Nos. 20A71, 20A72

IN THE
Supreme Court of the United States

TIMOTHY K. MOORE ET AL.,
Applicants,
v.
DAMON CIRCOSTA ET AL.,
Respondents.

PATSY J. WISE ET AL.,
Applicants,
v.
DAMON CIRCOSTA, ET AL.,
Respondents.

RESPONSE IN OPPOSITION TO EMERGENCY APPLICATIONS FOR A WRIT OF INJUNCTION

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The North Carolina State Board of Elections and its members and executive director in their official capacities respectfully file this memorandum in opposition to the applications for an emergency injunction under the All Writs Act.

INTRODUCTION

The State Board of Elections—the executive agency authorized by statute to adjust election procedures to deal with exigent circumstances—decided to extend by six days the deadline for county boards to receive mailed ballots. The Board took this action in an effort to protect lawful North Carolina voters from having their votes thrown out because of mail delays that the Postal Service had explicitly warned the State about. The extension does not affect the deadline for voters to submit their ballots—they must still be marked and mailed by Election Day.

By a 12-3 vote, the en banc Fourth Circuit declined to interfere with the Board's decision. *Wise v. Circosta*, Nos. 20-2104, 20-2107, 2020 WL 6156302 (4th Cir. Oct. 20, 2020) ("Slip Op."). Applicants now ask this Court to overturn the Fourth Circuit's prudent ruling through extraordinary relief: an emergency appellate injunction that would block the Board from exercising its statutory authority to temporarily adjust election procedures when necessary to deal with unexpected disruptions.

Injunctions of this kind require a showing that an applicant's rights are "indisputably clear." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). This demanding burden is even greater in the context of an ongoing election, a time when this Court has repeatedly instructed federal courts not to enter injunctions that will disrupt state election procedures. *Purcell v. Gonzalez*,

549 U.S. 1 (2006) (per curiam). Indeed, Applicants can identify only three times in this Court's history that it has issued an injunction in the first instance that would alter election rules. Wise Appl. 12. And they can find *no decision* of this or any court that has suggested that *Purcell* actually *supports* a federal intrusion on state election procedures, the theory they advance here. *See id.* at 21 (claiming that "*Purcell* . . . supports intervention under these circumstances").

To justify their extraordinary request, Applicants insist that the State Board has acted outside its statutory authority under North Carolina law. That assertion is flat-out false. Two different state statutes, duly enacted by the North Carolina General Assembly, authorize the State Board's actions here. The state courts that have considered the issue have all concluded that the Board's actions fall within its statutory authority to temporarily adjust election rules during an emergency, or to resolve "protracted litigation." *See* N.C. Gen. Stat. §§ 163-22.2, - 27.1. This state-court review process remains ongoing.

The Board—a bipartisan body whose members are appointed by the Governor from lists submitted by the two major political parties—unanimously concluded that the challenged measures were appropriate in light of the COVID-19 pandemic emergency and the resulting mail delays. In recent elections, the State Board has frequently exercised its authority to extend statutory deadlines and make other adjustments to deal with exigent circumstances. In the past three years alone, the Board has twice extended the absentee-ballot receipt deadline after hurricanes hit the State's coast. No one challenged those extensions. And

even as the Board has adopted a range of emergency measures over the course of the pandemic, the General Assembly has not acted to limit the Board's authority to adjust election procedures during emergencies. That inaction speaks volumes.

This case, accordingly, asks the Court to short-circuit the state judicial process and overrule North Carolina courts in their interpretation of the relevant state statutes. That kind of federal judicial interference would be inappropriate at any time, and it would be all the more so in response to an emergency request for an extraordinary injunction in the middle of an ongoing election. For these reasons alone, the Board respectfully submits that the applications should be denied.

Moreover, even if this Court were inclined to entertain this fundamentally state-law dispute, the applications contain numerous fatal defects that render this Court's intervention unwarranted. As the Fourth Circuit held, not only does *Purcell* counsel against imposing a federal injunction, but because the North Carolina courts are reviewing the state-law issues raised in the applications, the federal courts should abstain under *Pullman* as well. In addition, because Applicants are raising the exact same legal issues in this federal lawsuit that they already raised and lost in the state litigation, collateral estoppel precludes a relitigation of those issues in this federal forum.

Applicants' claims also fail on the merits, as well as for lack of standing. Applicants argue first that the Board's actions violate the Elections and Electors Clauses. But as the courts below both held, none of the Applicants has standing to

raise such a claim because they do not represent the North Carolina legislature as a whole. And in any event, the Board's actions here are entirely lawful. The Elections and Electors Clauses permit a state legislature to delegate part of its authority over federal elections to other state actors. Here, the Board is acting within its statutorily delegated authority to make temporary adjustments to election procedures in the face of unexpected disruptions to the voting process.

Applicants next argue that the Board's actions violate the Equal Protection Clause, because the Board has supposedly subjected voters to disparate and arbitrary treatment and diluted their votes. Applicants again lack standing to assert these claims, and the claims are also meritless. The Board's actions do not create disparate and arbitrary treatment. They establish clear, uniform voting standards that apply to all voters statewide. Nor do the Board's actions dilute any legal votes. As the North Carolina courts have thus far held, votes counted under the adjustments are completely lawful.

In sum, this Court should refrain from addressing Applicants' claims, but those claims fail in any event. For these reasons, the State Board respectfully submits that Applicants' request for an emergency appellate injunction just ten days before Election Day should be denied.

STATEMENT OF THE CASE

A. The COVID-19 Pandemic

The effects of COVID-19, both on public health and society at large are, by now, well known. The COVID-19 pandemic has been widely recognized as the greatest public-health crisis in at least a century. In North Carolina alone, as of

October 22, 2020, more than 252,992 people have had laboratory-confirmed cases of COVID-19, and more than 4,082 have died from the virus.

Both the President of the United States and the Governor of North Carolina have issued declarations of disaster for the State as a result of the COVID-19 pandemic. These disaster declarations are still in place. N.C. Exec. Order 116, § 1, 34 N.C. Reg. 1744, 1745 (Mar. 10, 2020); App. 1-2.

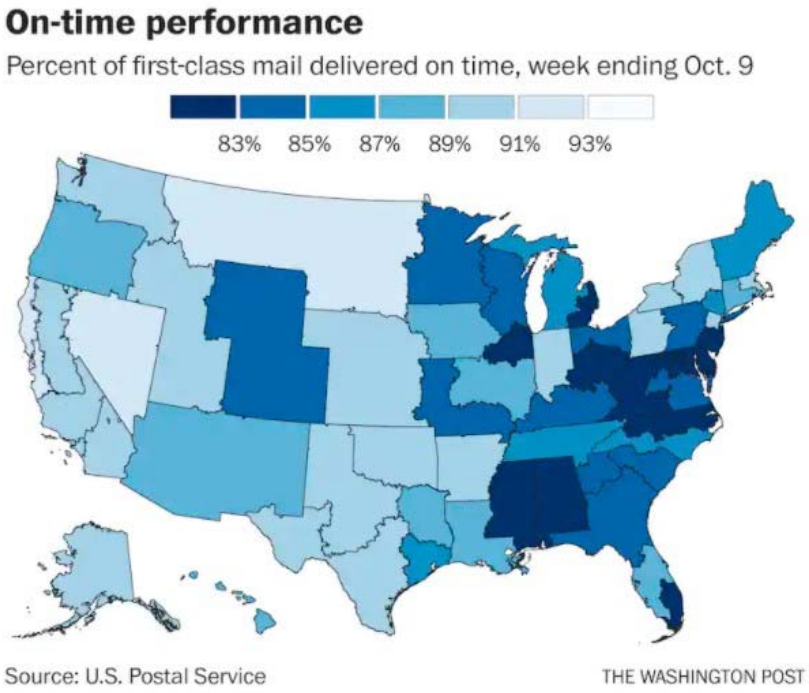
B. Mail Delays Caused by the United States Postal Service

On July 30, 2020, the United States Postal Service sent a letter to North Carolina warning that the State's elections law relating to absentee-ballot deadlines was "incongruous with the Postal Service's delivery standards." *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D. Pa.), Dkt. 1-1 at 53-55. USPS also stated that "there is a significant risk" 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.* In particular, USPS recommended that elections officials "allow 1 week for delivery" of ballots and other documents to voters, and that voters "should generally mail their completed ballots at least one week before the state's due date." *Id.* It went on to advise that "[i]n states that allow mail-in ballots to be counted only if they are *both* postmarked by Election Day *and* received by election officials by a date that is less than a week after Election Day, voters should mail their ballots at least one week before they must be received by election officials." *Id.* Accordingly, in North Carolina, voters might mail their ballot by Election Day—but solely because of USPS delays—not have their ballots counted because the ballots arrived after the statutory deadline.

USPS's operational changes have led to an injunction entered by the Eastern District of Pennsylvania in *Pennsylvania v. DeJoy*, No. 2:20-cv-4096, 2020 WL 5763553 (E.D. Pa. Sept. 28, 2020). The court concluded that the USPS's operational changes have harmed its users, including the state of North Carolina, in "various and meaningful ways," and that "irreparable harm will result unless [the USPS's] ability to operate is assured." *Id.* at *1-2; *see also Jones v. U.S. Postal Service*, No. 20 Civ. 6516, 2020 WL 5627002, at *1 (S.D.N.Y. Sept. 21, 2020) (enjoining USPS from making certain operational changes).

The court found that "the agency's sudden and rigid pivot" has resulted in "declines in service that . . . have not been fully remedied and pose a threat to the operation of the November 2020 elections." *DeJoy*, 2020 WL 5763553, at *3. The court concluded: "What is not reasonably in dispute is that the delays that have occurred as a result of the initiatives described above clearly pose a threat to the delivery of Election Mail to and from the voters." *Id.* at *10.

Despite this injunction, North Carolina is still experiencing some of the worst mail delays in the country. In 17 postal districts, representing 10 battleground states (including North Carolina), the average on-time delivery rate for first-class mail is 83.9%—down 7.8% since January. App. 3. This translates to roughly one in six mailings arriving outside the first-class-mail window of one to three days. *Id.* Thus, the data suggest that the mail-delivery delays continue to this day, and that a ballot mailed on November 3 may be at appreciable risk of not arriving by 5 p.m. on November 6.



These delays have been exacerbated by the pandemic. Because of the heightened public-health risks associated with voting in person, the number of voters who have opted to vote by mail has surged. As of October 22, more than 1,420,665 North Carolina voters had requested absentee ballots for the 2020 General Elections (compared to 220,058 requests at this time in 2016). App. 8. Yet the pandemic has hampered the USPS's ability to effectively manage this increased volume, as "[m]ore than 50,000 workers have taken time off for virus-related reasons." App. 25. This staffing crisis, combined with an unprecedented surge in the volume of ballots that must be processed, has rendered the USPS unable to deliver many ballots on time.

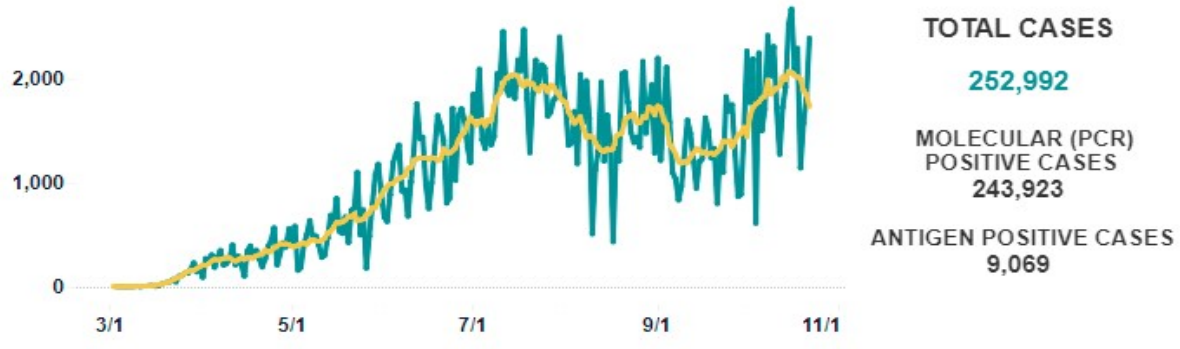
C. The Legislative Response

The COVID-19 pandemic first became a reality in North Carolina in early March. Since that time, the Board and its Executive Director have taken action

by issuing a number of emergency orders and guidance documents informing county boards of elections on how to prepare for the general election in the fall.

On June 10, for example, the General Assembly enacted House Bill 1169, which the Governor signed into law the following day. Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. The law made certain changes to elections administration in light of the pandemic, including reducing the requirement of having two witnesses for absentee ballots to one witness. *Id.* § 1.(a).

Since that time, even though the landscape of the pandemic has been constantly in flux, with the State experiencing three separate spikes in positive cases, the General Assembly has not reconvened to address these evolving issues.



Molecular (PCR) positive cases represent confirmed cases, and antigen positive cases represent probable cases of COVID-19, in accordance with CDC case classification guidelines. The terms "confirmed" and "probable" are used nationally to standardize case classifications for public health surveillance but should not be used to interpret the utility or validity of any laboratory test type.

North Carolina Department of Health and Human Services

D. The Board's Authority Under State Law

The General Assembly has empowered the Board to exercise wide discretionary authority to administer elections. As the North Carolina Supreme Court has held, while the "basic functions, powers, and duties that the [Board] is required to perform are, of course, outlined in statutory provisions enacted by the General Assembly," the legislature has not "ma[d]e all of the policy-related

decisions needed to effectively administer [an] election." *Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018). Instead, "consistent with much modern legislation, the General Assembly has delegated to the members of the [Board] the authority to make numerous discretionary decisions" on "interstitial policy issues" related to the conduct of elections. *Id.*

Two of these broad discretionary powers are relevant to this litigation. 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. This statute allows the Board to make adjustments to statutory requirements if doing so would obviate protracted litigation, but only when the legislature is out of session and is unable to make these modifications itself. *Id.* When the General Assembly next convenes, it can address any such modifications.

The second authorizes the Board's Executive Director 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 term "natural disaster" includes a "catastrophe arising from natural causes [that has] resulted in a disaster declaration by the President of the United States or the Governor." 08 N.C. Admin. Code 01.0106(b)(1)(H). The term "normal schedule" includes any "component[ ] of election administration," not merely the dates of an election. 08 N.C. Admin. Code 01.0106(a).

These emergency powers have been used frequently to allow the Board to cope with unforeseen circumstances that require adjustments to election procedures. For example, in November 2018, in the wake of Hurricane Florence, the Executive Director exercised her authority to extend the deadline for receipt of absentee ballots postmarked by Election Day to nine days after Election Day. App. 34-37. In September 2019, due to the disruption caused by Hurricane Dorian, the Executive Director again exercised her emergency powers to extend early voting, allowing voting to occur *after* the statutorily prescribed dates and times. In addition, the deadline for postmarked absentee ballots was extended to eight days after the election. App. 38-50.

The Executive Director also exercised her emergency powers earlier this year when, in July, she required minimum weekend-voting hours and expanded locations during the early voting period, both of which added requirements beyond existing statutory requirements. App. 51-58. Those and other actions were based on the conclusion that the COVID-19 pandemic constitutes a "natural disaster" under the terms of the emergency-powers statute. Applicants do not challenge that exercise of emergency authority, and the General Assembly has not acted to curtail it.

In addition to the Executive Director's authority to modify state statutes on a temporary basis to address emergencies, the Board has a long history of being required to depart from state statutes to comply with court orders. For example, in 2016, a three-judge panel struck down the State's racially gerrymandered redistricting map. *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd*

sub nom Cooper v. Harris, 137 S. Ct. 1455 (2017). To remedy the constitutional violation, the court required the State Board to depart from the state statutory requirements governing the 2016 primaries. *Id.* at 627. State courts have ordered the Board to depart from state election statutes as well. For example, in October 2016, a state court ordered the Board to extend statutory voter-registration deadlines in counties affected by Hurricane Matthew. App. 59-62. And in August 2018, a state court concluded that certain ballot language was misleading and enjoined the State from preparing or finalizing ballots with that language for the upcoming election. This injunction affected the processing and delivery of ballots to voters by deadlines prescribed by state law. App. 63-93.

E. Federal and State Constitutional Challenges to Statutes in the Midst of the Growing Crisis

In the last year—and particularly as the COVID-19 pandemic has raged in the State—the Board has been sued in eleven different lawsuits on claims that the State's elections procedures violate the North Carolina and U.S. Constitutions. Two of those lawsuits are relevant to the Applicants' actions here.

In *Democracy North Carolina v. North Carolina State Board of Elections*, plaintiffs sued in federal court challenging a number of North Carolina election laws, including the Board's procedures for curing deficient absentee ballots. No. 1:20CV457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020). On August 4, 2020, the district court largely denied the requested preliminary injunction, but required the Board to adopt a process by which absentee ballots with material deficiencies can be

cured before a ballot is rejected. *Id.* at *64. No party appealed this order—including the *Moore* Applicants, who intervened as defendants.

Other plaintiffs have challenged North Carolina's election laws under the State Constitution. For example, in *N.C. Alliance for Retired Americans v. State Board of Elections*, plaintiffs challenged numerous election procedures, including (1) the limitations on the number of hours and days of early voting, (2) the witness requirement for absentee ballots, (3) the lack of prepaid postage for absentee ballots, and (4) the rejection of absentee ballots delivered to county boards more than three days after the election. No. 20-cvs-8881 (Wake Cnty. Super. Ct.).

As these cases barreled toward Election Day with hearings on emergency or other temporary relief, 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 a lengthy discussion, the Board voted unanimously—on a bipartisan basis—to propose an offer of settlement in the *N.C. Alliance* case that would also moot or resolve the vast majority of the outstanding claims in other cases relating to the 2020 General Election. App. 94-103.[1]

[1] On September 23, one day after the joint motion was filed, the two Republican members of the Board resigned. In their resignation letters, they suggested that they had been misled as to the nature of their vote to approve the consent judgment. App. 146-48. On September 25, the remaining Board members voted to waive attorney-client privilege over the meeting minutes and other materials, which explained various options and opportunities for compromise. App. 149-68, 94-103. The materials made clear that: the Board had prevailed in some matters but was still at risk of adverse rulings, that the Board had been informed about areas for potential compromise (including extension of the absentee-ballot receipt deadline, the ballot logging procedure, and the cure procedure for ballots with deficiencies), and that the Board voted to approve a settlement based on those areas of compromise. App. 94-103. Later that night, it became public that Applicant North Carolina Republican Party had pressured the Republican members to resign. App. 169-74.

On September 22, the *N.C. Alliance* plaintiffs and the Board filed a Joint Motion for Entry of a Consent Judgment in the state court. Under the proposed judgment, the *N.C. Alliance* plaintiffs agreed to forgo many of their demands, including expanded early voting, elimination of the witness requirement, and prepaid postage for absentee-ballot return envelopes. In exchange, the Board agreed to three modest and temporary adjustments in election procedures: (1) to extend the deadline for receipt of absentee ballots to nine days after Election Day (matching the state statutory deadline for military and overseas voters), while keeping in place the requirement that ballots be mailed by Election Day; (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 their 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. 104-06.

These modest changes were designed to keep disruption of the elections process to a minimum. For example, the extension of the absentee-ballot receipt deadline does not modify in any way the deadline by which voters must vote. That deadline is still November 3. The only change is to accommodate USPS delays by extending the deadline for lawful ballots to be *received*. That change, moreover, mirrors the receipt deadline set by state law for military and overseas voters. *See* N.C. Gen. Stat. § 163-258.12. And to account for the fact that the USPS does not always place a postmark on mailed ballots, the Board agreed to rely on a ballot-

tracking system—one currently used by eleven other states—or the tracking systems of commercial carriers, which provide proof that a ballot was mailed on or before Election Day.

Similarly, the Board agreed to minor changes in the drop-off procedure for in-person return of absentee ballots to reduce voters' possible exposure to COVID-19. Specifically, the Board agreed to modify the logging procedure for recording the information of people returning their ballot. *See* 08 N.C. Admin. Code 18.0102. Instead of requiring *the person returning the ballot* to log the information—a process that requires exchanging logging materials and interacting extensively with elections officials—the modification allows the elections official to log the person's name and relationship to the voter. If that person is not authorized by law to possess the voter's ballot, the elections official logs the person's contact information to allow county boards to follow up as needed. Importantly, none of these changes in any way altered any statutory requirement.

Contrary to Applicants' suggestion, this modification does not allow "ballot harvesting" by allowing voters to use unmanned drop boxes, in violation of state law. Wise Appl. 24. The guidance that Applicants complain about—prohibiting county boards from rejecting ballots solely because the person who returned the ballot failed to comply with the rule—has existed for a number of years and follows the rule governing absentee ballots. 08 N.C. Admin. Code 18.0102. As the district court observed, this guidance is not new and was not changed as part of the consent

judgment. *See Moore v. Circosta* (*Moore II*), No. 1:20CV911, 2020 WL 6063332, at *20-21 (M.D.N.C. Oct. 14, 2020).

On October 2, the *N.C. Alliance* court held a hearing in which it approved the consent judgment over the objections of Applicants, who are intervening defendants in that case. The court memorialized its rulings in a written order. App. 175-85. It first ruled that the consent judgment was the product of an arms-length, good-faith negotiation. App. 180. The court also ruled that the Board had a "strong incentive to settle this case to ensure certainty on the procedures that will apply during the current election cycle." App. 180-81. The court further held that the Board had the authority under N.C. Gen. Stat. §§ 163-22.2 and 163-27.1 to agree to the consent judgment, in part because "[t]he COVID-19 pandemic constitutes a natural disaster" under state law that authorizes the Board to take emergency measures to respond to this pandemic. App. 181-82.

The state court also rejected the same constitutional claims that are raised in these cases by Applicants. It held that the consent judgment does not violate the Elections Clause because the Board had statutory authority to adopt these standards. It also held that the consent judgment does not violate the Equal Protection Clause, because the Board has provided adequate and uniform statewide standards for counting votes, which do not dilute the value of anyone's lawful vote. App. 183.

F. Applicants' Federal Collateral Challenges

The October 2 consent judgment in *NC Alliance* established the State's rules for the ongoing November election. *See* Slip Op. 6 (noting that the order set the

status quo). Although Applicants had the opportunity to appeal that order in state court, and in fact did so, they also filed two separate lawsuits in the Eastern District of North Carolina, seeking a federal injunction against the consent judgment. They sought this relief based on the same claims that they had asserted in state court in the *NC Alliance* case.

On October 3—the day *after* the state court entered its final judgment—a federal district court granted Applicants' request for a temporary restraining order and transferred the case to the Middle District of North Carolina. *Moore v. Circosta* (*Moore I*), No. 5:20-CV-507-D, 2020 WL 5880129, at *9 (E.D.N.C. Oct. 3, 2020). On October 6, Applicants filed motions for a preliminary injunction. On October 13, Applicants also asked the North Carolina Court of Appeals to stay the consent judgment during the pendency of its state-court appeal of that judgment. App. 331.

On October 14, the federal district court denied Applicants' motions for preliminary injunction. *Moore II*, 2020 WL 6063332, at *31. The court held that Applicants did not have standing to raise either their Elections Clause claim or their vote-dilution claim under the Equal Protection Clause. *Id.* at *14, *23-25. As to Applicants' disparate-treatment claim, however, the court held that certain individual voter plaintiffs had shown a likelihood of success on the merits. *Id.* at *18-19. But the court chose to avoid "judicially created confusion" by changing the Board's election procedures less than a month before Election Day. *Id.* at *23. It therefore restored the October 2 consent judgment as the status quo. *Id.*

The next day, on October 15, the North Carolina Court of Appeals issued a temporary administrative stay of the consent judgment, which it dissolved on October 19 when it denied Applicants' emergency petitions for a stay pending appeal. App. 331-32. Applicants then sought the same relief from the North Carolina Supreme Court. On October 23, the North Carolina Supreme Court declined to issue a temporary stay while it considers Applicants' petitions for a stay pending appeal. App. 333. The Board's response to those petitions is due on Monday, October 26.

Meanwhile, on October 15 and 16 respectively, Applicants moved in the Fourth Circuit for an emergency injunction pending appeal, following the district court's denial of a preliminary injunction. *Wise v. Circosta*, No. 20-2104 (4th Cir.), Dkt. 4; *Moore v. Circosta*, No. 20-2107 (4th Cir.), Dkt. 4. The *Moore* Applicants clarified that the only provision of the consent judgment that they sought to challenge was the extension of the absentee-ballot receipt deadline. *Id.* at 1-2. The *Wise* Applicants also clarified that they were no longer challenging the cure procedure, but left open their challenges to the receipt deadline and the logging procedure. App. 393. Given these concessions on the cure procedure, on October 19, the Board began implementing those provisions of the consent judgment. App. 358.

On October 20, the en banc Fourth Circuit on a 12-3 vote denied Applicants' motion. First, the court held that this Court's decision in *Purcell* strongly counsels against issuing Applicants' requested injunction because the state law in place—the consent judgment—was the status quo. Slip Op. 8.

On Applicants' Elections Clause claim, the en banc court affirmed the district court's holding that Applicants lack standing to bring that claim. *Id.* at 14. Citing the *Pullman* abstention doctrine, the en banc court also held that even if Applicants could get over that jurisdictional hurdle, the court should still abstain from ruling on the claim because the state courts are currently adjudicating the scope of the Board's authority. *Id.* at 14-16.

On Applicants' equal protection claims, the en banc court held that the consent judgment did not subject voters to disparate and arbitrary treatment because it created a uniform standard for every voter. *Id.* at 12. On the vote-dilution claim, the court held that the issue of whether votes that arrive within the safe-harbor period are lawful is an issue of state law from which federal courts must abstain. *Id.* at 13.

Applicants now ask this Court to enter an emergency injunction prohibiting the Board from continuing to enforce the consent judgment insofar as it extended the receipt deadline and modified the logging procedure for absentee ballots. All of these changes have been in place since October 19. During this time, thousands of ballots have been returned in person using the logging procedure. And, as of yesterday, voters are now inside the two-week window within which the USPS has informed States that it cannot guarantee that ballots sent to voters will be delivered in time for them to be counted under the previous receipt deadline of November 6—even if the voter mailed her ballot well before Election Day.

STANDARD OF REVIEW

Applicants ask this Court to issue an emergency appellate injunction that changes the election procedures that North Carolina currently has in place under state law. A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To make this showing, the moving party ordinarily must demonstrate that: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Id.*

However, because Applicants request that this Court issue an injunction in the first instance—an injunction that both the district court and the court of appeals declined to enter—they are subject to an elevated standard of review. An appellate injunction, unlike a stay, "'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux*, 561 U.S. at 1307 (Roberts, C.J, in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n,* 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

To obtain injunctive relief of this kind, an applicant must prove more than they are likely to succeed on the merits; they must show that their "legal rights at issue are *indisputably clear*." *Id.* Thus, this Court will deny an appellate injunction even where an applicant "may very well be correct" on the merits of their claims.

Id. at 1308 (denying appellate injunction to a candidate who challenged an election rule of Virginia Board of Elections in the months before an election, because "it cannot be said that his right to relief is 'indisputably clear'").

Injunctive relief of this kind "is to be used sparingly and only in the most critical and exigent circumstances." *Ohio Citizens*, 479 U.S. at 1313 (Scalia, J., in chambers). This restraint is especially warranted when, as here, an application seeks to alter procedures that are in place during an "impending election." *See Purcell*, 549 U.S. at 8. In fact, Applicants can only identify three times *in the last fifty-two years* when a Justice of this Court has entered an emergency injunction to alter election procedures—with the most recent example from more than three decades ago. *See* Wise Appl. 12.

ARGUMENT

Applicants cannot satisfy their heavy burden to show that they have an indisputably clear right to an emergency appellate injunction. At the outset, in the circumstances of this case, it would not be appropriate for this Court to consider entering the requested relief, for several reasons:

- First, as this Court has repeatedly emphasized, federal courts should ordinarily refrain from intruding on state election procedures this close to an election.
- Second, Applicants' claims are barred by issue preclusion, because these lawsuits represent improper collateral attacks on a state-court judgment.
- Third, because the North Carolina appellate courts are still reviewing that state-court judgment, this Court should abstain under *Pullman*.

In addition, even if this Court could address Applicants' claims, those claims fail, both on the merits and for lack of standing. As for the Elections and Electors Clause claims, those Clauses allow a state legislature to delegate authority to manage elections to executive officials. And here, the Board's actions fall within the scope of its delegated authority under North Carolina law. The claims under the Equal Protection Clause fail for similar reasons. The Board's actions create uniform, statewide standards to count lawful votes. They therefore do not subject anyone to disparate or arbitrary treatment, or dilute legal votes with illegal ones.

For all these reasons, the applications should be denied.

I. Prudential And Other Factors Advise Against Granting An Appellate Injunction.

A. The *Purcell* Principle Counsels Against an Emergency Injunction.

Granting the requested injunction would create uncertainty and confusion among North Carolina's voters. Issuing federal injunctions that might provoke this kind of uncertainty is precisely what this Court has repeatedly cautioned against in the election context. *Republican Nat'l Comm. v. Democratic Nat'l Comm. (RNC I)*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (citing *Purcell*, 549 U.S. 1). For this reason alone, this Court should deny the requested injunction.

In resisting this conclusion, Applicants distort the *Purcell* principle. *Purcell* is a discretionary rule of deference to States—not a substantive rule of federal constitutional law that bars States from exercising their sovereign authority to regulate their own elections. Specifically, *Purcell* cautions that "[c]ourt orders

affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." 549 U.S. at 4-5. Because late-breaking court orders can cause these harms, this Court has admonished that federal courts "should ordinarily not alter the election rules on the eve of an election." *RNC I*, 140 S. Ct. at 1207.

Both the district court and a 12-3 majority of the en banc Fourth Circuit heeded this advice, leaving the State's election rules in place while voting is underway. Yet Applicants ask this Court to discard that restraint—precisely the federal intervention into a State's election rules that the Court has repeatedly advised against. In fact, Applicants go as far as to make the astonishing claim that the *Purcell* principle affirmatively *supports* the entry of an emergency appellate injunction intruding on North Carolina's election procedures just ten days before Election Day. *See* Wise Appl. 21-26.

Applicants' arguments reveal their fundamental misunderstanding of the *Purcell* principle and the federalism concerns that underlie it. While this Court has repeatedly reversed federal court orders overriding state election procedures, it has made clear that States themselves retain broad latitude to run their own elections. For example, in *RNC I*, this Court stayed a federal court order directing Wisconsin to alter its election procedures. 140 S. Ct. at 1206. However, the Court explicitly made clear that its order was "subject to any further alterations that the State may make to state law"—even if those changes occurred on the eve of an election. *Id.* at

1208. Likewise, the Court found it "critical" that state election officials in that case had not "ask[ed] that the District Court" order the changes in question. *Id.* at 1206.

In a novel attempt to avoid the *Purcell* principle here, Applicants claim that *Purcell* applies only to election rules established by a state legislature, as opposed to executive officials. But that distinction has no basis in the law. In every case cited by Applicants, *Purcell* was invoked to do exactly the opposite of what Applicants request here; it was invoked to justify *refraining* from issuing an injunction against state election officials. Recent decisions of this Court confirm that *Purcell* allows deference to the decisions of state election officials. *See Merrill v. People First of Ala.*, No. 20A67, 2020 WL 6156545, at *1 (U.S. Oct. 21, 2020); *Republican Nat'l Comm. v. Common Cause R.I. (RNC II)*, No. 20A28, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020). In fact, Applicants can cite no case *ever* where this Court (or any other) has invoked *Purcell* to affirmatively enjoin a State's election procedures.[2]

Thus, this Court has made clear that *Purcell* is a discretionary, federalism-based principle designed to avoid disruption of elections caused by last-minute federal court intervention. It is not a substantive limit on how States administer elections. And here, like in *RNC II*, the state officials who are charged with the duty to administer elections have voluntarily agreed to make the election changes at issue and are before this Court opposing any last-minute changes to those procedures. Because Applicants seek to enjoin North Carolina's election procedures during an ongoing election, *Purcell* supports denying the requested injunctions.

[2] And even if this Court were to accept Applicants' novel reading of *Purcell*, it would not affect the outcome here, because the Board's changes were authorized by statute. *See infra* Part II.A.2.ii.

B. Collateral Estoppel Bars Applicants' Claims.

Next, collateral estoppel, or issue preclusion, precludes Applicants' claims. Because Applicants have already "fully litigated and lost" the issues at the heart of this case in North Carolina state court, they cannot relitigate those same issues here. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979). Instead, Applicants may appeal the adverse decision in state courts—as they are currently doing by way of a stay petition to the North Carolina Supreme Court.

Under North Carolina law, issue preclusion applies where: (1) the issue is identical to an 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). Each of these three requirements is satisfied here.

In *N.C. Alliance*, a group of plaintiffs sued the State Board, challenging a range of North Carolina elections laws. App. 176. To settle the claims, the State Board exercised its delegated authority under N.C. Gen. Stat. § 163-22.2 and unanimously voted, in bipartisan fashion, to enter an agreement that called for three modest, temporary modifications to the procedures governing the 2020 general election, including a six-day extension of the absentee receipt deadline. App. 102-03. The State Board and the *N.C. Alliance* plaintiffs then moved the state court to approve their proposed consent judgment. App. 104-45. The Legislators and Political Committees opposed the parties' motion as intervenors, arguing, *inter*

alia, that (1) the Board lacked the statutory authority to make the modifications that were part of the consent judgment, and (2) the Board's actions ran afoul of the Elections, Electors, and Equal Protection Clauses. App. 231-330.

The state court disagreed. In its findings of fact and conclusions of law, the court held, first, that in *two different state statutes*, the General Assembly had delegated to the Board the authority required to make the modest adjustments that the Board had proposed. App. 181-82. The court further held that the Board's actions did not violate the U.S. Constitution. App. 183. Having so held, the court entered final judgment. App. 184. The North Carolina Court of Appeals and the North Carolina Supreme Court have both declined to stay that ruling. App. 331-33.

Applicants would have this Court disregard the state court's conclusions and flout its obligation to afford those conclusions full faith and credit. *See* 28 U.S.C. § 1738 (judgments "shall have the same full faith and credit" in federal court "as they have by law or usage in the courts of such State . . . from which they are taken"). Applicants do not deny that a state court already held that the General Assembly expressly delegated to the Board the authority to institute the remedial measures at issue here. Nor do they dispute that the state court already rejected their constitutional claims. In fact, Applicants ignore collateral estoppel entirely in their applications.

The Fourth Circuit dissenters, for their part, did give three reasons why they believed that collateral estoppel should not apply here. Slip Op. 29-31. But each of those reasons misses the mark.

First, the dissenters suggest that Applicants "did not have 'a full and fair opportunity to litigate'" the relevant issues in the *N.C. Alliance* case. Slip Op. 31 (citation omitted). But the *N.C. Alliance* briefing and argument contradict this assertion. App. 231-330. Together, the parties involved in the *N.C. Alliance* case—Applicants included—submitted nearly 100 pages of briefing and presented more than six hours of argument on the Board's statutory authority and the consent judgment's constitutionality, among other issues. The state court, moreover, could not lawfully enter the proposed consent judgment without first considering and rejecting Applicants' positions. App. 184, 334-56.

Second, the dissenters suggest that collateral estoppel should not apply because the state court judgment related to a consent judgment. Slip Op. 30-31. The dissenters are incorrect. To start, it is not the *consent judgment itself* that precludes relitigation of the issues that Applicants raise here—it is the state court's judgment, memorialized in its separate findings of fact and conclusions of law, that the consent judgment was lawful. And, in any event, under North Carolina law (which controls here), a consent judgment itself *does* have preclusive effect. *Nash Cnty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486-87 & n.5 (4th Cir. 1981); *see Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375-76 (1996) (issue preclusion is ordinarily governed by state law).

Finally, the dissenters found that the Voter-Applicants were not in privity with the Applicants who intervened in *N.C. Alliance*. Slip Op. 29-30. This holding is also incorrect as a matter of North Carolina law. In North Carolina, privity

exists when "a person [is] so identified in interest with another that he represents the same legal right previously represented at trial," as a matter "of substance and not of mere form." *State v. Summers*, 528 S.E.2d 17, 20-21 (N.C. 2000) (internal quotation marks omitted). That is the case here, where the Political Committees were granted intervention in state court based in part on their assertion that they were acting on behalf of Republican voters. *See Eaton v. Bd. of Trs. of Mocksville Graded Sch. Dist.*, 114 S.E. 689, 689 (N.C. 1922) (holding that taxpayer in first action represented interest of taxpayers in later action where they shared same attorney and sought identical relief). Applicants should not be permitted to bring successive lawsuits and evade the preclusive effect of a state court judgment simply by recruiting individual voters to join their cause.

C. This Court Should Abstain From Deciding This Case Under *Pullman*.

This Court should also decline to issue an injunction because the Fourth Circuit properly held that these cases are subject to abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

In *Pullman*, this Court held that "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question." *Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975). In other words, federal courts should abstain "when a constitutional issue

in the federal action will be mooted or presented in a different posture following conclusion of the state-court case." *Growe v. Emison*, 507 U.S. 25, 32 (1993).

Here, as in *Pullman*, Applicants' federal constitutional claims are (1) premised on unsettled issues of state law (2) whose resolution will either moot those claims or place them in a different posture.

As an initial matter, Applicants' claims depend on multiple unresolved issues of state law. Applicants ask this Court to enter an injunction that prohibits the Board from implementing certain policies that the Board agreed to carry out as part of a consent judgment that resolved a lawsuit in state court. *See* Moore Appl. 3; Wise Appl. 30. In that lawsuit, Applicants themselves have opposed entry of the consent judgment and have now asked the North Carolina Supreme Court to stay that judgment on a variety of state-law grounds.

Specifically, Applicants have argued to the North Carolina Supreme Court that the consent judgment should be stayed because, among other reasons, the Board lacked authority under sections 163-22.2 and 163-27.1 of the North Carolina General Statutes to agree to it, and because the two leaders of the North Carolina General Assembly were necessary parties to the consent judgment under sections 120-32.6 and 1-72.2 of the General Statutes. App. 425-26, 431-32, 506-08. Applicants do not and cannot claim that these state-law issues have been definitively resolved, for they continue to press these issues before North Carolina's highest court, even though two lower state courts have already ruled against them.

Resolution of these state-law issues in state court, moreover, will either moot these federal cases or, at a minimum, place them in a different posture. The North Carolina Supreme Court could stay the consent judgment on the basis of any of the independent state-law grounds mentioned above. That court's acceptance of Applicants' arguments would immediately moot their request for injunctive relief in this Court, "thus avoid[ing] the possibility of [this Court] unnecessarily deciding a constitutional question." *Harris Cnty.*, 420 U.S. at 83.

On the other hand, if the North Carolina Supreme Court chooses not to stay the consent judgment, that decision would place Applicants' constitutional claims in a significantly "different posture." *Growe*, 507 U.S. at 32. If that court chooses not to issue a stay, thereby leaving undisturbed the state trial court's holding that the Board had authority under state law to propose and enter into the consent judgment, such a decision would affect Applicants' federal claims. It would do so because each of Applicants' federal constitutional claims depends in part on Applicants' assertion that the Board lacked statutory authority under state law to agree to the steps taken in the consent judgment. *See infra* Parts II.A.2.ii, II.B.2–3; *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (recognizing that state courts are the "ultimate expositors of state law").

Thus, here, all the criteria for *Pullman* abstention are satisfied: Applicants' federal constitutional claims are premised on unresolved issues of state law, the resolution of which will moot or modify their federal claims. Furthermore, the pendency of Applicants' challenge to the consent judgment in state court also

weighs strongly in favor of abstention. The Board is responding to the Applicants' petitions in the North Carolina Supreme Court on Monday morning. "Where there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, [this Court has] regularly ordered abstention." *Harris Cnty.*, 420 U.S. at 83.

II. Applicants Cannot Show That Their Right To Relief On The Merits Is Indisputable.

A. Applicants' Claims Under the Elections and Electors Clauses Are Unlikely To Succeed.

Applicants claim that the Memoranda violate the Elections and Electors Clauses. These claims fail for lack of standing and on the merits.

1. Applicants lack standing to challenge the Memoranda under the Elections or Electors Clauses.

As an initial matter, this Court's precedents make clear that Applicants lack standing to challenge the Memoranda under the Elections or Electors Clauses. *See Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam); *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n* (*AIRC*), 576 U.S. 787, 800-02 (2015).

Beginning with the Voter- and Political-Committee Applicants, this Court has explicitly held that private parties lack standing to bring an Elections Clause challenge. *Lance*, 549 U.S. at 441-42. Such parties, this Court has explained, can allege only that "the Elections Clause . . . has not been followed"—"precisely the

kind of undifferentiated, generalized grievance about the conduct of government" that cannot confer standing. *Id.* at 442.

Under this rule, the Voter- and Political-Committee Applicants lack standing to bring their Electors Clause claim. Again, those parties can claim only "harm to [their] and every citizen's interest in proper application of the Constitution and laws." *Id.* at 439 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992)). Such a claim "does not state an Article III case or controversy." *Id.* (quoting *Lujan*, 504 U.S. at 574).

The Legislator-Applicants lack standing as well. Ordinarily, "individual members of [a legislature] do not have a sufficient 'personal stake' . . . [to] establish[ ] Article III standing," unless they have been specifically "authorized to represent their respective" legislative bodies. *Raines*, 521 U.S. at 829-30; *see also AIRC*, 576 U.S. at 802 (emphasizing the "authorizing votes" that empowered the full legislature to sue in that case); *Bethune-Hill*, 139 S. Ct. at 1951-53 (requiring a "legal basis for [the legislators'] claimed authority to litigate on the State's behalf").

The Legislator-Applicants cannot claim any such authority. Although the Legislators insist that N.C. Gen. Stat. § 120-32.6 allows them to represent the full General Assembly (Moore Appl. 20-21), that statute is inapposite on its face. It applies only when "the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina" is in dispute. N.C. Gen. Stat. § 120-32.6(b). This statute grants the Legislator-Applicants authority to represent the General Assembly in litigation "with respect to the *defense* of the

challenged act . . . or provision." *Id.* (emphasis added). Here, by contrast, the Legislators themselves have brought an affirmative challenge that seeks to invalidate an executive memorandum. Section 120-32.6 does not address that scenario. Slip Op. 14. Because no North Carolina law authorizes the Legislators to represent the institutional interests of the General Assembly in a suit of this kind, they, too, lack standing to raise a claim under the Elections or Electors Clause. *Id.*; *see also Raines*, 521 U.S. at 829-30; *Bethune-Hill*, 139 S. Ct. at 1951-53.

2. The State Board's actions do not violate the Elections and Electors Clauses.

Even if Applicants had standing to bring a claim under the Elections or Electors Clauses, their constitutional arguments would fail. Both Clauses authorize the state "Legislature" to establish the ground rules for federal elections. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. In past cases, this Court has considered whether the use of the word "Legislature" precludes other state actors from wresting authority over elections away from the representative body and vesting it in themselves.[3] *See AIRC*, 576 U.S. at 808-09, 813-24; *id.* at 825 (Roberts, C.J., dissenting); *see also, e.g.*, *Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194 (U.S. Oct. 19, 2020). This case, however, does not implicate that question.

Instead, this case asks whether the Constitution permits a state legislature to voluntarily delegate its constitutional authority to regulate federal elections to

[3] These precedents hold that the "Legislature" does not mean the "representative body alone." *AIRC*, 576 U.S. at 805. Instead, that term refers to a State's "lawmaking processes," meaning States "retain [the] autonomy" to serve as "laboratories" and empower non-legislative actors to help oversee elections. *See id.* at 805, 816-17, 824 (citing *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932)).

other State entities and, if so, whether the State Board's actions here are consistent with such a delegation. The answer to both of those questions is plainly yes.

i. The Clauses permit state legislatures to delegate their authority over elections.

According to Applicants, the Elections and Electors Clauses forbid a state legislature from ever "transferr[ing] to executive branch officials" the power to "prescribe regulations governing the times, places, and manner of federal elections." Moore Appl. 19; Wise Appl. 14. This assertion is remarkable. Not only is such a reading inconsistent with this Court's precedents, it would also threaten to invalidate the elections regimes in every State in the nation.

As this Court has previously explained, "[t]he dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules"; the Clause was *not* intended to hamstring state legislatures by barring them from enacting statutes "delegat[ing] their legislative authority" over elections elsewhere. *AIRC*, 576 U.S. at 814-15. For that reason, separate and apart from the question of whether "the state legislatures' power to prescribe regulations for federal elections 'can[ ] be taken,'" the power undoubtedly can be *given* by the legislature itself. *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *see AIRC*, 576 U.S. at 814-15; *cf. id.* at 841 (Roberts, C.J., dissenting) (highlighting the difference between "*supplement[ing]* the legislature's role" with respect to elections and "*supplant[ing]*" its role). Moreover, when such a delegation occurs—that is, when a state legislature "expressly empower[s]" other governmental bodies to help "carry out its constitutional mandate" to regulate elections—this Court's review is "deferential."

Bush v. Gore, 531 U.S. 98, 113-14 (2000) (Rehnquist, C.J., concurring) (noting that the Florida "legislature has delegated the authority to run elections and to oversee election disputes to the Secretary of State and to state circuit courts" and stating that "the statutorily provided apportionment of responsibility" over federal elections "may not be altered." (citations omitted)).

Consistent with this understanding, state legislatures throughout the country have empowered non-legislative actors to help regulate federal elections.[4] As even the dissenters below agreed, these interstitial delegations are a practical necessity. *See* Slip Op. 41-42. Just as "Congress simply cannot do its job absent an ability to delegate power," it would be entirely unworkable for state legislatures to prescribe *all* of the rules governing the "Times, Places, and Manner" of federal elections on their own. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

In North Carolina, for example, the General Assembly has delegated to county boards the authority to establish a wide array of rules that affect the "Time[ ], Place[ ], and Manner" of elections. *See Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018) (confirming that the General Assembly has "delegated to the members of the [State Board] the authority to make numerous . . . interstitial policy decisions" related to elections, including the "number and location of the early

[4] *See* N.C. Gen. Stat. § 163-22 (delegating to the State Board the "authority to make . . . reasonable rules and regulations with respect to the conduct of primaries and elections"); *see also, e.g.*, Cal. Gov. Code § 12172.5(d) (delegating to the Secretary of State the authority to "adopt regulations to assure the uniform application and administration of state election laws"); Fla. Stat. § 97.012(1) (delegating to the Department of State the authority to "adopt by rule uniform standards for the proper and equitable interpretation and implementation of the requirements . . . of the Election Code"); N.Y. Elec. Law § 3-102 (delegating to the state board of elections the authority to "promulgate rules and regulations relating to the administration of the election process").

voting sites to be established in each county and the number of hours during which early voting will be allowed at each site"). For example, county boards are required to identify early-voting and election-day polling sites and to establish certain hours of operation at those sites. N.C. Gen. Stat. §§ 163-128, -227.6. Similarly, the State Board is empowered to "promulgate minimum requirements for the number of pollbooks, voting machines and curbside ballots to be available at each precinct." *Id.* § 163-22(n). Under Applicants' reading of the Elections and Electors Clauses, all of these delegations are unconstitutional.

As should be evident, Applicants' proposed reading of the Elections and Electors Clauses would paralyze election administration across all fifty States. And the implications of Applicants' position are brought into even starker relief when one considers the emergencies that inevitably arise during any given election cycle. If Applicants' interpretation is correct, state legislatures alone can devise contingency plans if a natural disaster incapacitates voting sites or if power outages require an extension of voting hours. That simply cannot be the law, as this Court and other federal courts have confirmed. *See, e.g.*, *AIRC*, 576 U.S. at 814; *Donald J. Trump for President, Inc. v. Bullock*, No. 20-cv-66, 2020 WL 5810556, at *11-12 (D. Mont. Sept. 30, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 930-33 (D. Nev. 2020); *Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018).

ii. The State Board's actions are consistent with its statutorily delegated authority

Applicants next argue that even if the General Assembly can delegate authority to regulate elections to the State Board, the legislature has not authorized

the Board's actions here. This is false. Not only has the General Assembly granted the State Board broad authority to promulgate "reasonable rules and regulations with respect to the conduct of . . . elections," N.C. Gen. Stat. § 163-22(a), it has also authorized the State Board to make temporary, modest modifications to the rules governing a specific election cycle in *two different statutes*, *id.* §§ 163-22.2, -27.1. As the state court has already recognized, the Board's actions here fall within these delegations of statutory authority.[5]

First, N.C. Gen. Stat. § 163-27.1 authorizes the Executive Director of the State Board to "exercise emergency powers to conduct an election . . . where the normal schedule for the election is disrupted by" a "natural disaster," "[e]xtremely inclement weather," or "[a]n armed conflict." "[N]atural disaster," in turn, is defined to include, among other things, hurricanes, tornadoes, snowstorms, floods, and "[c]atastrophe[s] arising from natural causes" that "result[ ] in a disaster declaration by the President of the United States or the Governor." 08 N.C. Admin. Code 01.0106(b)(1).

Here, both the President and the Governor have issued emergency declarations identifying the COVID-19 pandemic as a "disaster" within North Carolina. The Executive Director thus did not need to "redefine the meaning of 'natural disaster' . . . to include a pandemic," as Applicants claim. Moore Appl. 19.

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[5] Applicants suggest that disputes over whether state executive officials have exceeded their statutory authority present questions of federal law under the Elections and Electors Clauses. Moore Appl. 20 n.4. They are incorrect. To be sure, whether state officials can exercise that unquestioned state law authority consistent with the Elections and Electors Clause presents an issue of federal law. *See, e.g.*, *AIRC*, 576 U.S. at 805. But the antecedent question of whether state officials have acted *within the scope of* their state-law authority remains a question of state law.

The emergency declarations clearly triggered her emergency authority under state law. N.C. Gen. Stat. § 163-27.1(a)(1); 08 N.C. Admin. Code 01 .0106(b).

Applicants raise several additional arguments disputing the applicability of § 163-27.1, but each one fails.

To start, Applicants maintain that section 163-27.1 cannot apply here because, they say, the "normal schedule for the election" has not been "disrupted" if the "election will be held as scheduled on November 3." Wise Appl. 16; Moore Appl. 19. But this is not how section 163-27.1 has ever been understood. In recent years, the Director has frequently invoked her emergency authority to make modest adjustments to the elections laws—yet on all those occasions, the election itself has taken place on the previously scheduled date. *See supra* p. 10. This is because, under North Carolina law, whether the "'normal schedule' for the election has been disrupted" depends not on whether the election's date has changed, but instead on "whether one or more components of election administration has been impaired." 08 N.C. Admin. Code 01.0106(a).

There can be little doubt that the COVID-19 pandemic has caused many such impairments: Because of the threat posed by the virus, many voters feel they cannot vote safely under the ordinary election protocols. The pandemic, moreover, has affected the USPS's ability to deliver the mail in a timely manner, impeding the administration of the State's vote-by-mail process. These impairments are undoubtedly sufficient to warrant exercise of the Director's emergency power.

The Director's emergency power, of course, is not limitless. She must calibrate any remedial measures that she chooses to impose to "the nature and scope of the disruption." 08 N.C. Admin. Code 01 .0106(c). Here, there is no reason to believe that a modest, one-time receipt-deadline extension runs afoul of this limitation, given the need to address the perfect storm of an exponential increase in absentee voting and statewide mail delays.

Next, Applicants argue that whatever emergency power the Board enjoys under section 163-27.1 does not allow it to modify "clear statutory terms." Wise Appl. 16 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014)). But this assertion, too, is contradicted both by state law and by longstanding practice. In the last three years alone, the State Board has twice exercised its emergency powers to extend the statutorily prescribed absentee-ballot receipt deadline. The General Assembly has never challenged these extensions, nor has it acted to clarify through legislation that the Director's emergency powers do not encompass such a change. Presumably, this legislative acquiescence results from the fact that section 163-27.1 simply asks the Director to "avoid *unnecessary* conflict[s]" with the State's election laws. (Emphasis added.) Inherent in this command is an acknowledgement that, during an emergency, some conflicts between Board rules and General Statutes will be necessary and unavoidable. Here, the State Board could reasonably have concluded that it could not mitigate the pandemic's

disruptive effects without making a modest adjustment to the statutory receipt deadline for this particular election cycle.[6]

Finally, Applicants suggest that the Board's emergency authority should be more limited because the General Assembly itself already passed legislation to modify the State's election procedures in response to the pandemic. Moore Appl. 19-20 (citing Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB 1169")); Wise Appl. 16 (same). That legislation, however, was passed in June—before the significant disruptions at the USPS had been widely reported. In passing HB 1169, moreover, the General Assembly could have chosen to cabin the scope of the Director's emergency powers. Yet the legislature left those powers untouched. There is, accordingly, no justification for disregarding the plain language of section 163-27.1, which clearly authorizes the Board's actions here.

The second statute that authorizes the Board's actions is N.C. Gen. Stat. § 163-22.2. That statute empowers the Board, "upon recommendation of the Attorney General, to enter into agreement[s] with the courts in lieu of protracted litigation until such time as the General Assembly convenes." This authorization allows the Board to enter into a settlement agreement when a legal challenge to one of the State's election laws threatens to disrupt an impending election.

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[6] Although the Wise Applicants suggest that the State Board's interpretation of the term "postmark" in N.C. Gen. Stat. § 163-231(b)(2)(b) to include other mail tracking services constituted a modification of the statute, the district court correctly rejected that contention because "postmark" is not defined in the law and can reasonably be understood to include alternative tracking technologies. *Moore II*, 2020 WL 6063332, at *21.

That is precisely what happened here: the *N.C. Alliance* plaintiffs sued the State Board, alleging that a wide range of state election laws—including the statute setting the receipt deadline—violated the state constitution. The Memoranda that Applicants now challenge were part of an "agreement with the courts" that was devised to avoid "protracted litigation" in *N.C. Alliance* and to provide North Carolina voters with much-needed clarity regarding the elections procedures for the 2020 general election. N.C. Gen. Stat. § 163-22.2.

Applicants barely even attempt to address the Board's authority under section 163-22.2. Wise Appl. 15 (ignoring section 163-22.2 almost entirely); *see* Slip Op. 40 n.5 (Agee & Wilkinson, J.J., dissenting) (stating, without explanation, that the dissenters "concur . . . that the Board did not have authority to change the election rules under N.C. Gen. Stat. § 163-22.2"). Indeed, the sole argument that Applicants muster is that section 163-22.2 does not permit the Board to deviate from the election rules set out in other statutes. *See* Moore Appl. 19. Applicants are again mistaken. The entire purpose of § 163-22.2, after all, is to empower the Board to settle claims when the State's election laws are the target of litigation. In enacting that authorization, the General Assembly surely did not contemplate that consent judgments would require total surrender by plaintiffs, leaving in place the default rules that had been the impetus for the lawsuit in the first place.[7]

[7] Section 163-22.2 does state that the Board should avoid "conflict[s] with" the State's elections statutes. But that limit applies only to the Board's separate authority to "make reasonable interim rules and regulations" *after* an election law "is held unconstitutional or invalid." *Id.* It has no bearing on the scope of the Board's distinct settlement authority. *See id.* (providing that the Board "shall *also* be authorized" to settle lawsuits to avoid "protracted litigation") (emphasis added).

In sum, because the State Board's actions here were wholly consistent with its statutorily delegated authority, those actions do not violate the Elections or Electors Clauses.

B. Applicants' Claims Under the Equal Protection Clause Are Unlikely To Succeed.

Applicants raise two equal protection theories. First, Applicants claim that the Memoranda subject them to arbitrary and unequal treatment. Second, they claim that the Memoranda dilute the value of their votes. These theories fail, both for lack of standing and on the merits.

1. The injuries that Applicants allege are insufficient to confer standing.

The right to participate in elections on an equal basis belongs to voters alone. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Thus, the legislators, candidates, and political committees clearly lack standing to bring an equal protection claim.

In the circumstances here, moreover, the Applicants who are voters also lack standing to bring their vote-dilution claim. These Applicants claim that the value of their votes is being diluted by unlawful votes. But this argument ignores a determinative fact: all North Carolina courts that have considered the question have held that votes counted in accordance with the Memoranda are lawful under state law. App. 175-85, 331-33. Applicants' theoretical vote-dilution injury therefore is not traceable to the Memoranda.

The Voter-Applicants lack standing for another reason: as the district court held, their dilution-related injury is a paradigmatic generalized grievance. Wise App'x at 90-92. Under Applicants' theory, the Memoranda dilute the votes of all

North Carolinians equally. This kind of generalized injury does not confer standing. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (holding that vote-dilution claims must be based on injuries that are "individual and personal in nature" (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).[8]

2. The Memoranda do not subject Applicants to arbitrary or disparate treatment.

Applicants' equal protection claim fails on the merits as well. Relying on *Bush v. Gore*, Applicants claim that the Memoranda deny them equal protection because they allow for "arbitrary and disparate treatment" that "value[s] one person's vote over that of another." 531 U.S. at 104-05; *see* Wise Appl. 19-21; Moore Appl. 21-24. But *Bush* actually shows why the Memoranda are consistent with equal protection. In *Bush*, this Court held that Florida's plans for recounting votes during the 2000 presidential election would deny equal protection if they went forward, because the State had not adopted "uniform rules" to determine if votes should be counted. 531 U.S. at 106. 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." *Id.* at 110. The only reason that Florida was not permitted to develop these uniform standards was because there was too little time to do so before the State selected its presidential electors. *Id.*

[8] *See also Donald J. Trump for President v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *43-44 (W.D. Pa. Oct. 10, 2020); *United States v. Florida*, No. 4:12-cv-285, 2012 WL 13034013, at *1 (N.D. Fla. Nov. 6, 2012); *Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020); *ACLU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

Here, however, the Memoranda do precisely what *Bush* contemplated: they establish uniform statewide standards for determining what is a legal vote well in advance of Election Day, let alone the deadline for certifying electors. As the Fourth Circuit held, the Board's standards with respect to the ballot-receipt deadline and the postmark requirement "could not be clearer or more uniform: *everyone* must cast their ballot on or before Election Day, and the ballot will be counted for *everyone* as long as it is received within nine days after Election Day." Slip Op. 12. Moreover, the Memoranda's administrative procedures for logging absentee ballots that are returned in person have no effect at all on which votes are legal: they simply provide that ballots will be logged by staff instead of voters. As a result, nothing about these standards will "le[a]d to [the] 'unequal evaluation of ballots'" that concerned this Court in *Bush*. 531 U.S. at 106.

But even if the Memoranda did give rise to some marginally different treatment among voters, that negligible difference would not offend equal protection. Applicants do not allege any *burden* on their right to vote—the Memoranda institute remedial measures whose express purpose is to *remove burdens* imposed by the pandemic. *See McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (applying rational-basis review to practice that was "designed to make voting more available to some groups"). Absent any such

burden, minor differences in treatment among voters do not support an equal protection violation.[9]

This Court's recent orders confirm the point. Weeks ago, this Court declined to enjoin Montana's plan to offer universal mail voting in certain, but not all, of its counties this fall. *See Lamm v. Bullock*, No. 20A61 (U.S. Oct. 8, 2020); *Bullock*, 2020 WL 5810556, at *14. Similarly, in *Andino v. Middleton*, this Court ordered South Carolina to apply different procedures for counting absentee ballots, solely based on when the ballots were cast. No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (directing that ballots received after a certain date require two signatures, whereas others require one). Under Applicants' logic, this Court's order in *Andino* would itself give rise to an equal protection violation. That cannot be correct.

Indeed, if Applicants were right that any mid-election changes to election procedures violate the equal protection rights of those people who have already voted, then many routine adjustments to election procedures would be unconstitutional as well.[10] For example, state election administrators commonly

9 *See also Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (rejecting equal protection challenge to a California law that gradually introduced universal mail voting, because it did "not burden anyone's right to vote," but instead made "it easier for some voters to cast their ballots"); *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (holding that when plaintiffs "allege[] only that a state treated [them] differently than similarly situated voters, without a corresponding burden on the fundamental right to vote, a straightforward rational basis standard of review should be used"); *Wexler v. Anderson*, 452 F.3d 1226, 1227 (11th Cir. 2006) (holding that Florida's use of different voting machines in different counties did not violate equal protection).

10 Indeed, under Applicants' theory, they could not receive the relief that they are seeking in a separate lawsuit in which Applicant North Carolina Republican Party is challenging state elections law governing procedures for accessing absentee container envelopes and challenging absentee ballots. *Arnett v. N.C. State Bd. of Elections*, No. 20 CVS 570 (Duplin Cty. Super. Ct.). If the *Arnett* plaintiffs were to get the relief they seek in that case, it would change election law mid-season, thereby violating the equal protection rights of those who have already voted.

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 the Board to grant this relief). Likewise, state election administrators commonly extend voter-registration deadlines in response to emergencies. Just weeks ago, for example, executive officials in Florida extended the voter-registration deadline beyond the date required by statute, *see* Fla. Stat. § 97.055, because the State's voter-registration website crashed. App. 225-30.

Applicants suggest that their novel reading of *Bush* would not call practices like these into doubt, because *Bush* forbids only standards that are *both* disparate *and* arbitrary. *See* 531 U.S. at 104. The Board's actions, they maintain, not only create disparate treatment, but are also arbitrary because they supposedly exceed the Board's statutory authority. Moore Appl. 22-23; Wise Appl. 20-21.

But the Board did not exceed its statutory authority here. *See supra* II, A 2. And in any event, whether a voting standard is arbitrary has nothing to do with statutory compliance. *Bush*, 531 U.S. at 105. Arbitrariness instead turns on whether the governing standards are sufficiently specific "to ensure . . . equal application." *Id.* at 106. Here, unlike Florida's vague command to canvassers to ascertain voters' "intent" in recounting ballots, North Carolina's standards are specific and clear. *Id.* All ballots that are mailed by Election Day and received within nine days are counted. And the administrative procedures for logging returned ballots are equally clear: elections officials, not voters, log ballots.

For these reasons, Applicants' cannot establish that the Memoranda subject them to arbitrary and disparate treatment.

3. The Memoranda do not dilute Applicants' votes.

Applicants also suggest that the Memoranda deny equal protection because they would dilute the value of their votes. *See* Moore Appl. 24-26 (citing *Reynolds*, 377 U.S. at 555). *Reynolds* and other vote-dilution precedents provide no support for this argument. These cases involve situations "where a favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted." *Id.* at 555 n.29 (alterations in original) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950)). But no disfavored group's votes are discounted here.

Moreover, in *Reynolds*, this Court noted that intentional "ballot-box stuffing" would burden the right to vote, because it would dilute lawfully cast votes. *Id.* at 555. In support, it cited criminal cases where defendants had literally stuffed ballot boxes with fraudulent votes from fictitious voters. *See id.* Nothing remotely comparable is implicated here: The Memoranda in no way let votes be cast unlawfully. Rather, they merely establish uniform standards that make it easier for all North Carolinians to cast *lawful* votes. An increase in the volume of lawful votes simply cannot support a vote-dilution claim under the Equal Protection Clause. Slip Op. 13; *id.* at 19-20 (Motz, J., concurring).

CONCLUSION

The applications for an emergency injunction should be denied.

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