No. 20-2062

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs-Appellees,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections, JEFFERSON CARMON III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants-Appellants,

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

Plaintiffs-Appellees' Response in Opposition to Defendants-Appellants' Emergency Motion to Stay Temporary Restraining Order Pending Appeal

---

October 7, 2020 (counsel listed on reverse)

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

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

Counsel for Plaintiffs-Appellees

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE

Appellants, members of the North Carolina State Board of Elections ("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 U.S. Constitution's Elections Clause, which provides that only the "Legislature[s]" of the several states or Congress may prescribe the time, place, and manner of federal elections, U.S. CONST. art. I, § 4, cl. 1, Appellants, through the NCSBE's Executive Director, issued three Memoranda directly contravening the General Assembly's duly enacted statutes after the General Assembly had enacted bipartisan legislation specifically addressing voting during the pandemic this November. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169"). And they did so after over 150,000 absentee ballots had been cast.[1] Because these Memoranda have been issued while voting is ongoing, Appellants are applying different rules to ballots cast by similarly situated voters, thus violating the Equal Protection Clause in two distinct ways: Appellants are administering the election in an arbitrary and nonuniform manner that will inhibit the right of voters who cast their absentee ballots before the Memoranda were announced to participate in the election on an

[1] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 7, 2020), *available at* https://bit.ly/33SKzAw.

equal basis with other citizens in North Carolina, and Appellants are purposefully allowing otherwise unlawful votes to be counted, thereby diluting North Carolina voters' lawful votes.

Appellants characterize their substantial changes to North Carolina's election laws as "modest," Emergency Motion to Stay Temporary Restraining Order Pending Appeal at 7, Doc. 5-1 (Oct. 5, 2020) ("Appellants' Br."), but even cursory review of the Memoranda refutes that description. Through the Memoranda, Appellants vitiated the absentee ballot witness requirement after it had survived attack in both state and federal court, extended the absentee ballot receipt deadline from three to nine days after election day, amended the postmark requirements for ballots received after election day, and undermined the General Assembly's criminal prohibition of the unlawful delivery of completed ballots. Moreover, since August 21, Appellants have wreaked utter turmoil in the State's election procedures, zigzagging between fundamentally different election procedures and cure processes under the guise of providing "certainty" to the State's electorate. *See id.* at 28.

Appellants' motion suffers from an even more fundamental problem: the TRO is not an appealable order and this Court lacks jurisdiction over the appeal. The district court is moving with alacrity, with a preliminary injunction hearing scheduled for tomorrow. Moreover, the district court has indicated that a ruling on the motion for a preliminary injunction should be forthcoming on Tuesday or

Wednesday of next week. Appellees therefore respectfully request that the Court deny Appellants' emergency motion to stay the district court's TRO pending appeal.

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to hear Appellants' appeal because a TRO is generally not appealable and Appellants have failed to establish that the TRO fits into an exception rendering it subject to immediate appeal. *See Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1029–30 (4th Cir. 1976). Although Appellants attempt to recharacterize the TRO as a preliminary injunction, neither the TRO's practical effects, procedural history, nor purported disruption of the status quo counsel in favor of treating the TRO as a preliminary injunction.

First, the practical effect of the TRO is preventing irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws through the Memoranda. Second, the process leading up to and following the entry of the TRO—briefing was completed in less than a week; the district court did not issue findings of fact or conclusions of law; the district court did not address the merits of Appellees' Elections Clause claims; and a preliminary injunction hearing is scheduled for tomorrow—does not justify recharacterizing it as a preliminary injunction. And third, the proper status quo ante through which to view the State's election procedures is the regime in place when absentee ballot

voting opened on September 4 with the original Numbered Memo 2020-19 in effect. This Court thus lacks jurisdiction to hear Appellants' appeal.

ARGUMENT

The factors this Court must assess in considering a motion to stay pending appeal are the applicant's (1) "strong showing that he is likely to succeed on the merits," (2) irreparable injury to the applicant in the absence of a stay, (3) substantial injury to the nonmoving party if a stay is issued, and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors are the most critical, but a stay "is not a matter of right, even if irreparable injury might otherwise result." *Id.* at 433 (internal quotation marks omitted). Instead, a stay pending appeal is "an exercise of judicial discretion," and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34 (internal quotation marks omitted). Where likelihood of success is "totally lacking, the aggregate assessment of the factors bearing on issuance of a stay pending appeal cannot possibly support a stay." *Uniformed Fire Officers Ass'n v. de Blasio*, 973 F.3d 41, 49 (2d Cir. 2020).

Here, Appellants fail to make a strong showing that they are likely to succeed on the merits of their appeal.

I. Appellants Cannot Make a Strong Showing That They Are Likely to Succeed on the Merits of Their Appeal

A. The District Court Properly Considered Appellees' Claims

1. Collateral Estoppel Does Not Bar Appellees from Raising Their Equal Protection Claims in Federal Court

The doctrine of collateral estoppel, or issue preclusion, forecloses the "relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate." *Va. Hosp. Ass'n v. Baliles*, 830 F.2d 1308, 1311 (4th Cir. 1987). Federal courts give state-court judgments the same preclusive effects they would have had in other courts of the same state. *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986). Under North Carolina law, collateral estoppel applies where (1) "the earlier suit resulted in a final judgment on the merits"; (2) "the issue in question was identical to an issue actually litigated and necessary to the judgment"; and (3) the party against whom collateral estoppel is asserted was either a party to the earlier suit or was in privity with the parties and had a full and fair opportunity to litigate the issue. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 349 S.E.2d 552, 557 (N.C. 1986).

Collateral estoppel arising from the state trial-court litigation in *North Carolina Alliance for Retired Americans v. North Carolina State Board of Elections*,

No. 20 CVS 8881 (N.C. Wake Cnty. Super. Ct.), does not bar Appellees from raising their claims in this case. First, collateral estoppel cannot be asserted against a party that lacked a full and fair opportunity to litigate the issue in the prior proceeding. *See In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). Three of the Plaintiffs-Appellees in this case—Heath, Whitley, and Swain—were not parties to the state-court litigation, so they cannot be barred by collateral estoppel.

Appellants nevertheless insist that these Appellees were in "privity" with the parties to *North Carolina Alliance* because their interests "are in perfect alignment." Appellants' Br. at 14. However, this contention fails to account for how narrowly this Court has defined the "stringent standard" under which it will consider a non-party's interests to have been adequately represented in a prior action. *See Martin v. Am. Bancorporation Ret. Plan*, 407 F.3d 643, 652 (4th Cir. 2005); *see also Taylor v. Sturgell*, 553 U.S. 880, 885 (2008) ("We disapprove the doctrine of preclusion by 'virtual representation' . . . ."). Specifically, this Court will not bar a nonparty to a previous judgment from relitigating a claim "where the parties to the first suit are not accountable to the nonparties who file a subsequent suit." *Martin*, 407 F.3d at 651 (internal quotation marks omitted). The parties to *North Carolina Alliance* are not "accountable" to Heath, Whitley, and Swain. Indeed, Plaintiffs-Appellees Berger and Moore appeared in the *North Carolina Alliance* action as agents of the State to defend the State's and the General Assembly's interests in the validity of state laws.

Appellants offer an out-of-circuit case applying New York law, *Ferris v. Cuevas*, 118 F.3d 122 (2d Cir. 1997), for the proposition that "courts have recognized that privity exists between voters and the candidates or political parties that those voters support." Appellants' Br. at 14. But appellants in *Ferris* conceded that their interests were "represented in [the prior] action." 118 F.3d at 128. Furthermore, *Ferris* principally relied on *Ruiz v. Commissioner of Department of Transportation*, 858 F.2d 898 (2d Cir. 1988), which applied nonparty preclusion in large part because "the two parties had had the same attorney," *Ferris*, 118 F.3d at 127. The plaintiffs in *Taylor v. Sturgell* shared an attorney too, however, but the Supreme Court gave no weight to that fact when it reversed the lower court's finding of preclusion. 553 U.S. at 890.

Second, in considering Appellants' motion, this Court must determine the likelihood of success on the merits. The state trial court's consent judgment is subject to appeal, and there are substantial arguments that the state court erred in entering it. *See Fres-co Sys. USA, Inc. v. Hawkins*, 690 F. App'x 72, 79 (3d Cir. 2017); *World Wide St. Preachers' Fellowship v. Reed*, No. 05-cv-2565, 2006 WL 1984614, at *3 (M.D. Pa. July 13, 2006). Two were particularly glaring. First, the state trial court lacked jurisdiction to enter the consent judgment. Under North Carolina law, claims are facial to the extent they seek relief beyond the plaintiffs themselves, *see State v. Grady*, 831 S.E.2d 542, 570 (N.C. 2019), and facial claims must be heard and

decided by a three-judge panel, *see* N.C. GEN. STAT. §§ 1-81.1, 1-267.1. The *North Carolina Alliance* plaintiffs sought relief for the entire North Carolina electorate but the state trial court judge refused to transfer the case to a three-judge panel. Second, the state trial court judge lacked authority to enter the consent judgment over Berger's and Moore's objections because state law grants them "final decision-making authority" in constitutional challenges to North Carolina laws. N.C. GEN. STAT. § 120-32.6(b). Because it lacked the consent of necessary parties, the consent judgment is void. *See Owens v. Voncannon*, 111 S.E.2d 700, 702 (N.C. 1959). These are only two of the many errors undermining the consent judgment. Because it is likely to be reversed on appeal, any collateral estoppel effect it has against Appellees is likely to be eliminated.

Third, collateral estoppel is "qualified or rejected when [its] application would contravene an overriding public policy or result in manifest injustice." *United States v. LaFatch*, 565 F.2d 81, 83–84 (6th Cir. 1977); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28; 18 FED. PRAC. & PROC. JURISDICTION § 4426 (3d ed.). Applying collateral estoppel here would be contrary to public policy and work a manifest injustice. For one, the fundamental nature of Appellees' Elections Clause claim is that the authority to regulate federal elections is constitutionally delegated to state legislatures. Consequently, a state trial court's entering of a consent judgment at the behest of an executive branch agency should not be allowed to prevent this Court

from considering the merits of the claim. For another, the trial-court consent judgment is subject to appeal and Appellants are changing the rules of the election in violation of the Constitution as the election is ongoing. Any preclusive effect the order has may be ephemeral and the overriding importance of protecting the constitutional rights at issue here counsel in favor of disregarding it.

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

Appellants next contend that Heath and Whitley "have failed to demonstrate an injury sufficient to confer standing." Appellants' Br. at 16. They assert that Heath and Whitley "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," *id.* at 17, and that their vote-dilutions claims state merely "a generalized injury," *id.* at 18. Appellants fundamentally misconstrue Heath's and Whitley's injuries. They have been injured by the Memoranda because, through them, Appellants unilaterally changed the election rules during an ongoing election and Heath and Whitley had already complied with the now-eviscerated requirements. Both Heath and Whitley had a qualified adult witness their absentee ballots and submitted them well before the statutory ballot receipt deadline of 5:00 p.m. on the third day after election day. Under the Memoranda, North Carolina voters who submit absentee ballots would be able to avoid these requirements. Therefore, the implementation of the Memoranda subject Heath and Whitley to one set of rules, and another set of voters to a different

set of rules *during the same, ongoing election*. This is a quintessential Equal Protection injury. With regard to vote dilution, Appellees are asserting that Appellants are violating the one-person, one-vote principle affixed in the Supreme Court's jurisprudence. Dilution of Heath's and Whitley's lawful votes, to any degree, by the casting of unlawful votes, violates their right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker v. Carr*, 369 U.S. 186, 208 (1962). And that right is "individual and personal in nature," so "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal quotation marks omitted).

3. The District Court Appropriately Declined to Abstain from Hearing This Case

Appellants point to *Younger v. Harris*, 401 U.S. 37 (1971), to contend that the district court was required to abstain from hearing this case. Appellants' Br. at 18–21. The various "abstention" doctrines are "the exception, not the rule." *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention is only warranted in "exceptional" circumstances because federal courts have an "obligation to hear and decide a case" that "is virtually unflagging." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73, 77 (2013) (internal quotation marks omitted); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Abstention is not warranted "simply because a pending state-court proceeding

involves the same subject matter" as a federal proceeding. *Sprint*, 571 U.S. at 72. And abstention is to be avoided especially in areas where Congress has given concurrent jurisdiction—such as with Appellees' 42 U.S.C. § 1983 claims—to both federal and state courts. *See Pittman v. Cole*, 267 F.3d 1269, 1286 (11th Cir. 2001).

Younger abstention is appropriate in just three circumstances: (1) ongoing state criminal prosecution, (2) civil enforcement proceedings, or (3) civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions. *See Sprint*, 571 U.S. at 72. Obviously, any ongoing state court proceedings here are neither criminal nor civil enforcement proceedings. And there is no order, such as a contempt proceeding or bond requirement, that Appellees seek to circumvent. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987). Consequently, *Younger* abstention is inapplicable.

B. Appellees' Equal Protection Claims Are Meritorious

The district court properly recognized that Appellees are likely to succeed on the merits of their claims that Appellants' arbitrary, nonuniform procedures are subjecting North Carolina's electorate to different treatment and allowing for the casting of unlawful votes in contravention of the duly enacted North Carolina General Statutes, diluting their votes. Appellants' arguments to the contrary are meritless.

Appellants first maintain that the Memoranda will "establish[] uniform and adequate standards, which apply statewide, for determining what is a legal vote." Appellants' Br. at 22–23. But over 150,000 voters cast their ballots before issuance of the Memoranda on September 22, 2020, and therefore worked to comply with the witness requirement and the lawful ballot delivery requirements. Under the Memoranda, the witness requirement is nullified, and absentee ballots can be received up to nine days after election day. Consequently, under the Memoranda, North Carolina will be administering its election in a *different manner* than before September 22, subjecting its electorate to arbitrary and disparate treatment.

It is false that under the Memoranda, "[a]ll voters who wish to vote via mail-in absentee ballot must comply with the State's witness requirement." *Id.* at 23. As Appellants' counsel conceded below, under the Memoranda, if a voter submits an absentee ballot completely devoid of any witness information all the voter would have to do to "cure" the ballot would be to complete and send in an unwitnessed affidavit signed by the voter. *See* Hearing Transcript at 32:16–33:1, Doc. 26, *Wise v. N.C. State Bd. of Elections*, No. 20-cv-912 (M.D.N.C. Oct. 2, 2020). This procedure completely avoids the statutory requirement that an absentee ballot be witnessed. *See* HB1169 § 1.(a). Second, Appellants' representation that "the only thing stopping uniform statewide standards is the district court's order" is incorrect. Appellants' Br. at 23. They themselves have altered, realtered, and altered again the

State's election procedures over the past several weeks, and they have the authority to return the State to the status quo ante—the procedures set forth in the original Numbered Memo 2020-19. Nothing in the district court's TRO prevents Appellants from reimplementing its procedures; nor do Appellees seek to enjoin Appellants from enforcing that Memo. It is only by *Appellants' own choice* that there are no uniform statewide standards in place right now. The state court consent judgment is not standing in the way; under the Supremacy Clause, the federal court TRO takes precedence. *See N.C. State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

Appellants' contention that Appellees are advocating for a theory that "any change made during an election to ensure that all persons can vote denies equal protection to those who have already voted" misses the mark. *Id.* at 24. Appellants' examples of extending hours at polling places on election day "to address power outages or voting-machine malfunctions" and "extend[ing] the deadline for receipt of absentee ballots after hurricanes displaced voters," both pursuant to lawful authority, are inapposite. *See* N.C. GEN. STAT. § 163-166.01 (explicitly granting the NCSBE the authority to "extend the closing time" of polling places if the polls "are interrupted for more than 15 minutes after opening" "by an equal number of minutes"); *id.* § 163-27.1 (granting the Executive Director "emergency powers to conduct an election in a district *where the normal schedule for the election is disrupted*" by "[a] natural disaster," *e.g.*, a hurricane (emphasis added)).

Nor does Appellants' citation to *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020), fare any better. There is a material difference between the Supreme Court intervening to restore the status quo ante during an ongoing election after a district court erroneously enjoined a state election law and the situation here, where Appellants have unconstitutionally meddled with duly enacted state law, thereby inflicting disparate treatment on Appellees.

Appellants next argue that, because "the consent judgment in no way lets votes be cast unlawfully," Heath's and Whitley's votes are not being diluted. Appellants' Br. at 25. But the Memoranda ensure that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted in four ways: (1) by allowing unwitnessed, invalid ballots to be retroactively validated into lawful, compliant ballots, *see* Doc. 45-1 at 29–34 (Oct. 2, 2020); (2) by allowing absentee ballots to be received up to nine days after election day, *see id.*; *see also id.* at 26–27; (3) by allowing absentee ballots without a postmark to be counted if received after election day in certain circumstances, *id.* at 26–27; and (4) by allowing for the anonymous delivery of ballots to unmanned boxes at polling sites, *see id.* at 36–40. When Appellants purposely accept even a single ballot without the required witness, accept otherwise late ballots beyond the deadline set by the General Assembly, or facilitate delivery of ballots by unlawful parties, they have accepted votes that dilute

the weight of lawful voters like Heath and Whitley. *See Gill*, 138 S. Ct. at 1929; *Reynolds*, 377 U.S. at 555; *Anderson*, 417 U.S. at 226–27; *Baker*, 369 U.S. at 208.

Appellants' retreat to sovereign immunity and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), Appellants' Br. at 25, fails. Notably, another federal district court rejected the very same argument in an Elections Clause case decided just last week, observing that it would "undercut *Ex Parte Young* completely to conclude that simply because a federal constitutional claim requires the interpretation, or rests on the purported violation of, state law, it suddenly comes within *Pennhurst*'s grasp." *Donald J. Trump for President, Inc. v. Bullock*, Nos. 20-cv-66, 20-cv-67, 2020 WL 5810556, at *5 (D. Mont. Sept. 30, 2020). This Court should reject Appellants' *Pennhurst* argument for that reason and several others.

First, *Pennhurst* does not apply to claims alleging violations of federal law. 465 U.S. at 104–05. Appellees do not seek an order compelling Appellants to comply with North Carolina law. Instead, they seek an order that would prohibit Appellants from violating the Elections Clause and the Equal Protection Clause. The fact that the complaint alleges that the Memoranda contravene applicable North Carolina statutes does not change the analysis. Federal claims often require federal courts "to ascertain what" state law provides, but "ascertaining state law is a far cry from compelling state officials to comply with it." *Everett v. Schramm*, 772 F.2d 1114, 1119 (3d Cir. 1985); *see also David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 414

(1st Cir. 1985). In fact, the supreme Court has looked repeatedly to "the method which the state has prescribed for legislative enactments" to decide what constitutes state "[l]awmaking" for purposes of the Elections Clause. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015) (internal quotation marks omitted). If Appellants' view of *Pennhurst* were correct, every one of those rulings would have violated the Eleventh Amendment.

Second, application of the *Pennhurst* doctrine to an Elections Clause claim is inappropriate because when states regulate federal elections, they do so pursuant to power delegated to them by the *federal* Constitution. *See Cook v. Gralike*, 531 U.S. 510, 522–23 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995). Given the special relationship between state statutory enactments and the federal Constitution in this context, state statutes regulating federal elections do not qualify as "state" laws for purposes of the *Pennhurst* doctrine. *Cf. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 14–15 (2013) (declining to apply presumption against preemption in Elections Clause context in part because when states regulate federal elections they do not exercise any of their "historic police powers").

C. Appellees' Election Clause Claims Are Meritorious

Although Appellants do not address Appellees' Election Clause claims, those claims are meritorious and provide an independent basis to deny Appellants' motion. The text of the Elections Clause is clear: only the "Legislature[s]" of the several

states or Congress may prescribe the time, place, and manner of federal elections. U.S. CONST. art. I, § 4, cl. 1. North Carolina's Constitution establishes that the General Assembly is the "Legislature" of North Carolina. Moreover, the North Carolina Constitution vests the legislative authority exclusively in the General Assembly. N.C. CONST. art. II, § 1. And this exclusive grant of authority is encapsulated in North Carolina's robust nondelegation doctrine: "[T]he legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 249 S.E.2d 402, 410 (1978). Consequently, since neither Congress nor the General Assembly promulgated Appellants' Memoranda, the Memoranda are unconstitutional.

D. Irreparable Harm and the Public Interest Counsel in Favor of Denying Appellants' Motion

The two remaining factors this Court must assess in considering Appellants' motion to stay pending appeal—irreparable harm and the public interest—counsel in favor of denying that motion. First, contrary to Appellants' contention that "[t]he Board and voters will suffer irreparable harm if the injunction is allowed to remain in effect," Appellants' Br. at 27, the TRO is in fact *preventing* irreparable harm from occurring to North Carolina's electorate by preventing unconstitutional changes to the State's election laws. As explained above, the Memoranda substantially change the General Assembly's duly enacted laws, in violation of the Constitution's

Elections Clause and Equal Protection Clause. The Memoranda also inflict irreparable institutional harm to the General Assembly 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, the TRO is *preventing* irreparable harm, not engendering it.

What is more, Appellants' assertion that they are "unable to inform thousands of voters that their ballots contain minor deficiencies[] and . . . allow them to cure those problems" because of the district court's TRO is false. Appellants' Br. at 27. Again, the district court's TRO does not amend or enjoin the original Numbered Memo 2020-19, thereby preventing Appellants from instituting its cure process. It is *Appellants* who have unilaterally confused the State's election procedures and decided to halt all curing—within the span of one week, Appellants have gone from ordering county boards of elections to cure all absentee ballot deficiencies, including, erroneously, witness requirement errors, *see* Doc. 45-1 at 29–34, to directing county boards to send cure certifications for deficiencies *besides* a witness requirement error, *see* Doc. 40-2 (Oct. 2, 2020), to mandating that county boards take no action on *any deficiencies*, *see* Doc. 60-5 (Oct. 6, 2020). And there undoubtedly will be harm if this Court grants Appellants' motion, including

substantial confusion among voters and poll workers, who have been whiplashed back and forth between Appellants' numerous directives over the past few weeks. This Court must not countenance Appellants' actions.

Second, the public interest would be served by *denying* a stay. The public interest is served by allowing for state control of its election mechanics by elected officials, not unelected agency members and civil litigants. Also, because the Memoranda unconstitutionally alter duly enacted election laws, leaving the TRO in place "is where the public interest lies." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 412 (2020) (internal quotation marks omitted). Courts should not "lightly tamper with election regulations," *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020), so the public interest lies in "giving effect to the will of the people by enforcing the [election] laws they and their representatives enact," *id.* at 812. This is especially true in the context of an ongoing election. *Id.* at 813; *Respect Me. PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010).

Furthermore, a stay would not "provide certainty to the public on the procedures that apply during the current election period." Appellants' Br. at 28. Instead, it will engender substantial confusion, among both voters and election officials, by changing the election rules after the election has already started. *See Republican Nat'l Comm.*, 140 S. Ct. at 1207 (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. To date, voters have requested 1,233,349 absentee ballots and cast 394,825 absentee ballots.[2] These ballots require a witness signature on their face, so eliminating that requirement now would render the instructions on hundreds of thousands, if not over a million, absentee ballots inaccurate. The NCSBE itself admitted that altering the election rules this close to the election would create considerable administrative burdens, confuse voters, poll workers, and local elections officials, and cause disparate treatment of voters in the ongoing election. *See* Reply Brief of the State Board Defendants-Appellants at 8, Doc. 103, *N.C. State Conf. of the NAACP v. Raymond*, No. 20-1092 (4th Cir. July 27, 2020) ("[A]t this point in time, changes to the current [absentee voting] process would run a substantial risk of confusion and disparate treatment of voters for this election cycle. Thus, any mandate that the Court issues reversing the injunction should be given effect only after the current election cycle."); *id.* at 9, 27–35.

Additionally, the Memoranda undermine confidence in the election by eliminating safeguards that protect against ineligible and fraudulent voting and that protect vulnerable voters. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (controlling opinion of Stevens, J.); App'x at 210–11. For example,

[2] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 7, 2020), *available at* https://bit.ly/33SKzAw (latest available absentee ballot request data through the end of October 6, 2020).

eliminating the witness requirement that the General Assembly specifically insisted on retaining (in a relaxed form), could cause some to question the integrity of the election, particularly when the NCSBE also has barred signature matching for absentee ballots. Indeed, eliminating the witness requirement will create particularly acute risks for vulnerable populations. The witness requirement "protects the most vulnerable voters," including nursing home residents and other vulnerable voters, against being taken advantage of by caregivers or other parties by "provid[ing] assurances to family members that their loved ones were able to make their own vote choices" and were not victims of absentee ballot abuse. *Id.* at 211.

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

CONCLUSION

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

Dated: October 7, 2020

Respectfully submitted,

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

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

Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing response complies with the requirements of Federal Rules of Appellate Procedure 27(d) and 32(a). The response is prepared in 14-point Times New Roman font, a proportionally spaced typeface; it is double-spaced; and it contains 5,017 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 7, 2020, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. Service on counsel for all parties has been accomplished via ECF.

/s/ David H. Thompson
David H. Thompson