellate review.[1]

STATEMENT OF THE CASE

A. The Board's Response to COVID-19

In response to the unprecedented COVID-19 crisis, the State has made numerous modifications to election procedures to reduce the risk of spread. For example, on July 17, 2020, the Board's Executive Director issued an emergency order requiring county boards of elections to have minimum weekend hours, minimum number of voting sites, and minimum sanitation and hygiene standards. App. 2-8. This order was issued pursuant to the Board's statutory authority to adjust election procedures during a natural disaster. N.C. Gen. Stat. § 163-27.1.

The Board has regularly exercised this authority to make similar adjustments to election procedures in response to emergencies. For

[1] The Board has also appealed from a nearly identical order entered on the same day. *See Wise v. Circosta,* 20-2063 (4th Cir.). The Board has filed similar stay motions in both appeals.

example, the Board has twice recently extended the absentee-ballot receipt deadline for voters after hurricanes.[2]

Separately, in response to the pandemic, the State enacted a law that, *inter alia*, reduced the absentee witness requirement from two to one. 2020 N.C. Sess. Laws 17, §§ 1.(a), 7.(a).

B. United States Postal Service Delays

On July 30, 2020, the United States Postal Service informed North Carolina officials that the state's absentee deadlines were "incongruous with the Postal Service's delivery standards." *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D.P.A.), Dkt. 1-1 at 53-55. USPS stated that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned on time or be counted." *Id.* Thus, North Carolina voters can mail their ballot on time, but because of USPS delays, may not have their ballots counted.

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[2] Emergency Order 4, N.C. State Bd. of Elections (Nov. 5, 2018), https://bit.ly/3isyiIo; Second Emergency Executive Order 4, N.C. State Bd. of Elections (Sept. 6, 2019), https://bit.ly/2Gn7JaF. Other recent emergency actions included offering additional dropoff locations for absentee ballots where a disaster had displaced voters, and extending early voting hours where a hurricane had disrupted voting. *Id.*

C. Numerous Lawsuits Against the Board

In recent months, the Board has been sued ten times (eight in state court, twice in federal court) on claims that the State's election procedures violate the North Carolina and U.S. Constitutions, in light of the COVID-19 pandemic and USPS delays.

For example, in *Democracy NC v. NC Board of Elections*, plaintiffs sued in federal court challenging various provisions of North Carolina election law, including the Board's procedures for curing deficient absentee ballots. 2020 U.S. Dist. LEXIS 138492 (M.D.N.C. Aug. 4, 2020). On August 4, 2020, the district court largely denied a requested preliminary injunction. However, the court enjoined defendants from "permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation," and directed the adoption of due-process procedures before absentee ballots may be rejected. *Id*. at 182.

Though the court denied much of the requested relief, it warned that "Plaintiffs have raised genuine issues of concern with respect to the November General Election. Should Legislative and Executive Defendants believe these issues may now be discounted or disregarded

for purposes of the impending election, they would be sorely mistaken." *Id.* at 4. No party, including Legislative Defendants, appealed this order.

Many other lawsuits were filed against the Board raising similar claims. For example, other plaintiffs filed an action raising similar claims in state court under the North Carolina Constitution. *N.C. Alliance for Retired Americans v. N.C. State Bd. of Elections*, No. 20-CVS-8881 (Wake Cty. Super. Ct.). Specifically, plaintiffs challenged: (1) limitations on the number of hours and days for early voting; (2) the witness requirement for absentee ballots; (3) the lack of prepaid postage for absentee ballots; (4) rejection of absentee ballots delivered to county boards more than three days after the election; (5) rejection of absentee ballots due to voter-signature mismatch; and (6) restrictions on assistance with absentee ballots.

In part to comply with the *Democracy NC* injunction, and in part to address concerns raised in numerous similar pending lawsuits, the Board released guidance that allowed voters to cure voter-signature defects but required a voter to revote her ballot for witness-signature defects. App. 9-15. Soon thereafter, however, the Board was sued yet

again, on claims that the cure mechanism did not provide sufficient notice and opportunity to be heard on witness-signature defects, and that it disparately affected the rights of certain groups of voters, such as racial minorities. App. 263-82.

In response, and in a good-faith effort to ensure full compliance with the injunction while also complying with other legal obligations, the Board directed county boards not to disapprove any ballots until a new cure procedure could be implemented. App. 380.

D. The Board's Unanimous, Bipartisan Decision to Resolve These Cases Through Consent Decree

On September 15, 2020, the Board met to discuss with counsel a strategy to resolve these cases to best assure an orderly election process. After lengthy discussion, the Board voted unanimously, on a bipartisan basis, to propose an offer of settlement. App. 20-29.[3]

On September 22, 2020, the *NC Alliance* plaintiffs and Board Defendants filed a Joint Motion for Entry of a Consent Judgment with the state court. Under the proposed judgment, plaintiffs agreed to drop many of their demands, including expanded early voting, elimination of

[3] The Board is comprised of five members appointed by the governor, three of whom are nominated by the governor's party, and two nominated by the other major political party. N.C. Gen. Stat. § 163-19.

the witness requirement, and prepaid postage for absentee return envelopes. The State agreed to three modest and temporary adjustments in election procedures: (1) to extend the deadline for receipt of absentee ballots mailed on or before Election Day to nine days after Election Day (matching the state statutory deadline for military and overseas voters); (2) to implement a cure process that allows voters to correct deficiencies in their absentee ballots by affirming under penalty of prosecution that they had, in fact, marked the ballot; and (3) to establish separate absentee ballot "drop-off stations" staffed by elections officials at each early voting site and at each county board office to reduce congestion and crowding. App. 48-50.

On October 2, the state court held a hearing in which it approved the consent decree. The court made a series of rulings that rejected objections to the decree, which were memorialized in a written order. App. 72-81. It first ruled that the consent judgment was the product of an arms-length, good-faith negotiation. App. 77. The court further ruled that plaintiffs had demonstrated a likelihood of success on the merits on their state-law claims, giving the Board a "strong incentive to settle this case to ensure certainty on the procedures that will apply

during the current election cycle"—and to foreclose a court order requiring it to comply with plaintiffs' far greater demands for relief. App. 77-78.

The court also ruled that the Board had the authority under state law to enter the consent decree. App. 78. This authority arose from two state statutes. The first authorizes the Board "upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes." N.C. Gen. Stat. §163-22.2. The second authorizes the Executive Director of the Board to "exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by" a "natural disaster." *Id.* § 163-27.1. The court held that "[t]he COVID-19 pandemic constitutes a natural disaster within the meaning of the statute." App. 78.

In addition, the court held that certain state statutes that authorize the legislative leaders to represent the General Assembly in litigation do not give the leaders any role in enforcing the law, including by preventing executive officials from entering settlements that affect the way laws are enforced. App. 79 (citing N.C. Gen. Stat. §§ 1-72.2,

120-32.6). Any other reading of those statutes, the court held, would violate the separation of powers under the North Carolina Constitution. App. 79-80.

Finally, the state court rejected the same constitutional claims that are raised by plaintiffs here (who are intervening defendants in the state case). As relevant, the court held that neither the Numbered Memoranda nor the consent judgment violates the Equal Protection Clause, because they provide adequate and uniform statewide standards for counting votes, practical procedures to implement those standards, and do not dilute the value of anyone's lawful vote. App. 80.

After the state court made these rulings and entered judgment, the federal district court here received briefing and held a hearing on plaintiffs' temporary restraining order. App. 84. The following day, the district court granted a TRO enjoining the Board from implementing the procedures set forth in the Numbered Memoranda—the same procedures that the state court had *ordered* the day before. App. 101.

The district court held that, by altering the procedures that apply for processing absentee ballots after they had begun being processed, the Board violated the equal protection rights of the individual voter-

plaintiffs.[4] App. 96-97. The court reasoned that *any* change in voting procedures after absentee ballots were distributed is unconstitutional. It further reasoned that such changes somehow dilute the voting power of voters who had successfully submitted ballots before those changes went into effect.

The district court made these rulings without meaningfully addressing the Board's arguments for why the court lacked authority to address Plaintiffs claims, including because of: (1) issue preclusion, (2) standing, and (3) abstention. Instead, the court simply incorporated by reference Plaintiffs' arguments on these jurisdictional bars to federal review. App. 97-98.

JURISDICTIONAL STATEMENT

The district court entered a temporary restraining order, after full briefing and a hearing. As explained further in defendant's motion for a

[4] The district court declined to address the plaintiffs' claim that the Board violated the federal Elections Clause, because they purportedly went beyond the Board's statutory authority under North Carolina law. App. 94; *see also* App. 79-80 (state court holding that the Board's actions were valid under state law). The district court further declined to rule on the Equal Protection claims that were brought by the plaintiffs who are state legislators, political candidates, and political campaigns. Instead, it ruled only on the equal protection claims brought by individual voters. App. 94, 96-97.

temporary administrative stay, because the district court's order serves effectively as an injunction, this Court has jurisdiction under 28 U.S.C. §1292(a)(1); *see Com. of Va. v. Tenneco, Inc.*, 538 F.2d 1026, 1029-30 (4th Cir. 1976). This Court also has jurisdiction under the All Writs Act to stay the district court's order. 28 U.S.C. § 1651.

ARGUMENT

A party seeking a stay of a district court's order pending appeal must show: (1) that it is likely to prevail on the merits of the appeal; (2) that it will suffer irreparable injury in the absence of a stay; (3) that the issuance of a stay will not substantially harm other parties; and (4) that a stay will serve the public interest. *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). All four factors are satisfied here.

I. The Board Is Likely to Prevail in This Appeal.

A. The District Court Erred By Considering Plaintiffs' Claims.

1. Plaintiffs Are Collaterally Estopped From Raising an Equal Protection Claim in Federal Court.

Collateral estoppel, or issue preclusion, "bars the relitigation of specific issues that were actually determined in a prior action." *Sartin v. Macik*, 535 F.3d 284, 287 (4th Cir. 2008). "Federal courts must give

the same preclusive effect to a state court judgment as the forum that rendered the judgment would have given it." *Id.*

Under North Carolina law, issue preclusion applies where: (1) the issue is identical to the issue actually litigated and necessary to a prior judgment, (2) the prior action resulted in a final judgment on the merits, and (3) the plaintiffs in the latter action are the same as, or in privity with, the parties in the earlier action. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 349 S.E.2d 552, 557 (N.C. 1986). Under this standard, the *NC Alliance* judgment should have barred relitigation of plaintiffs' claims in this lawsuit.

First, the issue raised by the plaintiffs here is the same as an issue litigated and necessary to the final judgment in *NC Alliance*. In *NC Alliance*, the parties litigated whether the proposed consent judgment and Numbered Memoranda violated the Equal Protection Clause. *See* App. 148-49, 172-180, 228. The court in *NC Alliance* considered these arguments and held that "neither the Numbered Memoranda, nor the consent judgment itself, violates the Equal Protection Clause" because they "provide adequate statewide standards for determining what is a legal vote" and "do not dilute or discount

anyone's vote." App. 80. Before the district court here ruled, the *NC Alliance* court entered final judgment in the plaintiffs' and the State Defendants' favor. App. 260.

Finally, the plaintiffs in the federal cases are the same as, or in privity with, the parties in *NC Alliance*. The legislative and political-committee plaintiffs all intervened in *NC Alliance*. App. 283, 313, 317. Upon intervention, these parties pressed the same arguments to the state court that were made in this lawsuit: that the Numbered Memos violate the Equal Protection Clause. *See* App. 172-180, 228.

The voter-plaintiffs are in privity with the legislators and political-committees. Privity exists when "the interests of one party are so identified with the interests of another that representation by one party is representation of the other's legal right." *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007). Where a party with closely aligned interests controls the litigation of another, the parties are in privity. *Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 651 (4th Cir. 2005); *see Whitacre Partnership v. BioSignia, Inc.*, 358 N.C. 1, 35-36 (2004).

In similar cases, courts have recognized that privity exists between voters and the candidates or political parties that those voters support. The Second Circuit's decision in *Ferris v. Cuevas* is instructive. 118 F.3d 122 (2d Cir. 1997). In *Ferris*, organizers of a city referendum campaign sued in state court for the city's refusing to put the referendum on the ballot. *Id.* at 124. The state court upheld the clerk's refusal. *Id.* at 125. After the state judgment, voters who had signed the petition sued in federal court, this time raising federal issues. The voters sought the same relief that the organizers sought in state court, and even engaged the same lawyer who had represented one of the organizers in state court. *Id.* at 128. The Second Circuit held that the federal and state plaintiffs had identical interests—forcing the referendum to appear on the ballot. *Id.* In holding that the organizers exhibited sufficient control over both the state and federal lawsuits to establish privity, the court emphasized that both sets of plaintiffs shared the same lead counsel. *Id.*

This situation is no different. The interests expressed by the political committees and legislators in *NC Alliance* are in perfect alignment with the interests pressed by the voter-plaintiffs here. The

voters claim an interest in excluding votes cast in accordance with the Numbered Memoranda, because the Memoranda supposedly violate the voters' Equal Protection Clause. *Moore v. Circosta*, No. 5:20-cv-507, Dkt. 1, ¶ 74; *see also Wise v. Circosta*, Dkt. 1, ¶ 100.

This is the same interest that the legislators and the political committees pressed in *NC Alliance*. And they did so explicitly *on behalf of the voters* who supported their candidates and party: they argued that votes cast in accordance with the Numbered Memoranda should be excluded because they would "administer[] the election in an arbitrary and nonuniform manner" and would "be purposefully allowing otherwise unlawful votes to be counted, thereby deliberately diluting and debasing North Carolina voters' votes." App. 172-180, 228. And in this case, just as in *Ferris*, the voter-plaintiffs share the same counsel with the legislators and the political committees, in both the federal actions and *NC Alliance*. Thus, it is apparent that the legislators and political committees have sufficiently overlapping interests with the voter-plaintiffs to establish privity.

Finally, the political committees successfully intervened in *NC Alliance* on their own behalf, as well as on behalf of voters and their

members. App. 286 (claiming an interest in representing the interests of "Republican voters throughout the state"). By doing so, they directly represented the interests of the voter-plaintiffs here—all of whom are either (1) formally unaffiliated, but voted in Republican primaries or (2) are members of the Republican Party. The voter-plaintiffs are therefore also in privity with the political committees who were parties to *NC Alliance*.

For these reasons, issue preclusion bars plaintiffs from relitigating their equal-protection claims in this lawsuit. If plaintiffs wish to seek further review of those claims, the proper course is to appeal the *NC Alliance* court's judgment, not to collaterally attack that judgment in a new lawsuit in federal court. Indeed, plaintiffs have *already* filed an appeal of the *NC Alliance* court's order to the North Carolina Court of Appeals, again raising the same claims that are made in this lawsuit.

2. Plaintiffs Have Failed to Demonstrate Standing.

The district court improperly entered a TRO without addressing whether it had subject-matter jurisdiction to hear the case. App. 94. The voter-plaintiffs have failed to demonstrate an injury sufficient to confer standing. These plaintiffs base their equal-protection claim on

two theories: (1) that they are being subjected to arbitrary and disparate treatment, and (2) that their votes will be diluted as a result of other votes being counted under the procedures in the Memoranda. Neither theory shows how voter-plaintiffs suffered any harm.

First, plaintiffs have failed to demonstrate disparate treatment. The Memoranda apply to all voters in North Carolina in the 2020 general election. All voters are subject to the same rules. Indeed, Plaintiffs' arbitrary-treatment claim actually proves that they have no injury: Plaintiffs' ballots were accepted without the need to invoke any of the curative procedures outlined in the Memoranda. Surely Plaintiffs cannot claim an injury for *not* having to go through a remedial process put in place for voters who make substantive errors in casting their absentee ballots.

Second, plaintiffs' claims of vote dilution fare no better. Plaintiffs argue that allowing voters to cure deficiencies relating to the witness signature is illegal and that counting these illegal votes will dilute the value of their valid votes. App. 341. But plaintiffs' argument is based on a faulty premise: a state court has already held that votes counted in accordance with the Memoranda are lawful under state law. App. 79-

80. Because these votes are not illegal, they do not dilute the value of plaintiffs' votes.

But even if a court had not already determined that cured ballots were valid, plaintiffs' vote-dilution claim alleges a generalized injury: Under plaintiffs' theory, not only will their votes be diluted, but so will every other North Carolinian voter's. As numerous courts have held when dismissing similar vote-dilution claims for lack of standing, these sort of generalized injuries are not sufficient to confer standing because plaintiffs' "asserted interests are the same . . . as for every other registered voter in the state." *United States v. Florida*, No. 4:12cv285-RH/CAS, 2012 WL 13034013, *1 (N.D. Fla. Nov. 6, 2012); *see Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, *4 (D. Nev. May 27, 2020) (no standing for voters to their generalized "claimed injury [of] vote dilution"); *ACLU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

3. The District Court Erred by Failing to Abstain From This Case.

The district court erred by thrusting itself into ongoing state court litigation, rather than abstaining as required under *Younger* and its progeny.

Federal courts must abstain under *Younger* if there is: "(1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165 (4th Cir. 2008).

The circumstances of this case undoubtedly meet this test and thus demand abstention.

First, there is an ongoing state proceeding that was instituted prior to the filing of this lawsuit. The *NC Alliance* plaintiffs filed their complaint on August 10, 2020; the legislators intervened on August 12; and the political committees were granted intervention on September 24. The *NC Alliance* court granted a joint motion for a consent judgment on October 2, holding that the Board had the authority to issue the challenged Memoranda, and that neither the consent

judgment nor the Memoranda violated the Constitution. App. 260. That order has now been appealed.

In contrast, the federal plaintiffs filed these actions a little more than a week ago, on September 26, 2020, and *explicitly asked* the federal court to enter an injunction "before the state court acts." App. 355-56. Despite plaintiffs' best efforts, the district court in this action did not act until the day *after* the *NC Alliance* court had already approved and entered the consent judgment. The *NC Alliance* proceedings are clearly ongoing, and had already advanced considerably at the time the district court issued its TRO.

Second, the *NC Alliance* case implicates the important state interest in "enforcing the orders and judgments of [its] courts." *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13 (1987); *Sprint Commc'ns, Inc. v. Jacobs,* 571 U.S. 69, 73 (2013) (reaffirming *Pennzoil*); *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005) ("[E]nforcing state court judgments cuts to the state's ability to operate its own judicial system, a vital interest for *Younger* purposes."). Plaintiffs' challenge seeks to undo and thwart the enforcement of the *NC Alliance* consent judgment. "[A] consent judgment is the contract of the parties

entered . . . with the approval and sanction of a court of competent jurisdiction." *Keen v. Parker*, 217 N.C. 378, 8 S.E.2d 209, 214 (1940). The district court's TRO requires the Board *not to take* actions that the state court has ordered the board *to take*, and in doing so "interfere[s] with the execution of state judgments." *See Pennzoil*, 481 U.S. at 14.

Finally, *Younger*'s third prong is satisfied because the federal plaintiffs were afforded the opportunity to raise their federal constitutional claims in the state proceeding—and actually did so. *Laurel*, 519 F.3d at 167. *See* App. 172-180, 228. The *NC Alliance* court considered and rejected these arguments. App. 80. Accordingly, the district court erred by not abstaining from deciding plaintiffs' claims.

B. Plaintiffs' Equal Protection Claim Lacks Merit.

The district court also erred when it held that plaintiffs are likely to succeed on their two equal-protection theories.

First, relying on *Bush v. Gore*, the district court held that the consent judgment would deny voters equal protection because it would create "arbitrary and disparate treatment" and "value one person's vote over that of another." App. 95-96 (quoting 531 U.S. 98, 104-05 (2000)).

But *Bush* actually shows why the consent judgment is consistent with equal protection.

In *Bush*, the Supreme Court held that Florida's plans for recounting votes during the 2000 presidential election, if they went forward, would deny equal protection because the state had not adopted "uniform rules" to determine if votes should be counted. *Id.* at 106. The Court explained that Florida's recount plans denied voters equal protection because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Id.* at 107. Nevertheless, the Court also made clear that Florida *could have* proceeded with a recount if it had developed "adequate statewide standards for determining what is a legal vote," *even after* the election was over. *Id.* at 110. The only reason that Florida was not permitted to develop these uniform standards was because too little time existed to develop them before the State needed to select its presidential electors. *Id.*

Here, the consent judgment does precisely what *Bush* contemplated: It establishes uniform and adequate standards, which

apply statewide, for determining what is a legal vote. All voters whose mail-in ballots are postmarked by Election Day and received within nine days can have their votes counted. App. 347. All voters who wish to vote via mail-in absentee ballot must comply with the State's witness requirement. 2020 N.C. Sess. Laws 2020-17, § 1.(a). All voters who wish to submit a mail-in absentee ballot in person may do so, so long as the person dropping off the ballot provides the information required for the written log. App. 349-53. And all voters who return a mail-in absentee ballot with a curable deficiency can remedy that deficiency by way of a certification. App. 16-19. If the consent judgment goes into effect, these uniform standards will apply to all voters statewide. Indeed, the only thing stopping uniform statewide standards is the district court's order.

The district court nevertheless suggested that these standards deny voters equal protection, merely because some absentee ballots were cast before all the standards were in place. It reasoned that the alteration in procedures gives preferential treatment to persons who vote after their adoption. App. 96-97. But if these standards go into effect, they will apply to *all voters*. App. 80. That would have been true

for these plaintiffs as well—had they needed to avail themselves of the cure procedure. And critically, the State's revised standards do not weigh any two lawfully cast ballots differently. Thus, nothing about the consent judgment "value[s] one person's vote over that of another." *Bush*, 531 U.S. at 104-05. It instead treats all voters alike.

Moreover, if the district court were correct that any change made during an election to ensure that all persons can vote *denies* equal protection to those who have already voted, the consequences would be profound: If it is unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions. *See* N.C. Gen. Stat. § 163-166.01 (granting power to Board to grant this relief). Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps are implemented after voting begins. These emergency adjustments are not theoretical. In the last three years alone, the Board has twice extended the deadline for receipt of absentee ballots after hurricanes displaced voters.

Second, the district court also held that the consent judgment would deny voters equal protection because it would result in the "dilution of the weight of a citizen's vote." App. 96 (quoting *Reynolds*, 377 U.S. 533, 555 (1964)). *Reynolds* and other vote-dilution precedents provide no support for the district court's decision. In *Reynolds*, in striking down malapportioned legislative districts, the Supreme Court noted that intentional "ballot-box stuffing" would deny voters equal protection, because it would dilute lawfully cast votes. *Id.*

But the consent judgment in no way lets votes be cast unlawfully. It instead simply establishes uniform standards that help county boards ascertain which votes are lawful. The state court that approved the consent judgment has already held, under North Carolina law, that votes cast consistent with the procedures in the Numbered Memoranda are lawful. App. 80. Even if the district court disagreed with that state-law holding, moreover, sovereign immunity would bar the district court from entering an injunction that required the Board to comply with the federal court's reading of state law. *See Pennhurst*, 465 U.S. at 106, 124-25.

As a result, when a state *voluntarily* adopts measures that "make[ ] it easier to vote," they are indisputably constitutional. *Short v. Brown*, 893 F.3d 671, 677-78 (9th Cir. 2018). Indeed, some courts have held that the Constitution *requires* similar accommodations during this unprecedented pandemic.[5] *E.g.*, *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 15 (1st Cir. 2020). And many states carry out their elections under more lenient rules; only eleven states use a witness requirement at all.[6]

Indeed, tonight's U.S. Supreme Court~~'s~~ order in *Middleton* directly refutes the reasoning in the decision below. *See Andino v. Middleton*, 592 U.S. __ (Oct. 5 2020). In granting a stay of a South Carolina district court's order reducing that State's absentee-ballot witness requirement from two to one, the Supreme Court specifically ordered

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[5] To justify its order, the district court cited the Supreme Court's ruling in *Purcell*, but that stands the *Purcell* principle on its head. *Purcell* is a rule of discretion under which "lower *federal courts* should ordinarily not alter the election rules on the eve of an election." *RNC v. DNC*, 589 U. S. ____ (2020) (emphasis added) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). It does not allow federal courts to *bar* states from lawfully adjusting *their own election rules*.

[6] Nat'l Conf. of State Legis., How States Verify Voted Absentee Ballots (Apr. 17, 2020), https://bit.ly/2GyPwql.

that "any ballots cast before this stay issued and received within two days of this order" must be counted. *Id.* That is, the Court ordered South Carolina to apply different procedures for counting absentee ballots, solely based on when they were cast. Under the district court's logic, the Supreme Court just ordered South Carolina to violate the Equal Protection Clause. That cannot be the case.

For these reasons, the State's reasonable efforts to ensure that all North Carolinians can vote does not deny equal protection to those who have already successfully voted.

C. The Remaining Factors Also Warrant Relief.

The other stay factors all also point to the need for a stay. *Long*, 432 F.2d at 979. The Board and voters will suffer irreparable harm if the injunction is allowed to remain in effect: For half of the remaining mail-in voting period, the Board would be enjoined by a federal court from following procedures that a state court has held are necessary to protect voters' rights under the North Carolina Constitution. Because of the district court's order, the Board is unable to inform thousands of voters that their ballots contain minor deficiencies, and to allow them to cure those problems so they can exercise their right to vote.

In addition, no other party will suffer harm if a stay is granted. Persons who have already voted are not harmed when other voters can cast their ballots as well.

Finally, the public interest would be served by a stay. A stay would provide certainty to the public on the procedures that apply during the current election period. It would also free the Board from multiple, conflicting orders and allow the election to proceed in an orderly fashion.

CONCLUSION

Defendants respectfully request that this Court stay the temporary restraining order issued below.

Respectfully submitted,

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October 5, 2020

CERTIFICATE OF SERVICE

I certify that on this 5th of October, 2020, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Ryan Y. Park

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(C), 32(a)(5), and 32(g)(1), I certify that this motion has 5,198 words and was prepared using Century Schoolbook, 14-point font.

/s/ Ryan Y. Park