CASE No. 20-2107

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

TIMOTHY K. MOORE, *et al.*,
Plaintiffs – Appellants,

—v.—

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina Board of Elections, *et al.*,
Defendants – Appellees,

and

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, *et al.*,
Intervenors – Appellees.

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

Case No. 1:20-cv-00911-WO-JLW

INTERVENOR-APPELLEES' OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

MARC E. ELIAS
UZOMA N. NKWONTA
LALITHA D. MADDURI
JOHN M. GEISE
JYOTI JASRASARIA
ARIEL B. GLICKMAN
Perkins Coie LLP
700 13th Street, NW, Suite 800
Washington, DC 20005-3960
Telephone: (202) 654-6200

BURTON CRAIGE
NARENDRA K. GHOSH
PAUL E. SMITH
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: (919) 942-5200

MOLLY MITCHELL
Perkins Coie LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702
Telephone: (208) 343-3434

Attorneys for Intervenor-Appellees North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz

INTRODUCTION

Intervenors-Appellees North Carolina Alliance for Retired Americans and seven individual voters (together, the "Alliance") request that the Court deny Appellants' emergency motion for injunction pending appeal. Having failed to convince the district court to enjoin relief ordered by a state court consent judgment, issued on state law grounds, Appellants have asked this Court to stall the enforcement of a state court judgment, less than three weeks before Election Day, after in-person early voting has already begun, threatening the constitutional rights of North Carolina voters which the state court sought to protect. This Court should reject this truly extraordinary request.

On October 2, the Wake County Superior Court (the "State Court") entered a consent judgment resolving the Alliance's challenges under the North Carolina Constitution to restrictions on absentee and in-person voting in the upcoming election. After extensive briefing and argument from the Alliance, Defendant State Board of Elections ("NCSBE"), and Intervenors Timothy Moore, Philip Berger, and several Republican Party entities, the State Court ruled that the Alliance was likely to succeed on its claims, and that the Alliance and NCSBE's Consent Judgment is consistent with the state and federal constitutions. Less than 24 hours later, a federal district court usurped the State Court's authority and granted Appellants' requested TRO, enjoining enforcement of the State Court's judgment through October 16. But

on October 14, another federal district court declined to extend the TRO and denied Appellants' requested preliminary injunction ("PI"), allowing the Consent Judgment to remain in force.

In seeking recourse in federal court to overturn an unfavorable state court judgment, Appellants flouted well-established principles of federalism and comity, not to mention the Alliance's constitutional rights. By endorsing Appellants' impermissible collateral attack on the Consent Judgment, the district court violated fundamental principles of abstention and standing, but did not grant Appellants' request for PI, recognizing the disruptive effect of their requested relief on the State's electoral process. Unsatisfied with the district court's ruling, Appellants now seek an emergency injunction pending appeal to delay once more. Meanwhile, with each passing day, the Alliance and thousands of North Carolinians stand to be irreparably harmed by their eligible votes not being counted as Appellants' ongoing collateral attack against the State Court judgment have brought the absentee ballot cure process to a standstill. Therefore, an emergency injunction is not only improper, but would cause significant harm to voters and violate their rights under the North Carolina Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

In light of the COVID-19 pandemic, the Alliance sued NCSBE and its Chair in state court, challenging election laws and procedures that impose undue burdens

on the right to vote this November, in violation of the North Carolina Constitution. IAA343-47. A number of Appellants were granted intervention along with two state legislators ("Intervenors"). On August 18, the Alliance moved for a preliminary injunction. *See* IAA243-48. The Alliance submitted over 500 pages of supporting evidence, including four expert reports, 17 affidavits, and numerous official documents.[1]

Before the preliminary injunction hearing, the Alliance and NCSBE reached an agreement and filed a joint motion for entry of a consent judgment. *See* IAA023-242. Under the Consent Judgment (which required the implementation of Numbered Memos 2020-19, 2020-22, and 2020-23), NCSBE agreed to: (1) count eligible ballots postmarked by Election Day, if received within nine days (deadline for military and overseas voters); (2) implement a cure process for minor ballot deficiencies, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate manned ballot drop-off stations at early voting locations and county board offices for in-person ballot return; and (4) inform the public of these changes. IAA041-043. The State Court scheduled a hearing for October 2 to consider the proposed Consent Judgment and hear Intervenors' objections.

[1] The Alliance can make available the exhibits to its Memorandum in Support of Motion for Preliminary Injunction at the Court's request.

Rather than wait for that hearing, the legislators who were also Intervenors below, along with a handful of individuals, preemptively filed a federal lawsuit to enjoin enforcement of the Consent Judgment before the State Court could act. IAA743-65. On October 2, the State Court held a six-hour hearing and entered the Consent Judgment implementing the Numbered Memos. *See* IAA448-458. In doing so, the State Court found that (1) NCSBE had legal authority to settle the case, IAA454-56; (2) the Alliance was likely to succeed on the merits, IAA453; (3) the terms of the Consent Judgment are "fair, adequate, and reasonable" and not illegal or collusive, *id.*; (4) the settlement is consistent with the state and federal constitutions, IAA456, and (5) the settlement serves "a strong public interest in having certainty in our election procedures and rules," IAA454. The State Court issued its Findings of Fact and Conclusions of Law on October 5. IAA448-458. Appellants immediately filed a writ of supersedeas and motion for temporary stay in the state court of appeals. IAA658-96. Yesterday, the state appellate court granted a temporary stay, pending a ruling on the writ. IAA697-98.

Also on October 2, hours after the State Court Consent Judgment issued, a court in North Carolina's Eastern District held a short hearing on Appellants' TRO. *See* IAA767. The following morning, the district court granted the TRO and

transferred the case to the Middle District of North Carolina, where Appellants requested conversion of the TRO into a PI. *See* IAA767-86.[2]

On October 14, the district court denied Appellants' motion for a PI. *See* IAA557-647. The court determined that all Appellants lacked standing for their vote dilution, Elections Clause, and Electors Clause claims. *See* IAA598-99, 627-31. The court further held that only individual voters who had already cast ballots had standing to raise disparate treatment claims, and found that those Appellants had failed to establish a likelihood of success regarding their challenges to NCSBE's regulations regarding postmarks and ballot drop-off stations. *See* IAA601, 617-18, 620. Though the Court believed those few Appellants were likely to succeed on their equal-protection challenges to cure procedures for missing witness or assistant signatures and the ballot receipt deadline extension, *see* IAA608, the witness cure challenges were mooted by an order issued in *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457 (M.D.N.C. Oct. 14, 2020), and the Court declined to enjoin the receipt deadline extension under the doctrine announced in *Purcell v. Gonzalez*, 549 U.S. 1 (2006). *See* IAA624-25.

[2] The Middle District granted the Alliance's pending motion for intervention. IAA501-02, 551-56.

Yesterday, the district court denied Appellants' motion for a stay pending appeal, or alternatively to leave the TRO in effect pending appeal. Appellants noticed this appeal and filed their motion for an injunction pending appeal.

LEGAL STANDARD

An injunction pending appeal requires appellants to demonstrate that they are likely to succeed on the merits, they will be irreparably injured absent an injunction, the equitable balance favors an injunction, and an injunction benefits the public. *Nken v. Holder*, 556 U.S. 418, 434 (2009).

ARGUMENT

I. The district court abused its discretion in exercising jurisdiction over this case.

Appellants' attempt to use a federal court action to bypass unfavorable rulings in ongoing state court proceedings implicates fundamental principles of federalism and calls for abstention. Collateral attacks on state court proceedings are precisely what federal abstention doctrines seek to avoid, particularly where Appellants have turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). The district court should have abstained under multiple well-established doctrines; even considering the PI was an abuse of discretion.

First, Appellants' claims are precluded under *Pennzoil*. *See id.* In *Pennzoil*, the losing party in a state court proceeding sued in federal court to enjoin

enforcement of the state court judgment, alleging that the state's process for compelling compliance violated the U.S. Constitution. *Id.* at 13. The U.S. Supreme Court, citing "the importance to the States of enforcing the orders and judgments of their courts," held that the federal court could not entertain the suit. *Id.* at 13-14; *see also Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989) (applying *Pennzoil*). Such is the case here. Appellants' federal lawsuit seeks to render the State Court's adjudication nugatory by enjoining enforcement of the Consent Judgment. But the *state courts*, not the federal courts, provide the proper avenue for Appellants' challenge.

The district court failed to apply *Pennzoil* based on its mistaken belief that Appellants' challenges do not "relate to pending state proceedings" and "there does not appear to be any relief available to Plaintiffs for the[ir] federal questions" in state court. IAA585-86; *see also* IAA583 ("The Plaintiffs from this case were intervenors. They were not parties to the Settlement Agreement and were in no way properly adjudicated 'state court losers.'"); *see also* IAA587 ("Plaintiffs did not appeal the state court's conclusions, but sought relief in federal court . . . ."). This is demonstrably false. There is no dispute among the parties that legislators can (and did) press their federal constitutional claims through the state appellate process; indeed, after securing the TRO in federal court, Appellants *appealed* the State Court's judgment raising the same federal constitutional claims they assert here, and

the parties are concurrently litigating those claims in state court. This Court should therefore "defer[] on principles of comity to the pending state proceedings." *Pennzoil*, 481 U.S. at 17.

Second, the *Pullman* doctrine also warrants abstention. Under *Pullman*, "[f]ederal courts should abstain . . . where a case involves an open question of state law that is potentially dispositive inasmuch as its resolution may moot the federal constitutional issue." *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839-40 (4th Cir. 2012) (quotation marks omitted). This is particularly so when a federal court must evaluate a legislature's allegedly ambiguous delegation of power to other actors. *Cf. K Hope, Inc. v. Onslow Cnty.*, 107 F.3d 866, Nos. 95-3126, 95-3195, 95-3127, 95-3196, 95-3153, 95-3197, 1997 WL 76936, at *1 (4th Cir. 1997).

State delegation of authority is at the center of Appellants' challenges here. Appellants asked the federal court to determine whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos. These arguments—premised on misinterpretations of state law—were raised by Appellants in the State Court, which rejected them after careful consideration. IAA454-56. Though the federal district court was not necessarily bound by the State Court's holdings on these questions, the fact that it holds a different "opinion" strongly suggests this is an unsettled issue of state law that warrants abstention. *See* IAA587;

see also IAA644-46 (discussing disagreement with state superior court regarding NCSBE's authority to enter into Consent Judgment and promulgated challenged Numbered Memos).

These state law questions are potentially dispositive. Rather than first appealing the State Court's conclusions, Appellants improperly sought a second opinion in federal court and then returned to state courts. But if the reviewing state court agrees with Appellants, there would be nothing left for this federal court to decide; neither the Consent Judgment nor the Numbered Memos would survive. Thus, Appellants' claims plainly raise "unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question." *Meredith v. Talbot Cnty., Md.*, 828 F.2d 228, 231 (4th Cir. 1987).[3]

In deciding to exercise jurisdiction, the district court made two significant errors: First, the court suggested that the state law issue must be actively "pending in state court." IAA587. This is incorrect, *see Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir. 2006) ("*Pullman* . . . appl[ies] without regard to the existence of an ongoing proceeding."). Second, the court stated that the issue was not pending in state court *because* "Plaintiffs did not appeal the state court's conclusions." *See id.* Not so. Appellants are actively litigating the scope of NCSBE's authority in the North

[3] Appellants' federal constitutional claims can be *and already have been* raised in state court.

Carolina Court of Appeals. *See* IAA658-98. Though not required for *Pullman* abstention, "[w]here there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, [the Supreme Court] ha[s] regularly ordered abstention" under *Pullman*. *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975). Despite the district court's misrepresentations of fact and law, *Pullman* abstention is clearly warranted.

This Circuit has recognized that "[t]he list of areas in which federal judicial interference would 'disregard the comity' that Our Federalism requires is lengthy" and specifically includes states' interest in "enforcing state court judgments." *Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 352 (4th Cir. 2005). Appellants cannot turn to federal court in a transparent effort to relitigate the *same* claims that failed before the State Court.[4] This blatant "attempt to . . . avoid adverse rulings by the state court . . . weighs strongly in favor of abstention." *Nakash v.*

[4] The district court is incorrect that it is exempt from comity concerns because its prior *Democracy N.C.* order "was issued prior to the filing of these state court actions, and that Order was the basis of the subsequent grant of affirmative relief by the state court." IAA580. Respectfully, the court overstates the significance of that order, which is only referenced in the "Recitals" of the Consent Judgment (along with other supporting facts), IAA032, but is not cited elsewhere in the consent judgment or anywhere in the state court's finding of facts and conclusions of law. IAA448-58. Even if it *were* relevant to abstention, *Democracy N.C.* only relates to the cure procedure for missing witness or assistant signatures, which is no longer at issue in this case after the district court's October 14 Order in *Democracy N.C.* *See* IAA624-25.

Marciano, 882 F.2d 1411, 1417 (9th Cir. 1989). Appellants' end-run fares no better merely because they have joined additional parties that lack standing and raise meritless claims. *See infra* Section II. If any case demands abstention, it is this one.

II. The district court erred in adjudicating Appellants' claims because they lack standing.

This Court should also deny Appellants motion because, as a threshold matter, they lack standing to assert any of their claims, and the district court erred to the extent it held otherwise.[5] "The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. At its "irreducible constitutional minimum," standing requires: (1) an injury-in-fact, that is (2) fairly traceable to the defendant's conduct, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish injury, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

[5] Appellants also raised Elections Clause claims. The district court correctly found they do not have standing to do so as private parties and individual legislators. IAA627-31; *see Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). Moreover, these claims are meritless, as innumerable courts to examine this issue have held that "legislature" in the Clauses does not mean that legislative authority cannot be delegated. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015).

A. Appellants' lack standing to seek their requested injunction based on their alleged equal protection injury.

Even assuming that the district court was correct that Heath and Whitley would have an injury due to disparate treatment under the Equal Protection Clause (they do not, *infra* Section II.B), this is not an injury that provides standing for the requested injunction. As cognized by the district court, Heath and Whitley have standing because they has already voted under a more rigorous regime and voters following them will be able to vote with fewer restrictions. This (in the district court's view) arbitrarily subjects them to disparate treatment.

But, assuming all of that is true, it is not an injury sufficient for standing for prospective injunctive relief because it cannot occur again. The Supreme Court's decision in *City of L.A. v. Lyons*, 461 U.S. 95 (1983) is instructive here. There, the plaintiff sued for injunctive relief seeking a ban on the Los Angeles Police using chokeholds because he had been previously subject to a chokehold. *Id.* at 99-100. The court denied his relief because it was speculative that the plaintiff himself would be subject to a chokehold again and, although he could show he had once been subject to unconstitutional conduct, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

So too here. Even if Heath and Whitley have suffered a cognizable injury under the Equal Protection Clause, they have already voted under those conditions and cannot plausibly allege any continuing injury, and the only potential future harm they have alleged—vote dilution—this district court found too speculative to establish standing. IAA596. This alone should have resulted in the denial of Appellants' request for injunctive relief.

But *City of L.A.* is also instructive for another reason related to the abstention principles elucidated above. The Court noted that part of the reason it upheld the high requirements for standing to seek equitable relief was that "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers . . . in the absence of irreparable injury which is both great and immediate." *Id.* at 112; *see also id.* ("In exercising their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951))). Those same principles of restraint must guide this Court in the present instance and require finding that Appellants lack standing for the requested injunction.

B. Appellants lack standing to assert violations of the Equal Protection Clause.[6]

In addition to their lack of standing to seek injunctive relief, a more fundamental flaw in Appellants' equal protection claim is that the relief ordered by the State Court does not personally injure Heath and Whitley in any way—here, again, the district court erred in suggesting otherwise. They have voted and have not alleged any injury or burden in connection with casting their ballots. Allowing other lawful voters to cure immaterial issues with their ballots (e.g., an incomplete address for the observer) does not infringe on her right to vote or have her vote counted. Nor does the fact that voters who prefer to submit their ballots in person can do so at manned drop-off stations without unnecessarily risking their health. The same is true of the State's acceptance of ballots postmarked by Election Day that arrive before the canvass, the same deadline established for military and overseas voters' ballots. N.C.G.S. §§ 163-182.5(b), 163-258.10, 163-258.12(a). The Numbered Memos simply ensure that these lawful voters are not disenfranchised as a result of curable

[6] The district court correctly found that Appellants lacked standing for an equal protection injury under their alternative vote dilution theory, a holding echoed by courts around the country. *See, e.g.*, *Carson v. Simon*, No. 20-CV-2030 (NEB/TNL), 2020 WL 6018957, at *8 (D. Minn. Oct. 12, 2020); *Donald J. Trump for President, Inc. v. Cegavske*, -- F. Supp. 3d --, 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020); *Martel v. Condos*, -- F. Supp. 3d --, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2748301, at *4 & n.12 (D. Nev. May 27, 2020); *Am. Civ. Rts. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789, 802-03 (W.D. Tex. 2015).

mistakes and USPS delivery delays outside of their control. Heath and Whitley have no legitimate interest in invoking the power of the federal judiciary to prohibit other lawful voters from having their ballots counted.

C. Appellants' theory of standing would result in a breathtaking expansion of the Equal Protection Clause.

At bottom, Appellants argued (and the district court found) that disparate treatment alone—without injury—constitutes a violation of the Equal Protection Clause. This is a breathtaking expansion of the Equal Protection Clause, conferring a constitutional injury on just about anyone anytime a law changes. Under Appellants' theory, individuals who abided by the former law would presumably suffer an equal protection injury simply because other individuals would not be subject to the same law. Here, Appellants take issue with the fact that future voters may face fewer barriers to casting their ballots, even though Appellants have alleged no barriers to successfully casting their own. There is no authority to suggest that a law that makes the exercise of a fundamental right easier for future actors is barred by the equal protection doctrine. *Cf. Short*, 893 F.3d at 677-78 ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution."). That position is especially troubling here, where the Alliance demonstrated in the state court proceedings that the rules which preceded the Numbered Memos burdened their fundamental right to vote—and the

State Court found that the Alliance was likely to succeed on the merits of its claims. *See* IAA453.

Taking Appellants' argument to its logical conclusion would lead to absurd results. It would mean that someone who is already registered to vote could challenge the introduction of online voter registration in the State because that "easier" procedure was unavailable to them at the time of registration—just as North Carolina did on September 1 when it introduced its online registration portal. Ultimately, Appellants' position would allow just about any voter to block any and all new procedures on the ground that they benefit others, inviting the Court to adopt a limitless expansion of federal court jurisdiction to vindicate a previously-unrecognized right to dictate how others vote.

III. Appellants are not likely to succeed on the merits of their equal protection claims.

Appellants are also unlikely to succeed on the merits of their equal protection claim—which, again, is the only claim for which the district court found (erroneously) that they had established standing. Putting aside errors in the district court's standing analysis, Appellants' equal protection claim fundamentally misconstrues well-settled precedent, as did the district court in assessing what constitutes an "arbitrary" application of a law in violation of the Constitution. In *Bush v. Gore*, 531 U.S. 98, 105-06 (2000), the Supreme Court specifically found "unobjectionable" Florida's instruction to implement a new post-election procedure

for counting some ballots but not others by considering the intent of the voter in determining whether a vote was legally cast. The Court found that voters were subject to unlawful arbitrary treatment *only* due to the lack of "uniform rules" on *how* to implement that procedure, resulting in county-to-county and election-official-to-election-official variation in application, subjecting voters to arbitrary acceptance or rejection of vote. *Id.*

Here, the Numbered Memos apply equally to all voters. Memo 2020-22 requires all otherwise eligible ballots to be mailed by Election Day. All ballots, including those already mailed, will be counted if received up to nine days after the Election. Under Memo 2020-23, all voters who choose to return their ballots at early voting locations can utilize the ballot drop-off stations. Finally, Memo 2020-19 expands the list of curable deficiencies for all voters, including those who made errors prior to its implementation on September 22, 2020.[7] Appellants fail to demonstrate how their right to vote—or anyone else's for that matter—has been burdened, nor can they establish that their votes will be valued less than others. *See Bush*, 531 U.S. at 104-05 ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote

[7] In a separate case, a district court ordered that the lack of witness signature is not a curable deficiency. IAA702-42. While no version of Memo 2020-19 eliminated the witness requirement, there can be no question now that the witness requirement remains in place for all voters. Thus, no voter is subject to any alleged "disparate treatment."

over that of another.") (emphasis added). In fact, Heath and Whitley have already successfully voted, and their ballots will count.

Nor does the timing of the release of the Numbered Memos give rise to an equal protection claim. As the district court found, election procedures are regularly changed after voting has started to ensure that the fundamental right to vote is protected. *See Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *30 (D.S.C. May 25, 2020) (enjoined witness requirement after absentee voting had started); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1031 (N.D. Fla. 2018), *appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790 (11th Cir. 2020) (enjoined Florida's signature-matching procedures and ordered a cure process *after* election concluded); *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Ga.*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) (enjoined Georgia's signature-matching scheme and ordered a cure process in the middle of the absentee and early voting periods); *Action NC v. Strach*, 216 F. Supp. 3d 597, 646-47 (M.D.N.C. 2016) (injunction after absentee and early voting started requiring that certain voters be treated as registered for that election).

In each case, the fact that some voters had already successfully voted made no difference. The same reasoning applies here; to hold otherwise would effectively proscribe all constitutional protections once voting has started.

IV. The concerns animating *Purcell* counsel in favor of denying the requested relief.

Appellants incorrectly and confusingly base their request for the extraordinary relief of having this *federal court* enjoin state administrative actions in part on *Purcell*, a case that provides two clear admonitions to the federal judiciary, which both counsel against the requested relief here. First, *Purcell* is a caution to a reviewing court—deprived of the full record before a lower court—not to act hastily close to elections. In *Purcell*, the district court considered evidence presented to it and denied a request for a preliminary injunction that would have prevented Arizona from enforcing a new identification requirement five months after the cases were initially filed. 549 U.S. at 3-4. The Ninth Circuit granted an injunction pending appeal a little over a month before the upcoming election, and the Supreme Court noted this was in error because it did not give appropriate consideration to the holdings and deliberations of the district court, a particular concern when making changes close to an election. *Id.* at 5.

Due to Appellants' decision here to collaterally attack a state court proceeding in federal court, the federal courts are essentially in the position of the Ninth Circuit in *Purcell*. Appellants request that the Court enjoin State Court relief that Appellees

have obtained after months of discussion and litigation—on the day after early voting has begun. *Purcell* counsels against this course of action.

Second, while *Purcell* certainly does not prohibit the federal judiciary from interceding close to elections to defend the Constitution, it advises them to tread carefully when deciding whether to do so. *Id.* at 4-6. The district court acted entirely consistent with that admonition. While it found (incorrectly) that Appellants had a likelihood of success on their equal protection claim, it decided that given the timing and the impending election, it would be inappropriate to enjoin the State Board from implementing the Consent Judgment and the accompanying Numbered Memos as ordered by the State Court. Granting an injunction would inject further confusion for administrators and voters. Clarity is needed at this point, and this Court can provide it by denying Appellants' motion for injunction pending appeal.

V. Appellants will suffer no irreparable harm absent an injunction.

For the reasons set forth in Section II, Appellants have not suffered any injury, much less irreparable harm that will result from the denial of the injunction pending appeal. To the extent Heath and Whitley suffered any harm by voting under a more restrictive regime, they cannot plausibly allege they will endure this harm in the future, *see City of L.A.* 461 U.S. at 111, nor can any of the other Appellants.

VI. The equities and public interest weigh strongly against an injunction.

This slight (or non-existent) harm on the one hand must be compared to the harm to NCSBE and the Alliance by entering an injunction pending appeal, which will be heavy. Appellees are under a state court order based on a Consent Judgment, and the conflicting relief Appellants request here presents an impossible conundrum of how to comply with dueling court orders and which court's order Appellees must violate. This issue can be largely avoided by the denial of the motion for injunction pending appeal.

Second, the requested injunction would cause practical injury to both NCSBE and the Alliance by injecting further confusion into the State's electoral processes. The TRO previously entered in this matter forced NCSBE to halt all curing procedures, and thousands of ballots thus remain in limbo. To make matters worse, those voters do not know that there is an issue with their ballot. The district court determined in a separate proceeding that a lack of an opportunity to cure absentee ballot deficiencies is likely a due process violation, *see Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-457, 2020 WL 4484063, at *55 (M.D.N.C. Aug. 4, 2020), which will continue unabated should the Court grant Appellants' requested relief. This confusion and unending limbo significantly harm both NCSBE and the Alliance. The Court should deny Appellants' request so that NCBSE can provide clarity for North Carolina voters.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that this Court deny Appellants' motion for injunction pending appeal.

DATED: October 16, 2020

PERKINS COIE LLP

By: s/ Marc E. Elias

Marc E. Elias
MElias@perkinscoie.com
Uzoma N. Nkwonta
UNkwonta@perkinscoie.com
Lalitha D. Madduri
LMadduri@perkinscoie.com
John M. Geise
JGeise@perkinscoie.com
Jyoti Jasrasaria
JJasrasaria@perkinscoie.com
Ariel Glickman
AGlickman@perkinscoie.com

Perkins Coie LLP
700 13th St. N.W., Suite 800
Washington, D.C. 20005-3960
Phone: (202) 654-6200
Fax: (202) 654-6211

Molly Mitchell
MMitchell@perksincoie.com

Perkins Coie LLP
1111 W. Jefferson St., Suite 500
Boise, ID 83702
Telephone: 208.343.3434
Facsimile: 208.343.3232
MMitchell@perksincoie.com

Burton Craige
BCraige@pathlaw.com
Narendra K. Ghosh
NGhosh@pathlaw.com
Paul E. Smith
PSmith@pathlaw.com

Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: (919) 942-5200

Attorneys for Intervenor-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A), 32(a)(5), and 32(g)(1), I certify that this motion has 4,995 words and was prepared using Times New Roman, 14-point font.

s/ Marc E. Elias

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of October, 2020, I caused this *Intervenor-Appellees' Opposition to Emergency Motion for Injunction Pending Appeal* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record.

This the 16th day of October, 2020.

s/ Marc E. Elias
Marc E. Elias