No. 20A72

In The Supreme Court of the United States

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

Applicants,

v.

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

Respondents,

&

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS; BARKER FOWLER; BECKY JOHNSON; JADE JUREK; ROSALYN KOCIEMBA; TOM KOCIEMBA; SANDRA MALONE; and CAREN RABINOWITZ,

Intervenor-Respondents.

On Application for Injunction Pending Appeal from
the United States Court of Appeals for the Fourth Circuit

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

October 25, 2020

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INTRODUCTION

The North Carolina General Assembly's constitutional power to set the rules for federal elections and North Carolina voters' right to vote on equal terms are at stake in this case. A nonrepresentative body — the North Carolina State Board of Elections ("NCSBE") — has usurped the constitutionally delegated authority of the General Assembly to structure federal elections under the Constitution's Elections Clause. U.S. CONST. art. I, § 4, cl. 1. By extending the absentee ballot receipt deadline from 5:00 p.m. on November 6, 2020, to 5:00 p.m. on November 12, 2020 — in direct contravention of the General Assembly's duly enacted statute, N.C. GEN. STAT. § 163-231(b)(2) — the NCSBE is sowing confusion among both voters and election officials by unconstitutionally changing the election rules after the election has already started and causing disparate treatment of voters in the ongoing election in violation of the Elections Clause and the Equal Protection Clause. The NCSBE is implementing an "insidious formula" to replace the General Assembly's statutes with its own policy preferences, a scheme that the dissenting judges in the Fourth Circuit recognized as a "pernicious pattern" playing out across the country that will "destabiliz[e] federal elections[] and undermin[e] the power of the people to choose representatives to set election rules." App. 253, 277 (Wilkinson and Agee, JJ., dissenting). And this "wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting), as Respondents' brief expressly acknowledges that the NCSBE simply "decided to extend by six days the deadline for county boards to receive mailed ballots," NCSBE Resp. at 1, thereby arrogating to itself power that

resides in the General Assembly. This Court must not countenance the NCSBE's actions.

The NCSBE and Intervenor-Respondents attempt to shield from review the NCSBE's unconstitutional actions, claiming that Applicants have no standing to bring their claims, that this Court must abstain from interfering in this case, and that the late hour counsels against granting Applicants relief in light of *Purcell*. They further attempt to minimize their bid to use the courts to enact substantial, unconstitutional changes to North Carolina's election laws as "modest . . . adjustments in election procedures" that "were designed to keep disruption of the elections process to a minimum." NCSBE Resp. at 13. These modest adjustments were supposedly implemented "in an effort to protect lawful North Carolina voters from having their votes thrown out because of mail delays." *Id.* at 1.

But it is the NCSBE, not Applicants, that have caused chaos in the State's election, altering election rules after voting began, zigzagging back and forth between different election procedures, and giving state laws governing the NCSBE's authority interpretations that they cannot bear. After all, "[i]f non-representative state officials can disregard a clear mandate from the state legislature merely by *claiming* state-law authority, and if federal courts cannot review that claim, non-representative state officials will be able to strip the state legislatures of their federal constitutional power whenever they disagree with legislative priorities." App. 273. And any purported mail delays have been well-publicized, allowing North Carolina's voters to account for them. What is more, the mail can be avoided altogether by dropping off

ballots in person or voting in person either on election day or during the 17-day early voting period. And in-person voting can be done curbside by individuals who are disabled, including those with a heightened susceptibility to COVID-19. North Carolinians have been taking advantage of their ample voting opportunities, as we are still more than a week from election day and nearly 3 million have voted, putting turnout already over 40%.[1]

The district court found that Applicants were likely to succeed on their Equal Protection claims, and the Fourth Circuit dissenting judges further found that Applicants were likely to succeed on their Elections Clause claim. Applicants have demonstrated that they face exigent circumstances and that their right to relief is indisputably clear, and Respondents' and Intervenor-Respondents' arguments to the contrary are meritless.[2]

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[1] *Absentee Data*, N.C. STATE BD. OF ELECTIONS (Oct. 25, 2020), *available at* https://bit.ly/33SKzAw.

[2] Respondents and Intervenor-Respondents' make much of the fact that there is parallel state-court litigation involving a consent judgment that would require the NCSBE to implement the extended absentee ballot receipt deadline. It is true that Applicants Moore and Berger have an emergency petition for a writ of supersedeas and motion for a stay pending appeal pending in the Supreme Court of North Carolina, but nevertheless, this state of affairs does not absolve this Court from adjudicating this claim. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 73, 77 (2013) (explaining that federal courts have an "obligation to hear and decide a case" that "is virtually unflagging" (internal quotation marks omitted)).

ARGUMENT

I. Prudential and Other Factors Do Not Prohibit This Court From Granting an Appellate Injunction

A. *Purcell* Counsels in Favor of Issuing Injunctive Relief Pending Appeal

Respondents contend that "[g]ranting the requested injunction would create uncertainty and confusion among North Carolina's voters," NCSBE Resp. at 21, by upsetting the purported status quo that was created when the state trial court entered the October 2 consent judgment in *North Carolina Alliance*, thereby "establish[ing] the State's rules for the ongoing November election," *id.* at 15. This, in turn, would supposedly run afoul of this Court's *Purcell* principle, which cautions against "this kind of uncertainty." *Id.* at 21; *see also* Int.-Resps.' Resp. at 36–39. Respondents, however, fundamentally misunderstand the *Purcell* principle and distort the proper status quo ante by which this Court must assess the NCSBE's unconstitutional alterations to North Carolina's election procedures. Indeed, Respondents' understanding of *Purcell* would provide unelected State bureaucrats with a clear roadmap for displacing validly enacted voting laws — simply wait until after voting has started to act, and then plead that it is too late for those actions to be challenged in court. This Court should not allow its precedents to be twisted to countenance such gamesmanship.

It is true that this Court has traditionally applied *Purcell* against federal courts changing the rules shortly before elections. But there is no principled reason — and Applicants have failed to find one in this Court's rulings — for why *Purcell* should not apply against interferences by state courts and agencies acting in violation

of the federal Constitution. After all, attempts to change election rules, whether facilitated in federal or state court, cause the uncertainty, confusion, and chaos that the *Purcell* principle is designed to guard against. Indeed, Respondents ignore this Court's animating concern regarding a "fundamental[] alter[ation]" of a State's election-administration regime at the eleventh hour. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

Moreover, an injunction pending appeal would reinstate, not change, the status quo in North Carolina. Respondents argue that, due to the NCSBE's issuance of the Memorandum and its inclusion in a state-trial-court–approved consent judgment, the status quo is the extended absentee ballot receipt deadline. Respondents misapprehend the correct status quo ante, which, properly understood, is the General Assembly's duly enacted statutes that governed this ongoing election from when it began on September 4 until the NCSBE's changes went into effect on October 19. *See* 11A FED. PRAC. & PROC. CIV. § 2948 (3d ed.) (explaining that courts have defined the status quo as "the last peaceable uncontested status" existing between the parties before the dispute developed). It would not be this Court departing from the status quo; it was the NCSBE and the North Carolina Superior Court that impermissibly departed from the status quo by approving changes to the election rules in a consent judgment in the middle of an election. Over 150,000 ballots had already been received when the NCSBE announced the extended absentee ballot receipt deadline, and over 1.5 million had been cast by the time the extension went into effect. The NCSBE's actions have thereafter cast a pall of uncertainty upon the

deadlines that North Carolina voters must follow, even more so now that nearly 3 million votes have been cast. Instead of preventing this Court from ending this chaos, *Purcell* counsels in favor of this Court's ending the uncertainty by issuing injunctive relief pending appeal.

B. Collateral Estoppel Does Not Bar Applicants' Claims

Collateral estoppel arising from the state trial-court litigation in *North Carolina Alliance* does not bar Applicants from raising their claims in this case. First, collateral estoppel cannot be asserted against a party that lacked a full and fair opportunity to litigate the issue in the prior proceeding. *See In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004). Three of the Applicants in this case—Heath, Whitley, and Swain—were not parties to the state-court litigation, so they cannot be barred by collateral estoppel.

Respondents nevertheless insist that these Applicants were in privity with the parties to *North Carolina Alliance* because their interests were so aligned that Applicants "represent[] the same legal right previously represented at trial." NCSBE Resp. at 27 (internal quotation marks omitted). However, in North Carolina, "'privity' for purposes of . . . collateral estoppel denotes a mutual or successive relationship to the same rights of property." *Hales v. N.C. Ins. Guar. Ass'n*, 445 S.E.2d 590, 594 (N.C. 1994) (internal quotation marks omitted). Contrary to Respondents' contention, mere "interest[] in the same question" is insufficient to establish privity. *State ex rel. Tucker v. Frinzi*, 474 S.E.2d 127, 130 (N.C. 1996) (internal quotation marks omitted). Respondents point to no shared property rights between Applicants Moore and

Berger and Heath, Whitley, and Swain. Moreover, this Court has expressed its disapproval of nonparty preclusion, confining it to only "limited circumstances." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008); *see also id.* at 885 ("We disapprove of the doctrine of preclusion by 'virtual representation' . . . ."). Indeed, under *Taylor* it would violate due process to preclude Heath, Whitley, and Swain from litigating their federal constitutional claims on the basis of a state-court judgment in which they did not participate and in which none of the limited circumstances in which adequacy of representation can take the place of personal participation was present.

Second, as this Court explained in *Arizona v. California*, 530 U.S. 392, 414 (2000) (internal quotation marks omitted), the general American rule is that "consent judgments ordinarily support claim preclusion but not issue preclusion." And that is especially so here, where Applicants never consented to or signed the consent decree, and where it evinces no intent to preclude them from litigating their Elections Clause or Equal Protection claims in subsequent litigation.

Third, collateral estoppel is "qualified or rejected when [its] application would contravene an overriding public policy or result in manifest injustice." *United States v. LaFatch*, 565 F.2d 81, 83–84 (6th Cir. 1977); see also RESTATEMENT (SECOND) OF JUDGMENTS § 28; 18 FED. PRAC. & PROC. JURISDICTION § 4426 (3d ed.). Applying collateral estoppel here would be contrary to public policy and work a manifest injustice. For one, the fundamental nature of Applicants' Elections Clause claim is that the authority to regulate federal elections is constitutionally delegated to state legislatures. Consequently, a state trial court's entering of a consent judgment at the

behest of an executive branch agency should not be allowed to prevent this Court from considering the merits of the claim. For another, the trial-court consent judgment is subject to appeal and Respondents are changing the rules of the election in violation of the Constitution as the election is ongoing. Any preclusive effect the order has may be ephemeral and the overriding importance of protecting the constitutional rights at issue here counsel in favor of disregarding it.

C. *Pullman* Does Not Require This Court to Abstain

Respondents argue that this Court should abstain under *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941). Even if *Pullman* could apply if we were not rapidly approaching election day (and as we shall explain, it could not), the Court should not abstain here. Abstention is a discretionary doctrine, to be evaluated in light of "the nature of the constitutional deprivation alleged and the probable consequences of abstaining." *Harman v. Forssenius*, 380 U.S. 528, 537 (1965). Here, "[g]iven the importance and immediacy of the problem" caused by Respondents' actions, *id.*, the Court should not abstain even if it had discretion to do so under *Pullman*.

Pullman at any rate has no application in this case. For a federal court to abstain under *Pullman*, there must be (1) an "unclear issue of state law" and (2) the resolution of that state-law question must "moot or present in a different posture the federal constitutional issue." *Educ. Servs., Inc. v. Md. State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983). Yet when "there is no ambiguity in the state statute, the federal court should not abstain but should proceed to decide the federal

constitutional claim." *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). And here there is no ambiguity in any of the North Carolina statutes. North Carolina General Statutes Section 163-231(b)(2) clearly provides for only a three-day receipt deadline. There is simply no ambiguity.

Respondents try to introduce ambiguity by arguing state law regarding whether the NCSBE has authority to rewrite duly enacted statutes. But whether the NCSBE has such authority is fundamentally a predicate question of *federal* constitutional law. By using the term "Legislature," the Elections Clause makes clear that the Constitution does not grant the power to regulate elections to states as a *whole* but only to the state's legislative branch. U.S. CONST. art. I, § 4, cl. 1; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 814 (2015). In North Carolina, the "Legislature" is not the NCSBE — it is unequivocally the General Assembly. N.C. CONST. art. II, § 1. Thus, unlike states where the state constitution divides the "legislative authority" among multiple entities, *see Ariz. State Legislature*, 576 U.S. at 814 (noting Arizona Constitution split legislative authority between the Arizona state legislature and the people through ballot initiatives (citing ARIZ. CONST. art. IV, pt. 1, § 1)), North Carolina has exclusively granted legislative authority to the General Assembly, *see* N.C. CONST. art. II, § 1. The General Assembly is thus the only North Carolina entity that can constitutionally regulate federal elections — it is the only "Legislature thereof." There is no delegation of legislative authority under the Constitution.

Even if such a delegation were constitutionally permissible (it is not), there is no state law ambiguity as to the NCSBE's authority that would merit *Pullman* abstention. *See Zwickler v. Koota*, 389 U.S. 241, 251 n.14 (1967) ("We have frequently emphasized that abstention is not to be ordered unless the state statute is of an uncertain nature, and is obviously susceptible of a limiting construction."). The statutes creating and regulating the NCSBE show the General Assembly has not delegated authority to the NCSBE to make the changes at issue here. *See infra* Part II.A.2.

D. *Pennzoil* Does Not Preclude This Suit

Intervenor-Respondents claim that Applicants' claims are precluded under *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), because their suit allegedly seeks to "render the state court's adjudication nugatory." Int.-Resps.' Resp. at 17. But Applicants do not seek to enjoin enforcement of the consent judgment entered by the Superior Court for the County of Wake; they seek to enjoin enforcement of the Memorandum extending the ballot receipt deadline as a violation of the Constitution's Elections Clause and Equal Protection Clause. Furthermore, there is no order, such as a contempt proceeding or a bond requirement, that Applicants seek to circumvent. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327, 336 n.12 (1977); *Pennzoil*, 481 U.S. at 10. Abstention is not warranted by the mere fact that a "pending state-court proceeding involves the same subject matter" as this federal proceeding. *Sprint*, 571 U.S. at 72.

II. Applicants Have an Indisputably Clear Right to Relief

A. Respondents' Elections Clause Contentions Fail

1. Applicants Have Standing to Challenge the Memorandum Under the Elections Clause

Applicants Moore and Berger are agents of the General Assembly to protect its institutional right as the "Legislature" of North Carolina to regulate federal elections. This Court has made clear that "a State must be able to designate agents to represent it in federal court." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And North Carolina has made abundantly clear that "[*w*]*henever* the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the *subject* of an action in *any* State or federal court, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the State through the General Assembly, shall be necessary parties." N.C. GEN. STAT. § 120-32.6(b) (emphases added). In this case, the General Assembly, acting through its agents Moore and Berger, asserts that the validity of its election laws has been usurped by the issuance and enforcement of the Memorandum. Since "state law authorizes legislators to represent the State's interests," Moore and Berger "have standing." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997); *accord Ariz. Indep. Redistricting Comm'n*, 576 U.S. at 802.

Respondents' argument that § 120-32.6(b) does not confer standing because Applicants Moore and Berger initiated this case to defend the General Assembly's election laws entirely misses the mark. As § 120-32.6(b) clearly indicates, the General Assembly through its agents the Speaker of the House and President Pro Tempore of

the Senate are "*necessary parties*" whenever the "validity" of a state law is the "subject of an action." The NCSBE's Memorandum contradicts and dramatically undermines the validity of duly enacted North Carolina statutes in violation of the Elections Clause and Equal Protection Clause. Thus, the validity of those statutes is at the heart of this dispute and squarely within § 120-32.6(b)'s broad grant of authority to the General Assembly.

Similarly, Applicant Swain has standing to bring his Elections Clause claims. First, Applicant Swain, as a candidate for Congress, falls squarely within the ambit of the Elections Clause's protections. After all, the Elections Clause first and foremost provides for the election of Representatives to the House of Representatives. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–805 (1995); *id.*, at 862 (Thomas, J., dissenting). And the violation of the Elections Clause alleged here directly injures Applicant Swain in his campaign for office. For instance, the casting of unlawful votes could reduce the competitiveness of his election. After all, even the "threatened" reduction of competitiveness in an election is sufficient for standing purposes. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586–87 & n. 4 (5th Cir. 2006) (political party has standing because "threatened loss of [political] power is still a concrete and particularized injury sufficient for standing purposes"); *see also Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) ("[T]he potential loss of an election [is] an injury-in-fact sufficient to give . . . officials standing."); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (political party representative has standing because his party may "suffer a

concrete, particularized, actual injury—competition on the ballot from candidates that . . . were able to avoid complying with the Election Laws and a resulting loss of votes"). Second, the unlawful regulation of the election in which Swain is a candidate stands as an impediment to his election. *Cf. Moore v. U.S. House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring) (noting that "private" individuals have standing to assert a claim that their right to a public office has been impeded by unlawful means (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); *Powell v. McCormack*, 395 U.S. 486 (1969))).

Respondents also maintain that Applicants Heath and Whitley do not have standing to raise their Elections Clause claim. Yet, the Elections Clause is a structural constitutional provision meant to protect voters by allowing state legislatures — comprised of accountable elected officials — to regulate the times, places, and manner of federal elections. By issuing the Memorandum that has injured Heath's and Whitley's ability to participate in the ongoing election on equal footing with all North Carolina voters and diluted their votes, Respondents have "violat[ed] . . . a constitutional principle that allocates power within government," and Heath and Whitley have "a direct interest" in challenging the Memorandum in court. *See Bond v. United States*, 564 U.S. 211, 222 (2011). What is more, unlike the plaintiffs in *Lance v. Coffman*, 549 U.S. 437 (2007), Applicants Heath and Whitley do not "only . . . allege" an abstract injury that "the Elections Clause . . . has not been followed," *id.* at 441–42. Instead, Heath and Whitley allege that because the NCSBE violated the Elections Clause, they have suffered the concrete injuries of vote dilution

and arbitrary and disparate treatment. Since the Elections Clause violation is leading to concrete injuries, Heath and Whitley have standing.

2. The NCSBE's Actions Violate the Elections Clause

Respondents' argument on the merits of the Elections Clause boils down to an argument that the NCSBE has the authority to rewrite the General Assembly's duly enacted statutes regulating this election. But as Applicants explained in their emergency application, the Constitution's exclusive grant of power to the state legislatures plainly forecloses this argument. North Carolina's Constitution establishes that the General Assembly is the "Legislature" of North Carolina. Moreover, the North Carolina Constitution — unlike the Arizona Constitution in dispute in *Arizona Redistricting Commission* — vests the legislative authority exclusively in the General Assembly. And this exclusive grant of authority is encapsulated in North Carolina's robust nondelegation doctrine: "[T]he legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." *See Adams v. N. C. Dep't of Nat. & Econ. Res.,* 249 S.E.2d 402, 410 (1978).

Ignoring the Elections Clause's prohibition of the delegation of lawmaking power, Respondents contend that the General Assembly has delegated this legislative power to the NCSBE. They point to three provisions. First, they point to the NCSBE's supervisory authority over the elections. North Carolina General Statutes § 163-22(a) grants the NCSBE the power to "supervis[e] . . . the primaries and elections in the State," and the "authority to make such reasonable rules and regulations . . . as it

may deem advisable *so long as they do not conflict* with any provisions of this Chapter." *See id.* (emphasis added). Thus, the General Assembly has not granted the NCSBE any power to overrule the duly enacted statutes governing elections or given it any form of legislative power; the NCSBE may not issue any rule or regulation that "conflict[s]" with provisions enacted by the General Assembly.

Respondents, NCSBE Resp. at 8–9, cite *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018), for the proposition that the General Assembly has granted the NCSBE authority to make "discretionary decisions" about "interstitial policy issues," but they neglect to read the cited footnote to the end, which goes on to make clear that the court's references to NCSBE policymaking "should not be understood as suggesting that the [NCSBE] has the authority to make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations," *id.* at 415 n.11. This is precisely the type of prohibited policymaking the NCSBE is attempting to engage in here.

Second, Respondents point to Executive Director's emergency powers under § 163-27.1(a)(1). This provision grants the Executive Director limited statutory authority to make necessary changes to election procedures in districts "where the normal schedule for the election is disrupted" by "[a] natural disaster." N.C. GEN. STAT. § 163-27.1. But the current pandemic is not a "natural disaster" under the statute and its implementing regulations "describing the emergency powers and the situations in which the emergency powers will be exercised," *id.* § 163-27.1(a); *see* N.C. ADMIN. CODE 1.0106. Indeed, the North Carolina Rules Review Commission

unanimously rejected an earlier attempt by Executive Director Bell to extend her emergency powers to the pandemic. *See* App. 219–24. In addition, respondents have yet to point to any way in which the pandemic has caused a deviation from the normal *schedule* of the election.

Furthermore, § 163-27.1(a) requires the Executive Director, in exercising her emergency powers, to "avoid unnecessary conflict with the provisions of this Chapter." That the General Assembly did not extend the absentee ballot receipt deadline when it expressly addressed the election procedures for the November election in light of COVID-19 demonstrates that the General Assembly determined this change was "unnecessary." Respondents' argument that HB1169 was passed before significant disruptions to mail delivery were reported — implying that no one anticipated then that mail delivery could be an issue — is meritless. NCSBE Resp. at 39. This Court itself had already addressed an extension of Wisconsin's absentee ballot receipt deadline for the presidential primaries, *see Republican Nat'l Comm.*, 140 S. Ct. at 1207, and the same counsel that represents Intervenor-Respondents had filed a complaint in state court challenging North Carolina's absentee ballot receipt deadline in early May, *see Stringer v. N.C. State Bd. of Elections*, No. 20-CVS-5615 (N.C. Wake Cnty. Super. Ct. May 4, 2020).

Third, Respondents point to a statute gives the NCSBE limited remedial power to make interim rules and regulations. *See* N.C. GEN. STAT. § 163-22.2. But here again Respondents do not grapple with the statutory text. Section 163-22.2 only grants the NCSBE this power when "any portion of Chapter 163 of the General Statutes" has

been "held unconstitutional or invalid by a State or federal court or is unenforceable because of" a Voting Rights Act violation. *Id.* But no court has found the ballot receipt deadline unconstitutional. Whatever authority the NCSBE has under § 163-22.2, it does not include rewriting laws that have never been found unconstitutional "by a state or federal court."

What is more, North Carolina's three-day grace period is more gracious than most. Many states require election day return, and several Circuit courts have recently stayed injunctions extending election-day deadlines. *See New Ga. Project v. Raffensperger*, No. 20-13360, 2020 WL 5877588 (11th Cir. Oct. 2, 2020) (staying injunction of Georgia's election day deadline); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2835, 2020 WL 5951359 (7th Cir. Oct. 8, 2020) (staying extension of Wisconsin's election day deadline); *Common Cause of Ind. v. Lawson*, No. 20-2911, 2020 WL 6042121 (7th Cir. Oct. 13, 2020) (staying extension of Indiana's election day deadline). And notably, even when granting relief to plaintiffs challenging Pennsylvania's ballot receipt deadline, the Supreme Court of Pennsylvania extended that deadline from 8:00 p.m. on election day to 8:00 p.m. only three days after — essentially the same deadline that North Carolina currently has and a much shorter extension than the nine-day extension that Respondents implemented. *Pa. Democratic Party v. Boockvar*, No. 133 MM 2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020).

B. Respondents' Equal Protection Clause Contentions Fail

1. Applicants' Vote-Dilution Injuries Are Sufficient to Confer Standing

Respondents argue that Heath and Whitley lack standing to assert their vote dilution claim under the Equal Protection Clause because "all North Carolina courts that have considered the question have held that votes counted in accordance with the Memorand[um] are lawful under state law," and Heath and Whitley merely allege "a paradigmatic generalized grievance." NCSBE Resp. at 41; *see also* Int.-Resps.' Resp. at 30–32. These contentions are meritless.

First, for the purposes of standing, this Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume that plaintiffs' will succeed on the merits of their legal claims. *See Warth v. Seldin*, 422 U.S. 490, 501–02 (1975). Consequently, this Court must assume, as Applicants allege, that votes submitted in accordance with the Memorandum are illegal. In turn, because these votes are illegal, the acceptance of them dilutes Heath's and Whitley's lawful votes, thereby injuring them and conferring them standing.

Second, Heath and Whitley are not asserting merely a generalized grievance. As an initial matter, Heath's and Whitley's injury is not "generalized" even in common parlance — the fact that their votes will be diluted by unlawfully cast ballots is shared only by registered voters who cast lawful ballots, not all registered voters in North Carolina. Furthermore, this Court has explained that an impermissible "generalized grievance" should not be confused with a widespread injury-in-fact that affects many people, such as the vote dilution suffered by Heath and Whitley. In

Federal Election Commission v. Akins, 524 U.S. 11 (1998), this Court explained that sometimes the term "generalized grievance" had been invoked imprecisely because the term "invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature — for example, harm to the common concern for obedience to law." *Id.* at 23 (internal quotation marks omitted). It was this latter lack of concreteness that most often led to widespread injuries being considered insufficient for standing. *Id.*; *accord Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (noting that plaintiffs' claims of injury that affected many people were particularized, but not concrete). Without recognizing that "generalized grievance" most often refers to a lack of concreteness, the term can obscure rather than clarify the standing analysis. *See Akins*, 524 U.S. at 23–24.

Therefore, this Court in *Akins* took the opportunity to explain that an injury does not become an impermissible "generalized grievance" merely because a plaintiff's injury is widespread. Instead, "generalized grievance" is most often a shorthand for a widespread injury that was too "abstract," *i.e.*, an injury with no concrete effects on particular plaintiffs. *Id.* at 23–24. To clear this up, this Court explained that widely shared injuries, when the harm is concrete, will give rise to an injury in fact, for instance in a mass tort. *Id.*; *see also Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449–50 (1989) ("The fact that other citizens or groups of citizens might make the same complaint . . . does not lessen appellants' asserted injury."). This Court added that one "particularly obvious . . . hypothetical example" was "where large numbers of voters suffer interference with voting rights conferred by law."

Akins, 524 U.S. at 24. Such an injury would not be a "generalized grievance" at all. *Id.*; *see also Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994) ("That all voters in the states suffer this injury, along with the appellants, does not make it an 'abstract' one.").

Accordingly, *Akins* demonstrates that Heath and Whitley have standing here. Each of Heath's and Whitley's injuries is a concrete "disadvantage to themselves as individuals." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964); Thus, far from an impermissible generalized grievance related to an abstract injury, Applicants Heath and Whitley have adequately alleged an injury-in-fact.

2. The Memorandum Dilutes Applicants' Votes

Respondents contend that the Memorandum does not dilute Applicants' votes because "no disfavored group's votes are discounted here" and "[t]he Memorand[um] in no way let[s] votes be cast unlawfully." NCSBE Resp. at 46; *see also* Int.-Resps.' Resp. at 28–32. This argument fails to account for this Court's most recent vote-dilution case, *Gill v. Whitford*. In *Gill*, this Court emphasized that "a person's right to vote is 'individual and personal in nature,'" *id.* at 1929 (quoting *Reynolds*, 377 U.S. at 561), such that "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage," *id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962). To avoid confusion, this Court repeated that "the holdings of *Baker* and *Reynolds* were expressly premised on the understanding that the injuries giving rise to those claims were 'individual and personal in nature,'" *id.*

at 1930 (quoting *Reynolds*, 377 U.S. at 561), "because the claims were brought by voters who alleged 'facts showing disadvantage to themselves as individuals,'" *id.* (quoting *Baker*, 369 U.S. at 206).

This Court's repeated, unmistakable focus on individual voting rights as the basis for vote-dilution claims makes clear that the racial gerrymandering and one-person, one-vote cases discussed in *Gill* and cited by Respondents are examples of—not limits on — cognizable vote-dilution claims. "Thus, 'voters who allege facts showing disadvantages to themselves as individuals'" — be it from malapportioned districts or racial gerrymanders or, as here with Heath and Whitley, the counting of unlawful ballots — "'have standing to sue' to remedy that disadvantage." *Id.* at 1929 (quoting *Baker*, 369 U.S. at 206). And Heath and Whitley *will* be disadvantaged because, contrary to Respondents' characterization, the Memorandum ensures that votes that are invalid under the duly enacted laws of the General Assembly *will* be counted by allowing absentee ballots to be received up to nine days after election day. By accepting even one ballot beyond the statutory three-day receipt deadline, Respondents are accepting illegal votes that dilute the weight of lawful voters' votes, like Heath and Whitley. *See Gill*, 138 S. Ct. at 1929; *Reynolds*, 377 U.S. at 555 (citing *Ex parte Siebold*, 100 U.S. 371 (1879); *United States v. Saylor*, 322 U.S. 385 (1944)); *Anderson v. United States*, 417 U.S. 211, 226–27 (1974); *Baker*, 369 U.S. at 208.

3. The Memorandum Subjects Applicants to Arbitrary and Disparate Treatment

Respondents maintain that Applicants' Equal Protection claim based on arbitrary and disparate treatment fails on the merits because the Memorandum, far

from subjecting Applicants to nonuniform treatment, "establish[es] uniform statewide standards for determining what is a legal vote well in advance of Election Day." NCSBE Resp. at 43; *see also* Int.-Resps.' Resp. at 32–33. Respondents fundamentally misconstrue Applicants' claim. Over 150,000 voters cast their ballots before the Memorandum was announced on September 22, 2020, and over 1.5 million voters cast their ballots before the Memorandum was issued on October 19. Those voters thus worked to comply with the lawful ballot delivery requirement. But under the Memorandum, absentee ballots can be received up to nine days after election day. Consequently, under the Memorandum, North Carolina will be administering its election in a *different* manner than before September 22, subjecting its electorate to arbitrary and disparate treatment.

Respondents further contend that Applicants' arbitrary and disparate treatment claim fails on the merits because, under Applicants' theory, "many routine adjustments to election procedures would be unconstitutional as well." NCSBE Resp. at 44; *see also* Int.-Resps.' Resp. at 33–34. But Respondents' examples of federal courts enjoining unconstitutional election procedures, or state agencies acting pursuant to lawful authority, are inapposite. *See* N.C. GEN. STAT. § 163-166.01 (explicitly granting the NCSBE the authority to "extend the closing time" of polling places if the polls "are interrupted for more than 15 minutes after opening" "by an equal number of minutes"); *id.* § 163-27.1 (granting the Executive Director "emergency powers to conduct an election in a district *where the normal schedule for the election is disrupted*" by "[a] natural disaster," *e.g.*, a hurricane (emphasis added)).

Furthermore, there is a material difference between this Court intervening to restore the status quo ante during an ongoing election after a district court erroneously enjoined a state election law, *see Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020), and the situation here, where Respondents have unconstitutionally meddled with duly enacted state law, thereby inflicting disparate treatment on Applicants.

III. Amici's Arguments Are Meritless

A. Amici States and the District of Columbia

Amici States focus on the policy choices that many states have made regarding their absentee ballot deadlines and postmark requirements. Nevertheless, despite the ardent nature of the Amici States' policy views, this case has nothing to do with policy. The central issue in this case concerns where the constitutional power to regulate the times, places, and manner of a state's federal elections. And the Elections Clause, which confers that power, is quite clear: only the State's "Legislature" may exercise it.

Applicants thus readily agree with Amici States that states "across the nation have made various accommodations to their voting procedures in light of COVID-19." Amici States' Br. at 2. North Carolina is included in that group. On a bipartisan basis, the North Carolina General Assembly enacted legislation specifically designed to alter the State's election procedures for the November election in light of the pandemic. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17. Following the authority granted to it by the Elections Clause, the General Assembly

"prescribe[d]" new "Regulations" for voting. The NCSBE, through the Memorandum, then unconstitutionally altered the General Assembly's duly enacted laws, thereby usurping the legislature's power.

Although Amici States point to all manner of different states' receipt deadlines or postmark rules, the vast majority of them are state statutes enacted by state legislatures. *See, e.g.*, CAL. ELEC. CODE § 3020(b)(1), (d); 2020 MASS. ACTS Ch. 115 § 6(h)(3); 10 ILL. COMP. STAT. 5/1-3(25), 5/19-8(c); N.D. CENT. CODE § 16.1-07-09; TEX. ELEC. CODE ANN. § 86.007; VA. CODE ANN. § 24.2-709(B); NEV. REV. STAT. § 293.317(2); MISS. CODE. ANN. § 23-15-637(1)(a); N.J. STAT. § 19:63-22. Thus, Amici States' own argument proves, rather than undermines, Applicants' position. State legislatures around the country have acted in a constitutional manner to enact election regulation. The NCSBE, by contrast, is not a state legislature.

The Amici States' isolated examples of receipt deadlines and postmark rules that do not appear to have been established by state legislatures are "beside the point." *Ariz. State Legislature*, 576 U.S. at 835 (Roberts, C.J., dissenting) (quoting *Smiley v. Holm*, 285 U.S. 355, 365 (1932)). That is because "[w]hat [Legislature] meant when adopted[,] it still means for purposes of interpretation. A Legislature [is] the representative body which [makes] the laws of the people." *Smiley*, 285 U.S. at 365. Whether other states have historically countenanced an "adverse-possession theory of [state administrative] authority," has no bearing on this Court's analysis. *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment). In fact, if other states have unconstitutionally established regulations for

federal elections with "increasing frequency," then that "sharpen[s] rather than blunt[s]," the need for the relief sought by Applicants here. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

B. Democracy N.C. Amici

Democracy N.C. Amici separately argue that this Court's granting of relief to Applicants would "would quickly undermine the states' principal role in administering elections in this country" by involving federal courts. Democracy N.C. Amicus Br. at 9. And they further raise the specter of *Pennhurst* to imply that this case revolves around state law, and thus that this Court must deny relief. But neither their Pandora's Box argument nor their *Pennhurst* argument has any merit. At bottom, this is a case about federal law and the commands of the U.S. Constitution. When states engage in regulation of federal elections, the states are not exercising inherent authority but rather authority assigned to them (and specifically their legislatures) by the U.S. Constitution. As this Court has explained, federal offices like congressional representative "aris[e] from the Constitution itself." *U.S. Term Limits, Inc.*, 514 U.S., at 805. Thus, since "any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *see also* 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 627 (3d ed. 1858) ("It is no original prerogative of State power to appoint a representative, a senator, or President for the Union").

Accordingly, the Constitution granted State legislatures — as a matter of federal law — the principle role in regulating federal elections. *Cf. Inter Tribal Council of Ariz.*, 570 U.S. at 14–15 (declining to apply presumption against preemption in Elections Clause context in part because when states regulate federal elections they do not exercise any of their "historic police powers"). It is by no means unusual then for the federal courts to interpret the federal grant of power to those entities regulating federal elections. And the fact that this Court must analyze state law is not irregular, but consistent with how this Court has examined Elections Clause claims for almost a century. After all, this Court has looked repeatedly to "the method which the state has prescribed for legislative enactments" to decide what constitutes state "[l]awmaking" for purposes of the Elections Clause. *Ariz. State Legislature*, 576 U.S. at 807 (quoting *Smiley*, 285 U.S. at 367); *see also Ohio ex rel. Davis v. Hildebrandt,* 241 U.S. 565 (1916); *Hawke v. Smith*, 253 U.S. 221 (1920).[3]

Furthermore, Applicants make exclusively federal constitutional claims, and the fact that this Court may need to construe state law to decide those claims does not implicate *Pennhurst*. For example, in the due process context, federal courts must

[3] Democracy N.C. Amici imply that North Carolina's lack of a procedure for federal court certification of state law questions has some bearing on this analysis. But it is irrelevant. After all, this Court considered *Arizona Independent Redistricting Commission* not on appeal from the Arizona Supreme Court but rather from a three-judge panel of a federal district court. And despite the fact that this Court previously had recommended the virtues of certification to the Arizona Supreme Court, *see Arizonans for Official English,* 520 U.S. at 78, this Court did not appear to consider certification in *Arizona Independent Redistricting Commission* when the Elections Clause was in dispute. The reason is simple: this is fundamentally a question of federal law.

examine state law to determine whether there is a property interest at stake, *see Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978), but that examination does not take due process cases out of the federal courts' jurisdiction under *Pennhurst*. Accordingly, the fact that this Court must analyze state law itself to determine if the federal Constitution was violated does not implicate *Pennhurst*.

IV. In the Alternative, the Court Should Grant Certiorari Before Judgment in the Court of Appeals

Intervenor-Respondents argue that granting an injunction pending appeal would not be in aid of this Court's jurisdiction because the case will be mooted regardless of how this Court rules on this application by the time this Court could grant certiorari. Int.-Resps.' Resp. at 34–36. To the extent that this argument is a concern (and it should not be), in the alternative to entertaining an injunction pending appeal, this Court should grant certiorari before judgment in the court of appeals, consider the briefing to date as briefing on the merits, and enjoin enforcement of the Memorandum pending disposition by this Court. *See* 28 U.S.C. § 2101(e). Given that election day is merely nine days away, certainty in North Carolina's election rules is now "of such imperative public importance as to justify a deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

CONCLUSION

Applicants respectfully ask this Court to issue an injunction pending disposition of Applicants' appeal in the Fourth Circuit and petition for a writ of certiorari in this Court.

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Respectfully submitted,

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