NOS. 20A71, 20A72

In the

Supreme Court of the United States

PATSY J. WISE; REGIS CLIFFORD; SAMUEL GRAYSON BAUM; DONALD J. TRUMP FOR PRESIDENT, INC.; GREGORY J. MURPHY, U.S. Congressman; DANIEL BISHOP, U.S. Congressman; REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE; NORTH CAROLINA REPUBLICAN PARTY; C MILLE ANNETTE BAMBINI; GREGORY F. MURPHY, U.S. Congressman,

APPLICANTS,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the State Board of Elections; JEFF CARMON, in his official capacity as Member of the NC State Board of Elections; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; NORTH CAROLINA STATE BOARD OF ELECTIONS,

RESPONDENTS.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit

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October 25, 2020

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To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court and Circuit Justice for the Fourth Circuit:

An emergency injunction is urgently needed to ensure that our federal election is governed by the statutes enacted by the people's duly elected representatives, and not by the whims of an unelected state agency. The North Carolina State Board of Elections insists that its election-eve rewrite of the state election code as part of a back-room settlement with a partisan advocacy group is only a "modest" response to the COVID-19 pandemic. But that disregards the grave constitutional interests at stake. *See Stern v. Marshall*, 564 U.S. 462, 503 (2011) (refusing to permit even "slight encroachments" to "compromise the integrity of the system of separation of powers"). In June, North Carolina's General Assembly enacted HB1169 in response to the pandemic. In setting the rules for the proper submission of ballots, it carefully balanced the challenges posed by the pandemic with the need to protect the election's integrity. The Board seeks to upend that balance by substituting its own policy preferences for those of the General Assembly, an egregious rule-of-law violation that can lead only to chaos and voter confusion. The Board's abuse of authority and departure from basic separation-of-powers principles violate Plaintiffs' rights under the Fourteenth Amendment's Equal Protection Clause and runs afoul of the Elections and Electors Clauses. Applicants urge this Court to safeguard our federal election, enforce the Constitution, and put a stop to this election-law abuse.

ARGUMENT

I. The Need for Injunctive Relief is Indisputably Clear.

A. The Board's Usurpation of the Powers Vested in the State Legislatures by the U.S. Constitution Demands Federal Intervention.

The Board argues that this case raises disputed questions of state law and, as a result, this Court should not intervene, even to vindicate the essential federal constitutional interests at stake. Board Br. 34–41; Alliance Br. 24–28. But at its core this case is not a state-law dispute. This case raises questions of federal law—namely, whether unelected state executives can use state court litigation to rewrite the election code on the eve of a federal election through a back-room settlement. The federal interests are paramount, for as this Court has long recognized, "no State can pass a law regulating elections that violates the Fourteenth Amendment's command that 'No State shall deny to any person the equal protection of the laws.'" *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). For that reason, this Court has not hesitated to enter the "political thickets" of state voting requirements, recognizing that it has a constitutional obligation to protect the integrity of our elections.[1] *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote.").

The Board devotes pages to discussing the COVID-19 pandemic, the purported mail delays caused by the U.S. Postal Service, and other policy considerations. It

[1] The State Attorney Generals cite no authority allowing the Board to rewrite North Carolina's election code. Indeed, they cite at least five examples of states extending ballot receipt deadlines via *legislation* in response to the pandemic. *See* State AGs' Amicus Br. 11-12.

does not deny, however, that the General Assembly carefully considered these issues when it enacted HB1169 on a bipartisan basis in June 2020. The General Assembly determined that absentee ballots must be received within 3 days to be eligible to be counted. That essential exercise of legislative judgment cannot be unilaterally changed by an unelected state board. *Cf. Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) ("[W]hen an agency wants to state a principle in 'numerical terms,'" which cannot be derived from statutory language, "the agency is legislating and should act through rulemaking") (quoting Henry J. Friendly, *Watchman, What of the Night?*, Benchmarks 144-45 (1967)).

The Board argues that 9 days is only a modest change from the statute's 3-day requirement, but if 9, why not 20, or even 30? The Constitution vests these decisions in the people's elected representatives, and not in unelected administrative officials. That is why executive officials have no authority to rewrite statutes. *See Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326, 328 (2014).

Significantly, the Board is not seeking deference for its interpretation of ambiguous statutory language or attempting to fill statutory gaps. *See City of Arlington v. FCC*, 569 U.S. 290, 318–19 (2013) (Roberts, C.J., dissenting) (noting concerns of unchecked executive authority and discussing judicial oversight when agencies "construe statutory provisions over which they have been given interpretive authority"). No one can argue that the statute is ambiguous. Nor is the Board exercising *rulemaking* authority to implement, interpret, or prescribe generally applicable requirements of law. *See* N.C. Gen. Stat. § 150B-2(8a) (noting that a state agency has authority to adopt only those rules "expressly authorized by federal or

State law"). The Board makes no attempt to reconcile its back-room settlement with the statute's plain terms or any accepted principle of delegated legislative power necessary to safeguard lawful, transparent, and accountable government.

This case instead asks whether the Board has the power to engage in a last-minute rewrite of a statute enacted to address the COVID-19 pandemic only four months ago based on the Board's limited authority to take emergency action in response to natural disasters. To ask that question is to answer it. The Board gives no reason to conclude that the General Assembly authorized the Board to red-pencil its legislative commands based on the Board's reweighing of the very same policy considerations that the General Assembly considered. *Cf. Billings v. United States*, 232 U.S. 261, 282 (1914) (the Constitution is not "self-destructive" and should not be assumed to confer powers on one hand and to take them away on the other).

The Board contends that its statutory rewrite—changing the 3-day deadline to 9, and overriding other election statutes—is authorized by two provisions in state law. But neither provision supports its position. The Constitution and North Carolina law make clear that the Board has exceeded its authority.

It is important to begin with first principles. The United States Constitution grants state legislatures exclusive authority (subject to federal congressional oversight) to establish the "Times, Places, and Manner of holding Elections for Senators and Representatives," U.S. Const. art. 1, § 4, cl. 1, and to appoint electors for President and Vice President, U.S. Const. art. II, § 1, cl. 2. North Carolina's Constitution vests "[t]he legislative power of the State . . . in the General Assembly, which shall consist of a Senate and a House of Representatives." N.C. Const. art. II,

§ 1. Acting consistently with these constitutional provisions, the General Assembly has enacted a comprehensive election code, *see* N.C. Gen. Stat. ch. 163, and recently revised the code to address the COVID-19 pandemic. The General Assembly's election code states plainly—multiple times—that the Board ***cannot*** take actions that conflict with that statute. *See* N.C. Gen. Stat. Ann. § 163-22(a) ("The [Board] shall . . . have authority to make such reasonable rules and regulations . . . *so long as they do not conflict with any provisions of this Chapter*.") (emphasis added); N.C. Gen. Stat. § 163-22.2 (temporary rules promulgated by the Board may not "conflict with any provisions of . . .Chapter 163 of the General Statutes"); *id.* § 163-27.1 (same for emergency powers). Instead, as the Board admits, *see* Board Br. 9, the Board's rule-making powers extend only to "interstitial policy decisions," *Cooper v. Berger*, 370 N.C. 392, 416, 809 S.E.2d 98, 113 (2018).[2] The constitutional and statutory structure expressly deny the Board authority to override the General Assembly's federal prerogative to regulate elections.

The Board makes two arguments. ***First***, it claims that it has authority to "enter into agreements with the courts in lieu of protracted litigation until such time as the General Assembly convenes." Board Br. 9 (citing N.C. Gen. Stat. § 163-22.2). According to the Board, it has often exercised authority to "depart from state statutory requirements" *when required by court order*. Board Br. 11. But the Board's authority to settle litigation does not give it sweeping authority to rewrite the election

[2] The word "interstitial" refers to the power to fill in minor statutory gaps, not to revise statutes outright. *See, e.g.*, *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 160 n.13 (1983) ("interstitial fashioning of remedial details" *under* a federal statute); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("interstitial silences *within* a statute or a regulation") (emphasis added).

code. *See* N.C. Gen. Stat. § 163-22.2 (rules must not conflict with statute). Otherwise, the Board could re-write any statute whenever any favored partisan group filed suit.

No one disputes that if a court strikes down a statutory provision as unlawful, the Board is obliged to comply with the court order. But here, courts have consistently upheld the statute against constitutional challenge. As Plaintiffs' opening brief explains, however, *see* Br. 8–9 & n.3, the Board misconstrued the federal court decision *upholding* the election code to justify a settlement *overriding* the election code. *See Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2020 WL 6058048, at *9 (M.D.N.C. Oct. 14, 2020) (Board "grossly mischaracterize[ed]" the court's order); *see also id.* at *7 (Board circumvented court's order). The Board cannot engineer a mid-election overhaul of North Carolina's election code and then defend that overhaul based on statutes that expressly deny it any authority to act inconsistently with the code.

Second, the Board argues that it has authority to "exercise emergency powers" to "cope with unforeseen circumstances" when "the normal schedule for the election is disrupted by" a "natural disaster." Board Br. 9–10; *see also* N.C. Gen. Stat. Ann. § 163-27.1. Emergency powers are often entrusted to the executive branch because it is designed to act with "energy" and "dispatch." The Federalist No. 70, at 423-24 (Hamilton) (Clinton Rossiter ed., 1961). But precisely because these powers must be open-ended to address unforeseen emergency situations, they are not an "escape hatch" to be wielded at the whim of executive branch officials. *Am. Fed. of Gov't Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *see also Am. Library Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005) ("categorically" rejecting argument

that agency "possesses plenary authority to act within a given area simply because" the legislature "has endowed it with some authority to act in that area"). Instead, as courts have recognized in other contexts, when executive branch officials attempt to exercise legislative authority by invoking an emergency exception to ordinary procedures, the exception must be "narrowly construed and only reluctantly countenanced." *State of N.J., Dep't of Envt'l Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (discussing "good cause" exception to notice-and-comment procedures for legislative rulemaking); *see also Dept. of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring) ("Congress improperly 'delegates' legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power").

In any event, this Court need not consider the precise scope of the Board's emergency powers because there is no emergency that justifies the Board's actions. Unlike a hurricane or electrical outage, the circumstances here were not unforeseen. The General Assembly drafted, debated, and ratified HB1169 with full knowledge of the pandemic and the issues it presented for voters and election authorities; the General Assembly also understood the need to accommodate a sharp increase in voting by mail.[3] The General Assembly carefully considered and accepted many but not all the Board's recommendations. And after passage of HB1169 to address the pandemic, the election is going forward on its normal schedule. In short, the General

[3] *See, e.g.*, Jordan Wilkie, NC House Passes Bipartisan Election Bill to Fund COVID-19 Response, Carolina Public Press (May 29, 2020), https://carolinapublicpress.org/30559/nc-house-passes-bipartisan-election-bill-to-fund-covid-19-response/ (stating that the bill passed with bipartisan majorities, but "NC ***elections officials*** didn't get all they wanted") (emphasis added).

Assembly never gave the Board the extraordinary power to rewrite the election code during an election based on a pandemic and Postal Service issues that the General Assembly had already taken into account. *See King v. Burwell*, 576 U.S. 473, 485-86 (2015) (courts should not assume that legislatures delegate questions of deep political significance to executive branch agencies).[4]

The Board's examples of emergency action—hurricanes, power outages, and election machine malfunctions—all involved isolated, emergent events and the Board's actions were tethered to those particular events. In all instances, there was a close nexus between the disaster and the disruption to the election. No such nexus exists here. The Board has ***never attempted*** to justify why it chose September 22—after voting had started—as the date for settling the *Alliance* action and issuing its Numbered Memos. The pandemic has been ongoing since March of this year, and the Board fails to identify any event occurring since HB1169's enactment that would justify its use of emergency power. And, in any event, the Board may not use its limited emergency powers in conflict with North Carolina's statutory election code, *see* N.C. Gen. Stat. §163-27.1(a).

Recognizing this problem, the Board now deemphasizes the pandemic and tries to justify its actions by focusing on challenges confronting the Postal Service. *See* Board Br. 39. But purported Postal Service issues are not a "natural disaster." Moreover, the Board's assertion that the General Assembly passed HB 1169 "before

[4] The Board argues that the extended deadline is consistent with the receipt deadline for overseas and military ballots, which attempts to minimize the disadvantage to those groups caused by frequent relocations of military personnel and the greater time for mail deliveries from abroad. Lockerbie Aff. ¶ 32, App. 341. The General Assembly, which passed both deadlines, decided to keep both when it revised the election code in HB 1169.

the significant disruptions at the USPS had been widely reported," Board Br. 39, is not credible: the General Assembly understood the need to accommodate a sharp increase in voting by mail when it passed HB 1169, and concerns about the postal service issues were well covered in the media.[5] The Board's shifting position underscores that no emergency supports its actions.

The Board admits (as it must) that the question of state officials' compliance with the Elections Clause and Electors clause is a federal question. *See* Board Br. 36 n.5. But it is wrong that state law governs the question of whether the Board acted in accordance with state law, because that question is loaded with federal significance. *See Moore*, 394 U.S. at 815 (examining whether state procedures for selection of presidential electors complied with federal law). Most important, the Board makes no attempt to argue that it is "on equal footing with the representative legislative body" under North Carolina law. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 795 (2015). And none of the Constitution's "seventeen provisions referring to the 'Legislature' of a State" can plausibly include the Board. *See id.* at 825 (Roberts, C.J., dissenting). By usurping the General

[5] *See, e.g.*, Brian Naylor, As More Americans Prepare To Vote By Mail, Postal Service Faces Big Challenges, NPR (May 30, 2020), https://www.npr.org/2020/05/30/865258362/as-more-americans-prepare-to-vote-by-mail-postal-service-faces-big-challenges; Red Wilson, Mail ballot surge places Postal Service under spotlight, THE HILL (May 27, 2020), https://thehill.com/homenews/campaign/499640-mail-ballot-surge-places-postal-service-under-spotlight. The map reprinted in the Board's brief (p. 7), specifies no source other than "U.S. Postal Service," and the week shown includes a postal holiday (Columbus Day on October 5). Non-holiday data show that as of late September USPS delivered approximately 95% of single piece first class mail in North Carolina (Greensboro and Mid-Carolina regions) within its two-day standard. *See* https://www.prc.gov/dockets/document/114756 (open Excel spreadsheet, go to "FC District" tab, and then scroll to right for 2020 data for North Carolina).

Assembly's power under the U.S. Constitution, the Board has violated federal law. Now it can be stopped only through injunctive relief.

B. The Board's Equal Protection Violation Warrants Relief.

The Board's separation-of-powers departures are violating Plaintiffs' rights to equal protection. Attempting to make a standing argument, the Board asserts that Plaintiffs have suffered no injury from the Numbered Memos because ballots cast pursuant to the Memos are lawful. But that argument begs the question, and contradicts the federal court's finding that the Board's "material[] change[]" to North Carolina's election rules after 150,000 ballots had been cast raises "profound questions" of vote dilution. App. 154. The Board's argument also confuses the merits of Plaintiffs' claim with their standing to bring it. *See Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 n.1 (D.C. Cir. 1996) (court should assume "during the standing inquiry that the plaintiff will eventually win the relief he seeks").

Next, the Board attempts to confuse Plaintiffs' arbitrary and disparate equal protection claim with arguments that have no place here: for instance, whether the Board established uniform standards or whether its changes make it easier to vote.[6] *See* Board Br. 42–46. The Board ignores the straightforward fact that on September 22—weeks after voting began and 150,000 ballots were cast—it unilaterally changed state election rules for later cast ballots. In doing so, it subjected North Carolina voters to arbitrary and disparate treatment based solely on ***when*** a voter casts his or

[6] The Alliance-Intervenors assert that "countless North Carolinians have relied on the extended ballot receipt deadline." *See* Alliance Br. at 11, 13, 36. That makes no sense: the extended receipt deadline cannot affect absentee ballots mailed this early. Nor could it influence someone to vote absentee rather than in person because the in-person option is available through Election Day.

her ballot.[7] The Board has provided no explanation why voters who cast their ballots *before* September 22 should be subjected to a different electoral system than those who cast ballots *after* September 22. As a result, the Board has arbitrarily changed the rules after ballots have been cast. *See Bush v. Gore* 531 U.S. 98, 105–06 (2000) (referring to the "minimum requirement for nonarbitrary treatment of voters" once "legally cast votes" are being counted); *cf. O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) (striking down a New York voting statute under which "two citizens awaiting trial . . . [and] sitting side by side in the same cell, may receive different treatment as to voting rights," because such arbitrary and disparate treatment violated equal protection).

Bush v. Gore confirms what common-sense teaches: it is unlawful to change the rules in the middle of an election. Allowing the Board to change the General Assembly's rules for how a vote should be validly submitted and for determining when a vote is properly received is in substance no different from allowing an executive branch official to stuff ballot boxes with votes that the General Assembly has determined are invalid. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) (recognizing that the right to vote is infringed by false tally or by stuffing the ballot box); *Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995) (noting that a "retroactive change in [ ] election laws" implicates "fundamental fairness issues"); *Brown v. O'Brien*, 469 F.2d

[7] The Board also eliminated North Carolina's Witness Requirement in its revised version of Numbered Memo 2020-19 issued on September 22. The Board later issued a third revised version (version 3) which it claimed honors that requirement. Plaintiffs expressed concern that version 3 would also undermine the Witness Requirement. The legislative plaintiffs in the related *Moore* action intend to provide evidence to Judge Osteen tomorrow that the Board is, in fact, using version 3 to accept ballots that do not comply with the Witness Requirement.

563, 570 (D.C. Cir.), *vacated as moot*, 409 U.S. 816 (1972) ("[T]he very integrity of the [election] process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force.").

Although the Board's actions here—misconstruing a federal court order to obtain a state court settlement that changes the election code—may be more complex than stuffing the ballot box, the Constitution prohibits states from debasing a citizen's vote whether through "sophisticated" or "simple-minded modes of discrimination." *Reynolds*, 277 U.S. at 555, 563.

C. *Purcell* Does Not Prohibit Injunctive Relief.

This Board is left urging the Court not to take action on the theory that enforcing the law and preventing the Board from rewriting it is beyond the role of a federal court, based on this Court's decision in *Purcell*. Board Br. 21-24. Even the Alliance-Intervenors do not go so far. *See* Alliance Br. 38 ("Purcell certainly does not prohibit the federal judiciary from interceding close to elections to defend the Constitution"). The Board asserts that *Purcell* reflects a discretionary rule of deference to the legitimate power of the states and instructs courts not to "alter the election rules on the eve of the election." Board Br. 21. But that is precisely the point: the Board is not exercising any lawful state authority. Nor are *Plaintiffs* seeking to override the state election code. Just the opposite: They are seeking to *defend* the code as written against the unlawful actions of an unelected Board. The Board cannot use a federal lawsuit upholding a state statute from challenge as an excuse to rewrite the state election code and then contend that the federal courts are powerless to stop

it. The federalism principles that *Purcell* embraces are designed to protect our elections, not insulate rogue executive branch officials from undermining them. Accordingly, even assuming *Purcell* applies to this case—and the Board never takes a clear position on that issue—nothing about it counsels against, much less precludes, an injunction. And whether *Purcell* supports an injunction, or doesn't apply here, the district court erred by denying injunctive relief.

II. The Board's Jurisdictional Arguments Fail.

The Board argues that the Court should not hear Plaintiffs claims because (1) they are barred by the doctrine of issue preclusion, and (2) *Pullman* abstention applies. Both arguments fail.

In its opposition, the Board ignores that "consent judgments ordinarily support claim preclusion but not issue preclusion." *Arizona v. California*, 530 U.S. 392, 414 (2000).[8] Also, Plaintiffs in this case were not parties to the Consent Judgment, and do not have a relationship with the prior plaintiffs sufficient to establish privity. *See State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 416, 474 S.E.2d 127, 130 (N.C. 1996). The voter plaintiffs in particular—whom the Board never addresses in its opposition—were not parties to the state litigation at all. Accordingly, Plaintiffs did not have an opportunity to fully and fairly litigate any overlapping issues in the Consent Judgment case, and therefore are not precluded from bringing their claims in federal court. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Whitacre P'ship v. Biosignia, Inc.*, 591 S.E.2d 870, 880 (N.C. 2004).

[8] Nothing in *Nash Cty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486-87 & n.5 (4th Cir. 1981), suggests that consent judgments are *issue* preclusive.

The Board's argument for *Pullman* abstention is also wrong. *Pullman* abstention applies only when there are "uncertain questions of state law." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984). Here, there is no unsettled question of state law. The North Carolina statute is unambiguous that ballots "shall not be accepted" after Election Day unless they are "postmarked" by and received "not later than three days after the election by 5:00 p.m." N.C. Gen. Stat. § 163-231(b)(2). And the Board has no authority to rewrite that numerical requirement.

Moreover, abstention is prudential in nature, representing a narrow exception to this Court's otherwise "virtually unflagging" obligation to decide the cases before it. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 359 (1989); *see also Artway v. Attorney Gen. of State of N.J.*, 81 F.3d 1235, 1270 (3d Cir. 1996) (courts must weigh other factors, including the impact of delay on the litigants). Although Plaintiffs are also seeking relief from the North Carolina Supreme Court, that case presents substantial federal issues that would inevitably make their way to this Court. With the election barely a week away, there is substantial risk that Plaintiffs' fundamental constitutional rights will be impaired by any delay in this case. Accordingly, *Pullman* abstention is not applicable, warranted, or appropriate.[9]

CONCLUSION

This case is part of a calculated strategy to enlist the courts in a scheme to usurp the constitutional authority of the people's elected representatives and impose

[9] The Alliance-Intervenors, but not the Board or the Fourth Circuit majority, assert abstention under *Pennzoil v. Texaco*, 481 U.S. 1, 13 (1987). *Pennzoil* does not apply because, among other reasons, Plaintiffs are not seeking to interfere with the state's judicial enforcement machinery. *Id.* at 11 (*Pennzoil* abstention is limited to civil proceedings "that implicate a State's interest in enforcing the orders and judgments of its courts").

partisan election rules. *See Wise v. Circosta*, No. 20-2104, 2020 WL 6156302, at *9 (4th Cir. Oct. 20, 2020) (Wilkinson and Agee, JJ., dissenting). The only way to protect the integrity of our election is to enforce the laws as written. Changes to the duly-enacted election code on the eve of an election—whether by unelected executive branch officials or by courts—should be rejected. Nothing should cause this Court to shrink from exercising its historic and proper role in enforcing the separation of powers, remedying equal protection violations, and protecting the integrity of our elections by granting an injunction in this case.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Fourth Circuit

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October 25, 2020

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Expert Report of Brad Lockerbie, Ph.D.

September 26, 2020

I. Purpose of engagement

1. I have been asked to review the potential impact of certain North Carolina election procedures on voting in the upcoming November general election in North Carolina.
2. I have reviewed publicly available voter and demographic data to formulate the opinions expressed herein. I also understand that certain features of North Carolina's election code have been the subject of legal challenge in recent months as a result of the COVID-19 pandemic. In particular, North Carolina requires voters who wish to submit an absentee ballot in the forthcoming general election to obtain the signature of another person before submitting the ballot. I refer to this requirement as the "Witness Requirement." I also understand that North Carolina places limits on who may assist voters with the completion and delivery of absentee ballots in order to prevent a practice known as "ballot harvesting."
3. Finally, I am aware that the North Carolina State Board of Elections recently entered into a consent judgment with plaintiffs in a state court action. This consent judgment, if approved, will adjust various processes for handling absentee ballots and also impact the Witness Requirement.[1]

II. Qualifications

4. I am professor of political science at East Carolina University in Greenville, North Carolina. I have taught at East Carolina University since 2007. From 1988 to 2007, I was an assistant and associate professor of political science at the University of Georgia. I have served as a consultant for the Advanced Placement Program, as an open-response question grader, and a table leader with supervisory responsibility for other graders. Also, I have served as a presenter at the Robert Taft seminars on American government.
5. In 1988, I received my doctorate in political science from the University of Iowa. I received a

[1] https://www.ncsbe.gov/news/press-releases/2020/09/22/state-board-updates-cure-process-ensure-more-lawful-votes-count.

Bachelor of Arts from the University of Georgia in 1984.

6. I have published over 30 peer-reviewed articles on elections and public opinion in political science journals and interdisciplinary journals, including the *American Journal of Political Research*, *PS: Political Science and Politics,* and *Social Science Quarterly*. I authored *Do Voters Look to the Future? Economics and Elections* published by SUNY Press. I have published several book chapters, including two with Cambridge University Press. My CV is attached.

7. I recently served as a consultant in *Nielson v. DeSantis* (N.D. Fla.), *Donald J. Trump for President, Inc., et al., v. Kathy Boockvar et al.* (W.D. Pa.), and *Chambers v. North Carolina* (Wake Cty. Sup. Ct.).

8. I am being paid $500/hour for work in this matter. My pay is not dependent on the content or the interpretation of the analysis performed, or on the outcome of this proceeding.

III. Impact of Witness Requirement in North Carolina

9. The North Carolina Legislature has reduced the number of signatures to one for the 2020 election. Some states use witness requirements to ensure the integrity of the absentee ballot, while others require some proof of identification along with the absentee ballot. These items include a copy of one's identification (driver's license, for example), a driver's license number, or a social security number.[2]

10. If the Witness Requirement were an impediment to participation, the turnout rate should be significantly higher in states without a witness signature requirement.

11. Looking at the Voting Eligible Population in 2016, the turnout rate in states requiring a witness signature on absentee ballots was 60.81% and the turnout rate in states *not* requiring a

[2] Some states have recently revised or eliminated their witness or identification requirements either voluntarily or pursuant to a court order.

signature on absentee ballots was 60.47%.[3] This is a statistically insignificant difference. States that require either a witness or proof of identification have a similar pattern. Those with some type of witness or identification requirement have a slightly *higher* rate of turnout than states without a witness or identification requirement—60.85% versus 60.7%. Those statistics show that states which require a signature actually have a slightly *higher* turnout rate. This is just the opposite of what we would expect if these requirements were an impediment to voting.

12. Looking at the Voting Eligible Population in 2012, the turnout rate in states requiring a witness signature on absentee ballots was 60.57% and the turnout rate in states that do not require a witness signature on absentee ballots was 59.75%.[4] States that require a witness signature have a slightly higher turnout rate. This is just the opposite of what we would expect if the witness signature requirement were an impediment to voting. States that require either a witness signature or proof of identification have a similar pattern. Those with some requirement have a slightly higher rate of turnout than states without a witness or identification requirement – 60.96% versus 59.49%.

13. In the 2008 general election, we see the pattern of no statistically significant differences. Looking at the Voting Eligible Population, the turnout rate in states requiring a witness signature on absentee ballots was 63.55% and the turnout rate in states not requiring a signature on absentee ballots was 63.08%.[5] States that require a witness signature actually have a slightly higher turnout rate. That is just the opposite of what we would expect if the witness signature requirement were an impediment to voting. States that require either a

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[3] McDonald, Michael P. 2020. "2016 November General Election Turnout Rates" *United States Elections Project*, http://www.electproject.org/2016g (last accessed Aug. 21, 2020).

[4] McDonald, Michael P. 2020. "2012 November General Election Turnout Rates" *United States Elections Project*, http://www.electproject.org/2012g (last accessed Aug. 22, 2020).

[5] McDonald, Michael P. 2020. "2008 November General Election Turnout Rates" *United States Elections Project* http://www.electproject.org/2008g. (last accessed Aug. 22, 2020).

witness signature or proof of identification have a similar pattern. Those with some requirement have a slightly higher rate of turnout than states without a witness or identification requirement – 63.88% versus 62.89%.

14. In none of the years referenced in paragraphs 11, 12, or 13 did the states with a witness signature or identification requirement have a statistically significant lower turnout rate than states without such requirements. In fact, if we use the Voting Age Population, the results are even stronger that there is no difference. Even in 2016, the turnout among the Voting Age Population is higher in states with a signature requirement. As a result, there is no indication that North Carolina's Witness Requirement negatively impacts voter turnout.

15. Kimberly Strach, Executive Director of the State Board of Elections of North Carolina from May of 2013 to May of 2019, points out in her affidavit in *Chambers v North Carolina* (Wake Cty. Sup. Ct.) that there are many benefits to having a witness signature requirement.

16. First, if there were an allegation of double voting, the witness on an absentee ballot can be contacted for information about the voter interaction.

17. Second, the witness signature requirement allows election officials to ascertain what happened when a voter shows up to vote on election day but has been recorded as having already voted. The witnesses can be contacted to straighten out the conflict.

18. Third, the witnesses can be interviewed if there are concerns about ballot harvesting. In the North Carolina CD-9 case involving McCrae Dowless, the pattern of witness signatures provided information that allowed the state to detect and discern the magnitude of the absentee ballot fraud and the number of voters harmed.

19. Ng, in an article for CNET discounting the prevalence of vote fraud, argues that absentee ballot fraud is not frequent **because** states employ security measures to diminish it. He

specifically references North Carolina's signature requirement as a means of deterring absentee voter fraud.[6]

20. Even if voter fraud is minimal, it might be the result of efforts by the government to maintain the security of the ballot. Taking action to prevent voter fraud might deter those who would otherwise be inclined to engage in such activity, thus the action taken to prevent vote fraud might be enough to reduce fraud. The concern that the signature might be checked might give potential fraudsters pause.

21. Furthermore, the Witness Requirement could diminish voter fraud in that election officials can keep track of how many ballots were witnessed by the same person. If they observed one person witnessing a large number of ballots, they might be inclined to examine the matter more closely. According to Strach, this was one of the ways the Dowless vote fraud scheme was discovered. Regardless, if those who would be tempted to engage in vote fraud believe that this is a possibility, they might be dissuaded from participating in vote fraud. Consequently, vote fraud would be lower than it otherwise would be.

22. In any event, it seems sensible that it is more challenging for a person intent on committing voter fraud to do so if he or she must persuade an accomplice. In addition, I understand that the involvement of more than one person in an instance of voter fraud can trigger the applicability of conspiracy laws, with enhanced criminal penalties.

IV. Impact of Ballot Harvesting

23. Regulations concerning who can handle ballots are crafted to ensure that elections are conducted in a manner untainted by fraud. There is a concern that if one individual can collect many ballots, these ballots might be altered or destroyed. See the discussion of North Carolina below in particular.

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[6] https://www.cnet.com/news/how-to-commit-mail-in-voting-fraud-its-nearly-impossible/ (last accessed Aug. 29, 2020).

24. It is widely accepted that mail-in ballots provide an opportunity for fraud. Reports from many sources confirm this point, as do examples from North Carolina and elsewhere.

25. The non-partisan Carter-Baker Commission on election reform, led by former President Jimmy Carter and James A. Baker, former Secretary of the Treasury, Secretary of State, and White House Chief of Staff, was formed as a result of the 2000 presidential election, in light of the issues surrounding the vote count in Florida, and the 2004 presidential election, in light of the issues concerning the vote count in Ohio.[7]

26. The Commission noted that because voting by mail creates an increased opportunity for vote fraud, safeguards are necessary to ensure the integrity of mail-in ballots, especially in states with a history of troubled elections.[8]

27. The Brennan Center for Justice similarly states that absentee ballots are more subject to fraud than regular ballots.[9] Additionally, the Heritage Foundation maintains a website documenting instances of vote fraud.[10] In particular, between 2018 and 2020, there have been at least 15 instances of voter fraud with regard to absentee ballots in a number of states, including Arizona, Florida, and Virginia.

28. A serious instance of absentee ballot voter fraud recently occurred in North Carolina during the November 2018 election involving the political operative L. McCrae Dowless.

29. State election regulators concluded that he had criminally mishandled absentee ballots. Dowless has been formally indicted with illegal ballot handling and the filling out of absentee ballots. “Karen Brinson Bell, the executive director of the State Board of Elections, stated that

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[7] https://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey7848.pdf (last accessed September 7, 2020).

[8] *See* Carter-Barker Commission Report at 35.

[9] https://www.brennancenter.org/sites/default/files/2019-08/Report_Response%20to%20the%20Report%20of%20the%202005%20Commission%20on%20Federal%20Election%20Reform.pdf (last accessed September 7, 2020).

[10] https://www.heritage.org/voterfraud (last accessed September 7, 2020).

the activity linked to [Dowless] had 'effectively disenfranchised voters' in the Ninth District."[11] In February 2019, the State Board of Elections ordered a new election given the pervasive level of fraud. The chair of the board referenced how "the corruption, the absolute mess with the absentee ballots" in the November 2018 election was enough to call the election tainted and require a re-do.[12]

30. Federal prosecutors have announced voter fraud charges against 19 individuals in Greensboro, North Carolina.[13] Each of the 19 non-citizens voted in 2016 and 1 also voted in 2018.

31. The COVID-19 pandemic has made mail-in ballot fraud even more likely given the sharp increase in use of mail-in ballots. For instance, mail-in ballot fraud was recently found to have occurred in New Jersey. A state court found that an election in the third ward of Patterson, New Jersey this year was "rife with mail in vote procedure violations." The results of that election were set aside, and the election is being rerun concurrently with the upcoming general election. [14] Noting the problems in Patterson, New Jersey, former Federal Election Commission Chair Hans A. von Spakovsky reports that mail-in ballots are the most vulnerable to theft and forgery.[15]

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[11] https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html (last accessed September 14, 2020)

[12] https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html (last accessed September 14, 2020)

[13]https://apnews.com/9323236f381ed129dcba84f114bb01e9?fbclid=IwAR3TxFEm4NoQzd5zGedRRYBzbnq_mTsnURX1D-qvcke6_BUbumnynBI6_sU (last accessed September 7, 2020).

[14] https://www.wsj.com/a-mail-in-voting-redo-in-new-jersey-11598050780 (last accessed Aug. 24, 2020).

[15] https://www.heritage.org/election-integrity/commentary/the-risks-mail-voting (last accessed Aug. 26, 2020.

V. Why Military Ballots Are Subject to Different Rules

32. Military ballots from abroad are accorded special status via the Uniformed and Overseas Citizens Absentee Voting Act. This Act allows those in the special circumstance of living abroad the opportunity to participate in elections. The difficulty and timeliness of getting and sending of mail from abroad makes it difficult to adhere to the requirements for domestic mail-in voting.[16] The Carter-Baker Commission points out that the difficulty of members of the military obtaining a ballot is exacerbated by their relatively high mobility. Many members of the military were relocated before their absentee ballots arrived.[17] The additional time currently allowed for receipt of ballots from persons overseas puts them on par with persons living in the United States; if the time for receipt of domestically-mailed ballots was extended, persons overseas would once again be placed at a relative disadvantage.

VI. Conclusion

33. States are prudent to be concerned with, and to implement protections against, absentee ballot fraud. As shown above, there are scores of reported instances of serious voting irregularities, many of them involving absentee ballots. To protect the integrity of elections, as well as public confidence in elections, it is essential for states to include safeguards in the absentee ballot process. While no system is foolproof, I am aware of no context in which the inability to impose perfect safeguards has justified imposing no safeguards. Requiring perfection before any safeguards are employed will make the perfect the enemy of the good. The most unscrupulous may still try to circumvent the safeguards, but my opinion is that the Witness Requirement nevertheless serves three important purposes: (i) it deters all but the most unscrupulous from attempting to submit fraudulent absentee ballots; (ii) it aids in the

[16] https://www.ncsbe.gov/Voting-Options/Military-Overseas-Voting (last accessed Aug. 24, 2020).

[17] See Carter-Baker Commission Report at 37.

detection of fraud if committed; and (iii) it assures the voting public that the State is taking reasonable and prudent steps to deter ballot fraud, which will in-turn increase confidence in the dependability and the honesty of the administration of elections.

I affirm, under the penalties for perjury, that the foregoing representations are true.

Brad Lockerbie