

IN THE
Supreme Court of the United States

PATSY J. WISE, et al.,

Applicants,

v.

DAMON CIRCOSTA, CHAIR, STATE BOARD OF ELECTIONS, et al.,

Respondents,

ON EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

**MOTION FOR LEAVE TO FILE BRIEF FOR
AMICI CURIAE PLAINTIFFS IN *DEMOCRACY NORTH CAROLINA* v.
NORTH CAROLINA STATE BOARD OF ELECTIONS IN OPPOSITION TO
APPLICATION FOR WRIT OF INJUNCTION**

Democracy North Carolina (“DemNC”), the League of Women Voters of North Carolina (“LWVNC”), John P. Clark, Margaret B. Cates, Lelia Bentley, Regina Whitney Edwards, Robert K. Priddy II, and Walter Hutchins (“Proposed *Amici*”), through their undersigned counsel, respectfully seek leave to file the accompanying brief as *amici curiae* in support of Defendants-Respondents, and in opposition to the Emergency Application for Writ of Injunction, (i) without 10 days’ advance notice to the parties of the Proposed *Amici*’s intent to file as ordinarily required by Sup. Ct. R. 37.2(a), and (ii) in an unbound format on 8½-by-11-inch paper. All parties have consented to the filing of the brief without such notice.

Proposed *Amici* are plaintiffs in *Democracy N.C. v. N.C. State Board of Elections*, No. 20-cv-457 (M.D.N.C.) (“*Democracy N.C.*”). In that case, plaintiffs moved for a preliminary injunction seeking a court order requiring the North Carolina State Board of Elections (“SBOE”) to implement certain measures to ensure that North Carolinians could safely vote during the COVID-19 pandemic, including establishing mechanisms to cure deficient mail-in absentee ballots. On August 4, 2020, after holding a three-day evidentiary hearing, receiving testimony, and reviewing hundreds of pages of briefing, the U.S. District Court for the Middle District of North Carolina issued an order partially granting plaintiffs’ motion, which prohibited and enjoined the SBOE from disallowing or rejecting, or permitting the disallowance or rejection, of absentee ballots with a material error that is subject to remediation without due process. Under the terms of the order, that injunction was to remain in place until the SBOE implemented a law or rule that provides a voter with notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected. Consequently, the SBOE implemented a cure procedure through Numbered Memorandum 2020-19, the validity of which is now challenged by the *Wise Applicants’* Emergency Application for Writ of Injunction. Accordingly, Proposed *Amici* have a substantial interest at stake in this litigation.

DemNC is a nonpartisan, nonprofit organization dedicated to increasing voter access and participation and reducing the corrupting role of money in poli-

tics through research, organization, and advocacy. DemNC's volunteers, who are registered North Carolina voters across every region of the state, form grassroots coalitions and are advocates in communities throughout the state. DemNC works for pro-democracy reforms that strengthen the enforcement of election laws, protect voting rights, and improve government accountability and ethics. DemNC engages in substantial election protection efforts to ensure that voters are able to access the ballot, and spends substantial time and effort producing voter guides to educate voters about the candidates that will be on their ballots. Through original research, policy advocacy, grassroots organizing, civic engagement, and leadership training, DemNC seeks to achieve a fair and representative political system and advance a just and equitable North Carolina.

The LWFVNC is a nonpartisan community-based organization, formed in 1920, immediately after the enactment of the Nineteenth Amendment to the U.S. Constitution granting women's suffrage. The LWFVNC is dedicated to encouraging its members and the people of North Carolina to exercise their right to vote as protected by the U.S. Constitution and the Voting Rights Act of 1965. The LWFVNC's mission is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. The LWFVNC impacts public policies, promotes citizen education, and makes democracy work by, among other things, working to remove unnecessary barriers to full participation in the electoral process. The LWFVNC also devotes substan-

tial time and effort to ensuring that government at every level works as effectively and as fairly as possible in implementing voting regulations and procedures. To do so, the LWVNC advocates for more transparent elections, supports a strong and diverse judiciary, and urges appropriate government oversight.

John P. Clark is a U.S. citizen and a resident of Wake County, North Carolina. He is 79 years old and a registered North Carolina voter who is eligible to vote in the November 2020 general election. He has voted in every presidential election since 1968 and votes regularly in state and local elections. Mr. Clark has voted by mail-in absentee ballot in the November 2020 election.

Margaret B. Cates is a U.S. Citizen and a resident of Duplin County, North Carolina. She is 85 years old and a registered North Carolina voter who is eligible to vote in the November 2020 general election. Ms. Cates has voted in every presidential election since 1956 and also votes in many state and local elections. She has never voted by mail but plans on voting by mail in the upcoming November 2020 election.

Lelia Bentley is a U.S. Citizen, a registered voter, and a resident of Wilkesboro, North Carolina. She is 62 years old and plans to vote by mail in the upcoming election.

Regina Whitney Edwards is a U.S. citizen and a resident of Durham County, North Carolina. She is 30 years old and a registered North Carolina voter. She has voted in several elections in North Carolina and would have voted in

person for the November 2020 election but for the health risks posed by in-person voting. Instead, she voted by mail-in absentee ballot to protect her health.

Robert K. Priddy II is a U.S. Citizen and a resident of Brunswick County, North Carolina. He is a 70-year-old registered North Carolina voter who was planning on voting in person for the November 2020 election. However, because of the health risks posed by COVID-19, Mr. Priddy voted by mail-in absentee ballot.

Walter Hutchins is a U.S. Citizen and a resident of Wilmington County, North Carolina. He is a 91-year-old registered North Carolina voter who lives in a nursing home. Mr. Hutchins has voted in every presidential election since 1952. He has voted by mail-in absentee ballot with assistance from the staff at his nursing home.

The Court should grant Proposed *Amici* leave to file the accompanying brief. As explained above, Proposed *Amici* have a substantial interest in Numbered Memo 2020-19, which the *Wise* Applicants argue is entirely invalid. As the party in *Democracy N.C.*, whose prevailing constitutional claim caused the SBOE to promulgate Numbered Memo 2020-19, creating an absentee ballot cure procedure, Proposed *Amici* are uniquely positioned to assist the Court in evaluating the Applicants' request for an injunction against Numbered Memo 2020-19.

All parties have consented to the filing of this brief. The proposed brief is attached as Exhibit 1.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

Democracy North Carolina (“DemNC”) and the League of Women Voters of North Carolina (“LWVNC”), along with registered North Carolina voters John P. Clark, Margaret B. Cates, Lelia Bentley, Regina Whitney Edwards, Robert K. Priddy II, and Walter Hutchins, respectfully submit this brief as *amici curiae* (hereinafter “*Amici*”). *Amici*, along with two other North Carolina voters, are plaintiffs in *Democracy N.C. v. N.C. State Bd. of Elections*, No. 20-cv-457 (M.D.N.C., filed May 22, 2020) (“*Democracy N.C.*”), an action raising federal constitutional and statutory challenges to various North Carolina election statutes. Due to the worst pandemic in a century, North Carolina is experiencing unprecedented demand for mail-in absentee voting.¹ As of this morning, nearly 2.7 million absentee ballots have already been cast.

In *Democracy N.C.*, *Amici* brought suit against numerous parties, including the North Carolina State Board of Elections (“SBOE”), Damon Circosta in his official capacity as the chair of the SBOE, Stella Anderson in her official capacity as an SBOE member, Jeff Carmon, III, in his official capacity as an SBOE member, and Karen Brinson Bell, in her official capacity as Executive Director of the SBOE—all of whom are also defendants in the action here. Of particular relevance, Count Four of the *Democracy N.C.* complaint alleged that allowing elec-

¹ For purposes of this brief, the terms “mail-in” and “absentee” voting are used interchangeably throughout and refer to the process of requesting and casting a ballot by mail, as provided by the North Carolina election code. *See generally* N.C.G.S. Art. 20.

tion officials to reject mail-in ballots without affording voters an opportunity to cure material defects violated procedural due process under the Fourteenth Amendment to the U.S. Constitution. *Democracy N.C.*, No. 20-cv-457, ECF No. 30 (Second Amended Compl.).

On August 4, 2020, after reviewing hundreds of pages of briefing and holding a three-day evidentiary hearing, the district court issued an opinion and order holding that the lack of a statewide cure process violated procedural due process and issued a preliminary injunction against the “disallowance or rejection” of “absentee ballots without due process as to those ballots with a material error that is subject to remediation.” *Democracy N.C.*, No. 20-cv-457, Opinion, ECF No. 124 at 187 (M.D.N.C Aug. 4, 2020.). The court’s August 4 order further stated: “This injunction shall remain in force until such time as Defendants implement a law or rule which provides a voter with notice and an opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected.” *Id.* No party appealed the preliminary injunction order.

SBOE Executive Director Bell issued Numbered Memorandum 2020-19 on August 21, 2020, directing North Carolina’s county boards of elections as to the processing of absentee ballots. *Moore v. Circosta*, No. 20-cv-911, ECF No. 36-2 (M.D.N.C. Oct. 1, 2020) (hereinafter, the “Aug. 21 Memo 2020-19”); *Wise v. N.C. State Bd. of Elections*, No. 20-cv-912, ECF No. 39-2 (M.D.N.C. Oct. 5, 2020) (same). In its original form, the Aug. 21 Memo 2020-19 required that county

boards of election identify any deficiencies with the absentee ballot envelopes that can be fixed (such as voter or witness certification issues), notify any voter of any such deficiencies with their ballots, and provide voters an opportunity to “cure” such deficiencies. Aug. 21 Memo 2020-19 at 2. Among other things, the Aug. 21 Memo 2020-19 provided a procedure for voters to cure ballots with a missing or misplaced voter signature by submitting a “[C]ure [A]ffidavit.” *Id.* However, the Aug. 21 Memo 2020-19 also listed several deficiencies that could not be cured by affidavit, including a missing witness signature. *Id.*

Separately, on August 10, 2020, the North Carolina Alliance for Retired Americans and individual voters brought suit in state court against the SBOE and certain individuals in their official capacity as members of the SBOE, challenging many of the same election statutes under the North Carolina Constitution. *N.C. Alliance for Retired Ams. v. State of North Carolina*, No. 20-CVS-8881 (N.C. Wake Cty. Super. Ct.) (“*N.C. Alliance*”). Some of the Applicants before this Court successfully intervened in that state court case. *See Wise*, No. 20-cv-912, ECF No. 1 (Complaint) ¶ 78; *Moore*, No. 20-cv-911, ECF No. 1 (Complaint) ¶ 51. In response to the *N.C. Alliance* lawsuit, on September 22, the SBOE revised Numbered Memorandum 2020-19,² in conjunction with a joint motion for entry of a consent judgment with the *N.C. Alliance* plaintiffs, providing:

² On the same date, the SBOE also issued Numbered Memorandums 2020-22 and 2020-23 that are challenged by Applicants, but neither concerns the cure procedures addressed by *Amici* in this brief.

For the 2020 elections, Executive Defendants shall institute a process *to cure deficiencies that may be cured with a certification from the voter in accordance with the procedures set forth in Numbered Memo 2020-19* (attached as Exhibit B). Curable deficiencies include: no voter signature, misplaced voter signature, *no witness or assistant name, no witness or assistant address, no witness or assistant signature, and misplaced witness or assistant signature.*

Moore, No. 20-cv-911, ECF No. 1-2 at 15 (M.D.N.C. Oct. 1, 2020) (hereinafter, the “Sept. 22 Memo 2020-19”); *Wise*, No. 20-cv-912, ECF No. 39 at 6 (M.D.N.C. Oct. 5, 2020) (same) (emphasis added). Thus, the Sept. 22 Memo 2020-19 clarified the categories of absentee defects, undefined in statute, that voters could cure by submitting an affidavit. Unrelated to the cure procedure, the Sept. 22 Memo 2020-19 also extended the deadline for receipt of absentee ballots. Sept. 22 Memo 2020-19 at 4.

On September 26, 2020, the *Wise* and *Moore* Applicants filed separate actions in the U.S. District Court for the Eastern District of North Carolina (“E.D.N.C”) seeking to enjoin the SBOE from “enforcing and distributing Numbered Memo 2020-19,” *Moore*, No. 20-cv-911, ECF No. 1 at 22, and “implementing and enforcing the ‘Consent Judgment’ and the related Numbered Memos,” *Wise*, No. 20-cv-912, ECF No. 1 at 33. Among other things, the Applicants alleged that the revisions allowing the voter to cure a ballot with no witness signature using the cure affidavit process and extending the absentee ballot receipt deadline by six days to November 12, 2020 violated Art. I, § 4 (the “Elections Clause”) and Art. II, § 1 (the “Electors Clause”) of the U.S. Constitution, and the Fourteenth

Amendment.³ Notably, the Applicants did not challenge any other provisions of the Sept. 22 Memo 2020-19.

On October 3, 2020, recognizing the significant overlap with the *Democracy N.C.* litigation, the E.D.N.C. court ordered that *Wise* and *Moore* be transferred to the Middle District of North Carolina, where *Democracy N.C.* is pending. *See Moore*, No. 20-cv-911, ECF No. 47; *Wise*, No. 20-cv-912, ECF No. 25. *Amici* moved to intervene in both *Wise* and *Moore* to protect the cure process promulgated by the SBOE in the numbered memos in response to the court order in *Democracy N.C. Moore*, No. 20-cv-911, ECF No. 35; *Wise*, No. 20-cv-912, ECF No. 38.

Specifically, *Amici* moved to protect the additional due process protections included in the Sept. 22 Memo 2020-19.⁴ *First*, the Sept. 22 Memo 2020-19 provided that “[c]ounty board staff shall, to the extent possible, regularly review container-return envelopes on each business day, to ensure that voters have every opportunity to correct deficiencies.” Sept. 22 Memo 2020-19 at 2. *Second*, several provisions addressed the nature of the notice that must be afforded to voters. The Sept. 22 Memo 2020-19 requires notification of curable defects by

³ Applicants also challenged the September 22 revision to Numbered Memorandum 2020-19 that expanded the time for receipt of absentee ballots, as well as Numbered Memos 2020-22 and 2020-23. *Amici* do not specifically address those challenges except to the extent they affect the witness cure procedures issued in response to the district court’s August 4, 2020 preliminary injunction order in *Democracy N.C.*

⁴ The *Wise* and *Moore* Applicants did not challenge the Aug. 21 Memo 2020-19 at all, including the original cure process promulgated by the SBOE.

physical mail “to the address to which the voter requested their ballot be sent,” and “by email” if “the voter has an email address on file.” *Id.* at 3. *Third*, the Sept. 22 Memo 2020-19 clarified that certain omissions by a witness are not defects that require a cure: (1) the witness’s failure to “list [his or her] ZIP code,” pursuant to N.C. Gen. Stat. § 163A-1310(a)(5); (2) the witness’s listing of a non-residential address, such as a “post office box or other mailing address”; and (3) the witness’s omission of certain address information where the county board is able to “determine the correct address.” Sept. 22 Memo 2020-19 at 2 n.3. *Fourth*, if the voter’s “witness or assistant signed on the wrong line,” the deficiency can be cured by sending the voter a certification. *Id.* at 2. The district court allowed *Amici* to participate in briefing and oral argument while their motions to intervene were pending.

On October 14, 2020, the district court issued two orders (one in *Democracy N.C.* and one joint order for both *Wise* and *Moore*), enjoining the curing of absentee ballots that lack a witness signature, but denying injunctive relief related to the rest of the cure procedures contained in the Sept. 22 Memo 2020-19. Pursuant to the district court’s October 14 orders, on October 17, 2020, SBOE issued a third version of Numbered Memo 2020-19 (hereinafter, the “Oct. 17 Memo 2020-19”),⁵ which clarified that a missing witness signature cannot be cured by affida-

⁵ See Numbered Memorandum 2020-19 (as revised Oct. 17, 2020), available at https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2020/Numbered%20Memo%202020-19_Absentee%20Deficiencies.pdf.

vit, but otherwise left the additional cure process detailed in the Sept. 22 Memo 2020-19 undisturbed. *See* Oct. 17 Memo 2020-19 at 3. For over a week now, county boards of elections have been contacting voters and voters have been curing ballots pursuant to the district court’s order and the Oct. 17 Memo 2020-19. As of yesterday, October 23, there were at least 2,731 ballots that had been successfully cured,⁶ 5,756 ballots coded as “PENDING CURE,” and, per the SBOE’s guidance on October 17, those voters should have been notified already of their opportunity to cure their ballot defects.⁷

The *Wise* and *Moore* Applicants appealed the district court’s October 14, 2020 order and filed emergency motions for injunctions pending appeal. *See Wise v. Circosta*, No. 20-2104 (L), ECF No. 4 (4th Cir. Oct. 15, 2020) and *Moore v. Circosta*, No. 20-2107, ECF No. 4 (4th Cir. Oct. 16, 2020). On October 19, 2020, the Fourth Circuit *sua sponte* consolidated these appeals and announced that it would hear those cases *en banc*. Order, No. 20-2104 (L), ECF. No. 17. On October 20, 2020, the *en banc* panel issued an order denying injunctive relief pending appeal. No. 20-2104 (L), ECF No. 20. The majority opinion, noting the “narrow-

⁶ Based on *Amici*’s analysis of the SBOE daily absentee files, *available at* https://s3.amazonaws.com/dl.ncsbe.gov/ENRS/2020_11_03/absentee_20201103.zip (filtered up to 10/23), some counties are coding cured absentee ballots as just “ACCEPTED” rather than “ACCEPTED – CURED,” which is what the 2,371 number represents, so the number of cured ballots is almost certainly higher.

⁷ There are likely more curable ballots because some counties continue to code deficient ballots as “WITNESS INFO INCOMPLETE,” even though such a designation frequently includes deficiencies beyond a missing witness signature—that is, deficiencies that are curable. As of October 23, there were 3,986 ballots in this category.

ness of the issue” being decided, “decline[d] to enjoin the North Carolina State Board of Election’s extension of its deadline for the receipt of absentee ballots for the ongoing general election.” *Id.* at 4. The Fourth Circuit held that “[b]ecause Plaintiffs have not established a likelihood of success on the merits—and because, in any event, *Purcell* and *Andino* require that we not intervene at this late stage—we rightly decline to enter an injunction pending appeal.” *Id.* at 5. As particularly relevant here, the court also concluded that the cure process in Numbered Memo 2020-19 was not before it: “[A]s Plaintiffs themselves vigorously assert, ‘the *only* aspect of the revised Numbered Memorandum 2020-19 that Appellants are seeking to enjoin is the extension of the receipt deadline.’ *Moore* Reply Br. at 1; *see also* *Wise* Reply Br. at 3 (noting that the most recent version of the memo issued by the Board ‘honor[s] the Witness Requirement’).” *Id.* at 8 (emphasis in original).

SUMMARY OF ARGUMENT

Applicants come to this Court seeking to undo the extraordinary efforts of the SBOE, the federal and state courts, and *Amici* themselves to protect the due process and voting rights of citizens of North Carolina in the midst of an unprecedented global pandemic that is driving a significant increase in absentee voting. This Court should reject applicants’ unprecedented request to disrupt all that effort at the last minute, immediately before the election. Rather, leaving undisturbed the district court’s due process ruling and the SBOE’s Oct. 17 Memo 2020-

19, which seeks to implement that ruling, provides the surest course for this Court to ensure that voting in the upcoming election can proceed in an orderly fashion, while also protecting the rights of all North Carolina voters to ensure that the votes they cast will be counted.

Amici's interest in this matter turns on (1) ensuring that the Oct. 17 Memo 2020-19's cure procedure for absentee ballots, which protects the due process rights of absentee voters in North Carolina, is maintained in force; and (2) ensuring that an ordinary dispute over the interpretation of state election law does not result in federal court litigation—potentially deterring and confusing voters and leaving the election in tumult. Indeed, accepting Applicants' submission would convert virtually every dispute over an agency's administration and interpretation of state election rules and laws—disputes that would normally be the bread and butter of state courts—into federal constitutional litigation. That result would quickly undermine the states' principal role in administering elections in this country, including federal elections, and contrary to sound doctrines articulated by this Court to protect the role of state courts in interpreting state laws, including abstention and the *Pennhurst* doctrine. The result would summon countless, *existing* disputes around the country over the meaning and application of state election, emergency, and other laws, and drive them into the federal courts. This Court should decline Applicants' invitation to start such a jurisprudential revolution.

ARGUMENT

I. **MOORE AND WISE SEEK DIFFERENT RELIEF FROM THIS COURT, AND THAT DIFFERENCE IS CRUCIAL**

Initially, the *Moore* and *Wise* cases both challenged the Sept. 22 Memo 2020-19 on the ground that it provided an end run around North Carolina’s statutory witness requirement for mail-in absentee voting. *Moore v. Circosta*, No. 20-cv-911, ECF No. 1 ¶ 59 (“Thus, the Board through Numbered Memo 2020-19’s ‘certification’ allows absentee voters to be their own witness and vitiates the Witness Requirement.”); *id.* ¶ 81 (alleging violations of Elections Clause because “Numbered Memo 2020-19 allows for absentee ballots without a witness in direct contravention of the General Assembly’s duly-enacted Witness Requirement.”); *Wise v. N.C. State Bd. of Elections*, No. 20-cv-912, ECF No. 1 ¶ 88 (“Once the voter presents the requested certification, the ballot will be counted *with no witness*. This directly contradicts the requirements of current law . . .”). Both suits, as originally pled, sought to enjoin the Sept. 22 Memo 2020-19 in full. *Moore*, No. 20-cv-911, ECF No. 1 at 21-22; *Wise*, No. 20-cv-912, ECF No. 1 at 33-34. On appeal, however, *Moore* and *Wise* have radically diverged, as only the latter appears to continue to challenge the absentee ballot cure procedure that *Amici* secured in *Democracy N.C.* from the district court.

The *Moore* case was brought by the Intervenor-Defendants in *Democracy N.C.*, Timothy K. Moore and Phillip E. Berger, the Speaker of the North Carolina House of Representatives and President Pro Tempore of the North Carolina

Senate, respectively, as well as three individual voters. *Democracy N.C.*, No. 20-cv-457. The *Democracy N.C.* Intervenor-Defendants (hereinafter “the *Moore* Plaintiffs”) recently sought in *Democracy N.C.* an injunction pursuant to the All Writs Act that would have enjoined the Sept. 22 Memo 2020-19 in its entirety. Instead, on October 14, the district court granted only a limited injunction disallowing the curing of absentee ballots that wholly lack a witness signature. *Democracy N.C.*, No. 20-cv-457, ECF No. 169 at 40-41. Having secured this relief in district court as to the sole feature of the Sept. 22 Memo 2020-19 that the *Moore* Plaintiffs challenged, the *Moore* Plaintiffs no longer press any argument that Numbered Memorandum 2020-19 is unconstitutional. They did not make such an argument to the Fourth Circuit in their Emergency Motion for an Injunction Pending Appeal, and they do not make that argument here to this Court in their Application.

By contrast, the *Wise* Applicants continue to press the same statutory and constitutional arguments against Numbered Memorandum 2020-19 as they did in the district court. Specifically, the *Wise* Applicants point solely to the Sept. 22 Memo 2020-19’s authorization to cure ballots that lack a witness signature. *Wise* Application 3, 8, 20 (No. 21A71). But the district court has *already enjoined* the SBOE from curing absentee ballots that lack a witness signature, and the SBOE has *already issued* a newly revised version of Numbered Memorandum 2020-19 to comply with that order. *See Wise* Application 8 n.3 (No. 21A71) (“Judge

Osteen enjoined Revised Numbered Memo 2020-19 *insofar as it negated the Witness Requirement*, and the Board then issued a revised version (version 3) of this memo which eliminated the contested change. *See* Revised Numbered Memo 2020-19 (version 3, issued Oct. 17, 2020), App. 168.”) (emphasis added); *see also* *Wise*, No. 20-cv-912, ECF No. 56 at 68 (“This court has, on separate grounds, already enjoined the Witness Requirement Cure Procedure in *Democracy North Carolina v. North Carolina State Board of Elections*, No. 1:20CV457 (M.D.N.C. Oct. 24, 2020) (enjoining witness cure procedure). Thus, the issue of injunctive relief on the Witness Requirement Cure Procedure is moot at this time.”).

The *en banc* Fourth Circuit’s majority opinion noted that the *Wise* Applicants have already conceded that the Oct. 17 Memo 2020-19 does not permit voters to evade the witness requirement through the cure procedure. *Wise v. Circosta*, Nos. 20-2104 & 20-2107, 2020 WL 6156302, at *3 (4th Cir. Oct. 20, 2020) (citing “*Wise* Reply Br. at 3 (noting that the most recent version of the memo issued by the Board ‘honor[s] the Witness Requirement’)”); Oct. 17 Memo 2020-19. No party to this case disputes that this aspect of Numbered Memorandum 2020-19 has in fact been enjoined, and no party has sought relief from this Court as to the district court’s October 14 injunction order or the Oct. 17 Memo 2020-19 implementing it.

As the district court has already enjoined the challenged deviation from the witness requirement for absentee voting, this Court should dispatch this part

of the *Wise* Application. It is well-established that “[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Indeed, “the scope of injunctive relief is dictated by the extent of the violation established.” *Id.* The *Wise* Applicants, however, have failed to allege any additional constitutional violations or claim that they are entitled to more or different relief, and, for that reason alone, this Court lacks subject matter jurisdiction over a live case and controversy with respect to the *Wise* Applicants’ request for injunctive relief as to all of the remaining features of Oct. 17 Memo 2020-19.

II. NONE OF THE PLAINTIFFS IN *WISE* OR *MOORE* HAS STANDING TO BRING THEIR ELECTIONS AND ELECTORS CLAUSE CLAIMS AND, IN ANY EVENT, THESE ARGUMENTS ARE UNPRECEDENTED AND EXTREME, AND SHOULD BE REJECTED

A. The Fourth Circuit And District Court Correctly Concluded That The *Wise* And *Moore* Applicants Lack Standing To Bring These Elections and Electors Clause Claims

As the *en banc* Fourth Circuit and the district court correctly concluded, the *Wise* Applicants lack standing to assert these claims because they are all private citizens. *Wise*, 2020 WL 6156302, at *6; *Wise*, No. 20-cv-912, ECF No. 56 at 71-75. As private citizens, the *Wise* Applicants can only claim a generalized grievance if the Elections and Electors Clauses are violated. *See Lance v. Coffman*, 549 U.S. 437, 441-442 (2007) (“The only injury [private citizen] plaintiffs allege is that ... the Elections Clause ... has not been followed. This injury is pre-

cisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.”).

The *en banc* Fourth Circuit and the district court also correctly held that the *Moore* Plaintiffs lack standing to assert their Elections and Electors Clause claims. *Wise*, 2020 WL 6156302, at *6; *Wise*, No. 20-cv-912, ECF No. 56 at 71-75. Even though Plaintiffs Moore and Berger are the Speaker of the North Carolina House of Representatives and the President Pro Tempore of the North Carolina Senate, respectively, their suit does not concern the constitutionality or validity of an act of the North Carolina General Assembly or a provision of the North Carolina Constitution. *Wise*, 2020 WL 6156302, at *6 (citing N.C. Gen. Stat. § 120-32.6(b)). Indeed, N.C. Gen. Stat. § 120-32.6(b)—upon which Moore and Berger rely for standing purposes—is a statutory guarantee that the legislative leadership can intervene as a defendant when a state law or constitutional provision is challenged; it does not confer standing upon the leadership to sue a state agency in federal court. And, as the district court correctly noted, Plaintiffs Moore and Berger have not been authorized to sue on behalf of the North Carolina General Assembly. *Wise*, No. 20-cv-912, ECF No. 56 at 72-75. Under this Court’s precedent, that fact is fatal to their standing to challenge Numbered Memorandum 2020-19:

The Supreme Court has held that legislative plaintiffs can bring Elections Clause claims on behalf of the legislature itself only if they allege some extra, particularized harm to themselves – or some di-

rect authority from the whole legislative body to bring the legal claim. Specifically, the Supreme Court found a lack of standing where “[legislative plaintiffs] have alleged no injury to themselves as individuals”; where “the institutional injury they allege is wholly abstract and widely disperse”; and where the plaintiffs “have not been authorized to represent their respective Houses of Congress in this action.” *Raines v. Byrd*, 521 U.S. 811, 829 (1997).

Wise, No. 20-cv-912, ECF No. 56 at 72-73. In any event, only the *Moore* Plaintiffs could even *conceivably* bring these Elections and Electors Clause claims under this Court’s precedent, and they manifestly do not seek any relief from this Court as to the Oct. 17 Memo 2020-19’s absentee ballot cure procedure.

B. Even If the *Wise* Applicants Do Have Standing To Assert Their Elections And Electors Clause Claims Against Unspecified Aspects Of The Oct. 17 Memo 2020-19, These Claims Should Be Rejected

The *Wise* Applicants’ Elections and Electors Clause theories are wholly unprecedented and far more extreme than those argued to this Court in the stay applications submitted in *Scarnati v. Boockvar*, No. 20A53, 2020 WL 6128194, at *1 (U.S. Oct. 19, 2020). In *Scarnati*, the decision below was a state supreme court ruling altering certain voting requirements on state constitutional grounds. *Id.* Here, the *Wise* Applicants challenge the SBOE’s Oct. 17 Memo 2020-19, and by extension the consent judgment entered by a state trial court that has not yet been fully reviewed by the Supreme Court of North Carolina and was premised on an interpretation of state emergency and election statutes. Indeed, on October 23, 2020, the North Carolina Supreme Court considered and rejected motions filed by the *Wise* and *Moore* Applicants seeking a temporary stay of the consent

judgment entered by the state trial court, showing that the highest court in North Carolina may find the Oct. 17 Memo 2020-19 to be entirely consistent with North Carolina law.⁸ By bringing this action in federal court, Applicants are, in effect, attempting to convert an ordinary dispute over the scope and interpretation of state election statutes into a federal constitutional case. But this Court has never so much as implied that federal courts may intervene to resolve disputes between state legislatures and state election authorities over the construction and implementation of state statutes, where the state supreme court has denied relief.

If this Court adopts the *Wise* Applicants' extreme position, it would open Pandora's box: the federal judiciary would be subjected to a flood of new election law challenges under the Elections and Electors Clauses. Any time state legislative plaintiffs viewed a state election agency's rule, interpretation, guidance document, or memorandum as at odds with a state statute, they could resort to federal court by invoking the Elections and Electors Clauses. Those litigants could proceed directly to federal court without even filing a challenge in state court, let alone appealing an adverse ruling to the state supreme court. The *Wise* case was filed on September 26, 2020, and now less than a month later, it is before this

⁸ See Docket Sheet p. 2, *N.C. Alliance for Retired Ams. v. N.C. State Bd. of Elections*, No. 440P20-1 (N.C. Sup. Ct) (entries 1 and 3 reflect denial of motion for temporary stay ("M-TEMP-STAY") filed by "Intervenor-Appellant Berger, Philip E et al" and "Republican National Committee, et al." respectively), available at <https://appellate.nccourts.org/dockets.php?court=1&docket=1-2020-0440-001&pdf=1&a=0&dev=1>.

Court seeking an *injunction* against unspecified aspects of the Oct. 17 Memo 2020-19 that it claims violate *state* statutes where the Supreme Court of North Carolina has found no such violation. There is no limiting principle to this radically destabilizing theory, which would force the federal courts into the position of adjudicating virtually all disputes over the meaning of state election laws, including all state election law disputes between the state legislature and one or both of the other branches of state governments. To authorize this new font of litigation would induce forum-shopping and a proliferation of end runs around state court systems perceived to be unfavorable to particular claims. A decision in the Applicants' favor would precipitate an immediate flood of new federal litigation by offering a federal forum for existing state election law disputes across the country and breathing new life into disputes that state actors had believed were already settled in state court.

The *Wise* Applicants do not contend that state election authorities lack authority to promulgate rules and guidance interpreting and implementing state statutes. Instead, they contend that a state agency's interpretation, rule, or directive violates a state statute, and that violation of state law per se creates a federal constitutional question that the federal courts must resolve. *See, e.g., Wise* Application 3-4 (No. 21A71) ("To protect the federal interests at stake and restore the status quo established by the General Assembly, Plaintiffs urge the Court to prohibit the Board from implementing the Numbered Memos and enjoin

it from further interfering with this election.”). The question of whether the SBOE has the authority to provide county boards of elections guidance on how to comply with due process protections for absentee voters is necessarily one of state law about whether the SBOE has overstepped its statutory authority.

If every dispute on questions of state statutory interpretation can form the basis for a federal question and federal jurisdiction in any voting-related matter—thus resulting in federal courts enjoining state election agencies’ or even local election officials’ actions and directives—proceeding down this road will effectively create an *election law exception* to this Court’s ruling in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984). While the North Carolina General Assembly establishes the laws that govern the state’s elections, they have delegated significant authority to the executive branch, via the SBOE and its Executive Director, to implement the law and provide appropriate guidance, including dealing with contingencies and guiding the county boards of elections through statutory gaps. *See, e.g.*, N.C.G.S § 163-166.01 (allowing SBOE to extend polling hours); § 163-27.1 (authorizing the SBOE director to take emergency action that “avoid[s] unnecessary conflict with the provisions of this Chapter”; N.C.G.S. § 163-166.8(b) (providing that a voter seeking assistance “request permission from the chief judge, stating the reason” but as further defined by the SBOE Director, as implemented in Numbered Memorandum 2012-27, (election officials “simply do not require enunciated spoken words and we do not set out to

inquire into the nature of a voter’s disabilities. If there is a reasonable indication that the voter would like assistance, the precinct official can ask the voter questions which would enable the precinct official to assert that the voter understands he or she is requesting assistance”).⁹ Federal court intervention in this state executive implementation is plainly not allowed under this Court’s precedent. *Pennhurst*, 465 U.S. at 106 (“A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.”).

Furthermore, North Carolina might be the least appropriate venue in the Union to apply the *Wise* Applicants’ extreme interpretation of the Elections and Electors Clauses. The North Carolina General Assembly is the only state legislature in the country that has not authorized federal court certification of state-law questions to the state supreme court. *See United States v. Kelly*, 917 F. Supp. 2d 553, 560 (W.D.N.C. 2013) (“[T]his Court does not have the option of certifying this hazy issue of state law to the North Carolina Supreme Court. North Carolina is the sole state in the union that does not permit a federal court to certify questions of state law to the high state court for resolution.”). As the sole

⁹ SBOE Numbered Memorandum 2012-27 (October 30, 2012), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2012/2012-27_VoterAssistance.pdf.

state that bars federal courts from certifying state law questions to the state supreme court, the North Carolina General Assembly has clearly expressed its strong preference for adjudicating questions of North Carolina law within its own state court system, exhausting all appeals through the Supreme Court of North Carolina. It expressly does *not* want the Supreme Court of North Carolina to issue advisory opinions on state law questions in the service of federal litigation.

Moreover, given the number of places within North Carolina statutes where the General Assembly has remained silent on details of election administration or how election administrators should proceed in emergency settings, inviting federal litigation second-guessing those important election administration¹⁰ efforts will greatly expand the federal judiciary's role in state law disputes. For example, the SBOE is authorized to extend polling hours where voting in a

¹⁰ Note that it is beyond dispute that North Carolina statutes were silent on the definition of a “curable” defect and the procedure for a cure. *See Democracy N.C.*, No. 20-cv-457, Opinion, ECF No. 124 at 157 (M.D.N.C Aug. 4, 2020) (“*Democracy N.C. Opinion*”) (“[T] the court is compelled to find that the complete lack of statewide curing procedure is constitutionally inadequate.”). But if the state disagreed with the SBOE on how to comply with the preliminary injunction, define a curable defect, and create mechanisms for a cure, the General Assembly could have convened and passed clarifying legislation within a matter of days, either after the Aug. 21 Memo 2020-19 or Sept. 22 Memo 2020-19 was promulgated. The *Moore* Applicants’ silence on this reflects legislative acquiescence with the SBOE’s actions in the face of vague or silent state laws. Accordingly, the *Wise* applicants have no grounds to come in now and effectively overrule state legislative acquiescence where the state legislature declined not to act, even when invited by the federal court. *Democracy N.C. Opinion* at 187.

precinct on Election Day has been interrupted by more than 15 minutes. N.C.G.S. § 163-166.01 (“If the polls are delayed in opening for more than 15 minutes, or are interrupted for more than 15 minutes after opening, the SBOE may extend the closing time by an equal number of minutes. As authorized by law, the SBOE shall be available either in person or by teleconference on the day of election to approve any such extension.”). Likewise, while *Amici* take no position on the absentee receipt deadline in this Court, *Amici* note that historically, in North Carolina, under N.C.G.S. § 163-27.1, the SBOE Director has exercised delegated authority to alter the conduct of elections because of natural disaster on a regular basis. For example, in 2018, because of Hurricane Florence, the Republican director of the SBOE not only extended the absentee receipt deadline in 28 counties to nine days after the election, like here, but also allowed absentee ballots to be delivered to *any* county in the state, not just the county in which the absentee voter was registered. N.C. State Board of Elections Emergency Order.¹¹ In enacting the statute under which the SBOE Director can act in exigent circumstances to “avoid unnecessary conflict with the provisions of this Chapter,” N.C.G.S. § 163-27.1, the General Assembly plainly contemplated there would be some necessary conflict with the statutes in emergencies and unprecedented situations, and expressly delegated this authority to the SBOE Di-

¹¹N.C. State Board of Elections Emergency Order – Updated 11/5/2010, *available at* https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Executive%20Director%20Orders/Order_2018-10-19.pdf.

rector. This Court’s intervention here would greenlight a federal lawsuit over every extension of polling hours, even if the chief judge overslept and voting started hours late or a chemical spill blocked the only road to a precinct for hours—both actual occurrences in North Carolina that were properly resolved under authority delegated to the SBOE Director by the state legislature. Under the *Wise* Applicants’ theory of this case, disputes over whether such a determination by the executive branch conflicted with state law would give rise to a panoply of federal claims.

Such a result would be manifestly contrary to decades of this Court’s jurisprudence counseling respect for the role of state courts in resolving questions of state law, especially where those questions involve important issues of state policy. *See generally Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The Elections and Electors Clauses in Articles I and II of the U.S. Constitution are not a font of such unfettered *federal* judicial intervention in purely *state* election law disputes.

III. THE *WISE* APPLICANTS’ EQUAL PROTECTION CLAUSE ARGUMENT UNDER *BUSH* V. *GORE* IS LEFT COMPLETELY UNDEFINED AS TO NUMBERED MEMORANDUM 2020-19 AND MUST NECESSARILY FAIL AS WELL FOR LACK OF SUBJECT MATTER JURISDICTION

The *Wise* Applicants fail to explain what aspect of the Oct. 17 Memo 2020-19’s absentee ballot cure procedure violates the equal protection principle articu-

lated in *Bush v. Gore*, 531 U.S. 98 (2000). To the extent they have alleged that the authorization to cure the lack of a witness signature violates the Equal Protection Clause, that feature of the Sept. 22 Memo 2020-19 has already been enjoined by the district court and Oct. 17 Memo 2020-19 has been issued to comply with that order, as the *Wise* Applicants have acknowledged in their briefs to the Fourth Circuit and this Court. *See supra* at 11-12. Accordingly, the district court and the Fourth Circuit majority both found that the request for injunctive relief as to the witness requirement was moot. *Id.* The *Moore* Applicants seem to agree. While the *Wise* Applicants appear to press on against the Oct. 17 Memo 2020-19, their Application fails to specifically describe any other Equal Protection Clause violation or identify how it could or should be remedied.

Accordingly, having failed to specifically point to any other legal violation or seek relief for that violation, the *Wise* Applicants are not entitled to any further injunctive relief as to the Oct. 17 Memo 2020-19. There is no basis whatsoever to enjoin the Oct. 17 Memo 2020-19 in whole or in part. At a maximum, the *Wise* Applicants could only be entitled to a remand of this action so that they can make their specific arguments to the lower courts in the first instance, identifying specific parts of the North Carolina election code that have been breached. The one claimed violation—the curing of ballots without witness signatures—has already been resolved in their favor.

Alternatively, to the extent the *Wise* Applicants believed that the existing injunction against curing the lack of a witness signature was insufficient to redress the equal protection violation they had pled, they were obligated, in the first instance, to seek a modification of that injunction from the district court. Instead, they still seem to argue that the Oct. 17 Memo 2020-19 subverts the witness requirement without explaining how that is so. Having failed to do that and having never alleged any other constitutional problem or deviation from North Carolina statutes in the Oct. 17 Memo 2020-19, their Application for an injunction against that memorandum must fail.

CONCLUSION

For the reasons stated above, *Amici* urge this Court to deny the Applications for injunctive relief in *Wise*.

Dated: October 24, 2020

Respectfully submitted,

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OCTOBER 2020

CERTIFICATE OF SERVICE

I, Paul R.Q. Wolfson, a member of the bar of this Court, hereby certify that on October 24, 2020, all parties required to be served consented to being served via email and were served copies of the foregoing document via email at the address below:

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