No. 20-2063

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Plaintiff-Appellees,

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

Appellants,

On Appeal From the United States District Court for the Middle District of North Carolina
Case No. 1:20-cv-00912-WO-JLW

APPELLEES' OPPOSITION TO THE INTERVENOR-APPELLANTS' MOTION FOR EMERGENCY STAY PENDING APPEAL

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INTRODUCTION

On October 8, 2020, the district court (Judge William Osteen) heard Plaintiffs' request for a preliminary injunction. By text order issued on October 13, 2020, Judge Osteen stated that he will issue his ruling imminently, by 2 p.m. EDT on Wednesday, October 14. *Wise v. N.C. State Board of Elections*, No. 20-cv-912, Order (M.D.N.C. Oct. 13, 2020). It is now abundantly clear that the order before the Court is indeed a temporary restraining order ("TRO"), not a preliminary injunction, and this Court lacks appellate jurisdiction. *See Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1029–30 (4th Cir. 1976) (noting TRO not ordinarily appealable). In any event, this appeal is soon to become moot.

The *Alliance* Intervenors' motion to stay the TRO also fails on its merits. Earlier this summer, the General Assembly modified North Carolina's voting laws to account for potential effects of COVID-19. A number of lawsuits were filed challenging the revised laws, including the absentee voting provisions at issue in this litigation. For three months, the North Carolina Board of Elections ("BOE") vigorously defended those suits, and before absentee voting began a federal judge and a three-judge state court denied injunctions against the statutes. *See* Ex. 1, *Chambers*

v. North Carolina, Case No. 20-CVS-500124, Order at *7 (Sup. Ct. Wake Cnty. Sept. 3, 2020) (Lock, J., Bell, J., Hinton, J.) (denying preliminary injunction against absentee ballot witness requirement a day before absentee voting began); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-457, 2020 WL 4484063 (M.D.N.C. Aug. 4, 2020) (Osteen, J.) (in comprehensive 188-page decision, refusing to enjoin witness requirement, ballot harvesting requirement, and other provisions, but granting limited relief). Both courts expressed deep concern with the harms changing the laws so close to the election would cause. *Chambers*, 20-CVS-500124, Order at *7; *Democracy N.C.*, 2020 WL 4484063, at *45. A concern the U.S. Supreme Court has recently echoed. *See Andino v. Middleton*, No. 20A55, 592 U.S. ___, 2020 WL 5887393 (Oct. 5, 2020) (staying Sept. 18 injunction of South Carolina's absentee ballot witness requirement). But nearly a ***month after absentee voting had been underway***, the BOE announced a secretive proposed "Consent Judgment" in a separate case—*North Carolina Alliance for Retired Americans v. North Carolina State Bd. of Elections*, No 20-CVS-8881 (Sup. Ct. Wake Cnty.). Three BOE "Numbered Memos" incorporated into the Consent Judgment would ***substantially*** alter the absentee voting

laws—including the Witness Requirement and the Ballot Harvesting ban—and effectively reverse the decisions in *Chambers* and *Democracy N.C.* Yet remarkably, the BOE and the *Alliance* plaintiffs never cited the *Chambers* ruling and used the ruling in *Democracy N.C.* as a purported, but flawed, basis for the Consent Judgment. *See* Ex. 2, *Moore* and *Wise* TRO Order, at 9. Before this Court, the *Alliance* Intervenors do not mention the *Chambers* or *Democracy N.C.* decisions.

Notably, the BOE and the *Alliance* Intervenors brought their Consent Judgment before a single judge Superior Court, intentionally avoiding both Courts that had previously ruled on the election law provisions. Having carefully avoided those two courts, they now contend that the federal judge, Hon. James C. Dever III (E.D.N.C.), presented with the TRO should have abstained. Simultaneously upon issuing the TRO, Judge Dever transferred the two cases to Judge William J. Osteen, Jr., who also retains jurisdiction in *Democracy N.C.* The argument for abstention is unsupported by law or logic, and Plaintiffs urge the court to deny the request for emergency stay.

BACKGROUND

After careful consideration of the pandemic, the recent primaries conducted in other states (such as Wisconsin), and challenges confronted by the U.S. Postal Service during those primaries, the General Assembly passed HB 1169 in June by overwhelming bipartisan majorities. Governor Cooper signed the bill and it became law. At least seven lawsuits challenging the statute have been filed. For three months the BOE vigorously defended the legislation, prevailing in all material respects in two cases, one in Federal court and one before a three-judge state court.[1]

On September 22, however—after absentee voting began on September 4—the BOE abruptly announced a secretly-negotiated proposed "Consent Judgment" with the plaintiffs in *North Carolina Alliance,* No 20-CVS-8881. That deal was to become effective upon its approval by a court. *See* Ex. 3, Consent Judgment, at 19. Simultaneously with announcement of that that deal, the BOE issued three "Numbered Memos."

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[1] *See Democracy N.C.*, 2020 WL 4484063, at *64; *Chambers*, No. 20 CVS 500124, Order.

As relevant here, the new Memos purport to do the following:

- Revised Numbered Memo 2020-19 purports to revise Numbered Memo 2020-19 issued on August 21. This Memo would undermine the statutory requirement, *see* N.C.G.S. § 163-231(a) ("the Witness Requirement"), that another person witness an absentee ballot, by allowing a voter to cure the omission of a witness to the absentee ballot by submitting a cure affidavit *executed by the voter*, but without fulfilling the Witness Requirement. *See* Ex. 4.
- Numbered Memo 2020-22 applies to "remaining elections in 2020," and provides that absentee ballots are timely if "the ballot is postmarked on or before Election Day ["the Postmark Requirement"] and received by ***nine days*** after the election, which is Thursday, November 12, 2020 at 5:00 p.m." *See* Ex. 5. In contrast, the statute requires ballots to be received by ***three days*** after the election,[November 6. N.C.G.S. § 163-231(b)(2)(b) ("the Receipt Deadline"). The Memo also eliminated the Postmark Requirement by deeming a ballot "postmarked" if there is information in BallotTrax (BOE's tracking system), or

another tracking service showing that the ballot was "in the custody of USPS or the commercial carrier on or before Election." *See* Ex. 5.

- Numbered Memo 2020-23 affirms that absentee ballots cannot be left in an unmanned drop box, but negates that restriction by stating county boards cannot "disapprove a ballot solely because it is placed in a drop box." *See* Ex. 6. Similarly, the Memo negates North Carolina's statutory limits on who may deliver a completed absentee ballot by instructing county boards that they cannot "disapprove an absentee ballot solely because it was delivered by someone who was not authorized to possess the ballot." *Compare id. with* N.C.G.S. § 163-226.3 (restricting who can handle a completed ballot) ("the Ballot Delivery Ban").

Because these Memos flout North Carolina's election statutes, contradict the decisions in *Chambers* and *Democracy N.C.*, and are causing disruption among election boards, on September 26—before the State court acted on the proposed Consent Judgment—Plaintiffs filed a Complaint and Motion for TRO in the U.S. District Court for the Eastern District of North Carolina to preserve North Carolina's election regime

and prevent the BOE from violating their federal constitutional rights. *See* Compl., *Wise* Dkt. 1; Mtn. for Temporary Restraining Order, Dkt. No. 4; *see also Moore v. Circosta*, No. 20-cv-507-D, Compl., Dkt. 1 (E.D.N.C. Sept. 26, 2020) (raising similar challenges).

On October 2, Judge G. Bryan Collins of the Wake County Superior Court held a hearing and immediately approved the Consent Judgment to which the contested Memos are appended. On October 5, he issued, without revision, findings of fact and conclusions of law proposed by the BOE. The court did not address the rulings in *Chambers* or *Democracy N.C.* that it is too late to change the election laws.

On October 2, following the hearing before the Wake County Superior Court, Judge Dever held a two-hour hearing on the motion for TRO. The following morning, Judge Dever granted the TRO and temporarily restrained the defendants in *Wise* and *Moore* from enforcing the Memos "or any similar memoranda or policy statement that does not comply with the requirement of the Equal Protection Clause." Dkt. No. 25 at *19. By the time of the Order, 1,157,606[2] absentee ballots had been

[2] *See* https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Ballo

requested and 340,795[3] had been returned. The order is "intended to maintain the status quo"—that is, the situation before the Memos go into effect—and will remain in effect until no later than October 16. Dkt. No. 25 at *19. The Order does not purport to restrain any state court proceedings. Judge Dever transferred both cases (*Wise* and *Moore*) to Judge Osteen in the U.S. District Court for the Middle District of North Carolina, who had previously decided the *Democracy N.C.* case, for further proceedings. *Id.* The plaintiffs in both cases moved for a preliminary injunction, Judge Osteen conducted an in-person hearing on those motions on October 8, and anticipates ruling by 2:00 pm EDT on October 14, 2020.

JURISDICTIONAL STATEMENT

This Court lacks appellate jurisdiction. "[O]rdinarily a TRO is not an appealable order." *Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1029–30

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t%20Requests%20for%202020%20General%20Election/Daily_Absentee_Request_Report_2020Oct02.pdf

[3] *See* https://s3.amazonaws.com/dl.ncsbe.gov/Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/Absentee_Stats_2020General_10032020.pdf

(4th Cir. 1976). The *Alliance* Intervenors claim that the "practical effects" of the TRO "are like a preliminary injunction," Br. at 6 n.3, but this is belied by the TRO's limited duration and the preliminary injunction hearing held on October 8. The TRO did not "effectively grant[] the plaintiff all of the relief which it sought." *Id.* at 1030. Moreover, the motion is soon to be moot.

ARGUMENT

The Court must consider four factors in evaluating the *Alliance* Intervenors' motion to stay: whether (1) the intervenors have "made a strong showing that [they are] likely to succeed on the merits"; (2) the intervenors "will be irreparably injured absent a stay"; (3) "issuance of the stay will substantially injure the other parties interested in the proceeding"; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009).

I. THE *ALLIANCE* INTERVENORS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR APPEAL

The two procedural arguments raised by the *Alliance* Intervenors fail and the Plaintiffs' request for a TRO is proper.

A. Plaintiffs Have Standing for their Claims.

In granting the TRO, the district court recognized that the Plaintiff voters satisfy the requisite elements of standing[4]—stating that they (1) complain of a "constitutional harm" in the form of vote dilution and disparate treatment, (2) brought about by the BOE's actions that "materially chang[ed] the electoral process in the middle of an election," and (3) imposing an "irreparable" harm that would be curable by court action in their favor. *See* Ex. 2, Order at 13–15.[5] While the alleged constitutional harms affect all North Carolina voters, that does not make the injury a "nonjusticiable generalized grievance" that would preclude standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016). Rather, "[v]oters who allege facts showing disadvantage to themselves as individuals have standing to sue," even when that disadvantage is shared by other members of the electorate. *See Baker v. Carr*, 369 U.S. 186, 206

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[4] A party has standing to sue if it suffers an injury in fact causally connected to the defendant's conduct and which is likely to be redressed by a decision in the party's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

[5] *Wise*, No. 5:20-cv-00505-M, Dkt. No. 25 (E.D.N.C. Oct. 3, 2020) and *Moore,* No. 4:20-cv-00507-D, Dkt. No. 46 (E.D.N.C. Oct. 3, 2020).

(1962); *see also Federal Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998). That is especially true where, as here, an agency seeks to arbitrarily impose different voting requirements for prospective absentee voters—a violation of the Equal Protection Clause that did not apply to any of the cases that the *Alliance* Intervenors cite in support of their argument against standing. *See* Alliance Br., Dkt. 13, at 15. For example, in *Baker* voters from Tennessee counties brought an equal protection challenge to a Tennessee statute that they alleged arbitrarily apportioned the members of the General Assembly among the counties. *Baker* 369 U.S. at 188, 206. The U.S. Supreme Court found they had standing and reasoned the alleged injury to the plaintiffs' right to vote "free of arbitrary impairment" was the equivalent of the injury that would occur to a voter in a case involving "stuffing the ballot box." *Id*. at 206. Here, Plaintiffs have effectively alleged that the BOE Memos would "stuff the ballot box" by counting ballots that are invalid under North Carolina law.

Further, both the Plaintiff candidates and Republican Committees are injured by the ever-changing rules at issue here. The Republican Committees spent considerable time and money educating citizens about the voting process while relying on the BOE's former memoranda. *See*

Wise, Dkt. 4, Ex. 16–18. These organizations will suffer if the substantial changes to North Carolina's voting laws contemplated by the Numbered Memos become effective, because they would need to divert additional resources to new educational efforts in response. Such harm is sufficient to confer standing.[6] *See, e.g., Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, 725 F.3d 571, 576 (6th Cir. 2013) ("[A] drain on an organization's resources . . . constitutes a concrete and demonstrable injury for standing purposes.").

B. Abstention Is Inappropriate.

Intervenor's discussion of abstention neglects two key facts. First, the federal court in *Democracy N.C.* and the state court in *Chambers* issued their decisions upholding key portions of the election statutes before the new Memos were issued and before the Consent Judgment was signed, much less approved by the Superior Court. Indeed, other than an inaccurate citation to *Democracy N.C.* as purported support for the

[6] In multi-plaintiff cases, if at least one plaintiff demonstrates standing, the court "need not consider whether" the other plaintiffs "have standing to maintain the suit." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977). Thus, harm to either the individual Plaintiffs or the political Plaintiffs confers standing.

Consent Judgment, neither the Consent Judgment nor the opinion approving it even addresses those two decisions. This case is now pending before Judge Osteen, who has already addressed the validity of the election laws in *Democracy N.C.*, long before the *Alliance* action was even filed. In short, the federal judiciary's involvement predates the state court's consideration of the Consent Judgment. Second, Plaintiffs filed their motion for a TRO against the Memos before the Superior Court's decision.

Plaintiffs grasp at four abstention theories, demonstrating that they are unable to fit this case into any abstention category. Indeed, the abstention doctrines remain "extraordinary and narrow exceptions to a federal court's duty to exercise the jurisdiction conferred on it." *Martin v. Stewart*, 499 F.3d 360, 363 (4th Cir. 2007) (quotation marks and alteration omitted). That is especially true here, where a federal court was the first to address the constitutional challenges, and the delays caused by state court adjudication might prevent the litigation from being completed before the general election, at which point the Plaintiffs' requested relief would be unattainable. *See Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 151 (3d Cir. 2000) (equitable

considerations "such as the effect of delay on the litigants or the public interest" disfavor abstention).

Moreover, abstention is inappropriate on any of the four grounds advocated by the *Alliance* Intervenors.

Pullman: *Pullman* abstention does not apply because the state court litigation in *Alliance* does not involve a sensitive area of social policy or an unclear question of state law. *Pullman* abstention "requires the demonstration of three factors: (1) the case involves a sensitive area of social policy; (2) the state court ruling could obviate the need to resolve the federal question; and (3) the meaning of state law is uncertain." 17A Wright & Miller, *Fed. Prac. & Proc. Juris.* § 4242 n.2 (3d ed. Apr. 2020); *see also Railroad Comm. of Tex. v. Pullman Co.*, 312 U.S. 496, 499–500 (1941). The first requirement is not satisfied because the election statutes at issue here, like election laws across the country, are often litigated in federal court, federal candidates are on the ballot, and federal constitutional provisions are at issue. *See Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 356 (4th Cir. 2005) ("Where there is an overwhelming federal interest . . . no state interest, for abstention purposes, can be nearly as strong at the same time."); *but cf. Pullman*,

312 U.S. at 497–98 (challenge to state railroad policy aimed at mandating the segregation of sleeper carriages). The federal government's allocation of emergency funding for the state administration of the 2020 general election through the CARES Act[7] further demonstrates that the election litigation is far afield from a "sensitive area of social policy" required for *Pullman* abstention. *See Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 939 (9th Cir. 2002) (hazardous waste remediation policy did not constitute a sensitive area of social policy because the issue was being addressed through a "partnership" between state and federal authorities).

Even if the first *Pullman* requirement were satisfied, the parties do not disagree about the *meaning* of any of the election laws at issue. *Pullman* abstention is inappropriate where the applicable state law is clear on its face. *See Young v. Hosemann*, 598 F.3d 184, 192 (5th Cir. 2010). Rather, the dispute is whether those laws should be obeyed. Moreover, the statutes governing BOE's authority clearly state that the BOE is obligated to follow and enforce North Carolina's election

[7] *See* https://www.eac.gov/payments-and-grants/2020-cares-act-grants.

statutes—an obligation that the North Carolina Supreme Court has already interpreted as binding. *See* N.C.G.S. §§ 163-22(a), (c); *see also James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005).

Younger: *Younger* abstention does not apply because the state court litigation in *Alliance* is a civil proceeding that does not implicate a state interest in enforcing its own judgments. The *Younger* abstention doctrine generally applies "[w]hen there is a parallel, pending state criminal proceeding," in which case "federal courts must refrain from enjoining the state prosecution." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). While the Supreme Court has extended the doctrine to apply to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," *see New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989), those proceedings involved a state's administration of its judicial system through processes such as contempt proceedings, rather than a state court's review of the constitutionality of agency action. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987); *Juidice v. Vaile*, 430 U.S. 327, 336, n.12 (1977). Indeed, the Supreme Court has expressly determined that extending *Younger* to "require

abstention in deference to a state judicial proceeding reviewing legislative or executive action" would "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Pub. Serv.*, 491 U.S. at 368.

Rooker-Feldman: Nor does the *Rooker-Feldman* doctrine bar this action because the Plaintiffs challenge the constitutionality of the Memos, rather than a state court's judgment. As the Supreme Court explained in *Skinner v. Switzer*, 562 U.S. 521, 532 (2011), "a state-court decision is not reviewable by lower federal courts, *but a statute or rule governing the decision may be challenged in a federal action*." (emphasis added). To hold otherwise would be to run afoul of this Court's precedents, which make clear that "[s]tate administrative decisions, *even those that are subject to judicial review by state courts*, are beyond doubt subject to challenge in an independent federal action commenced under jurisdiction explicitly conferred by Congress." *Thana v. Bd. of License Comm'rs for Charles Cnty.*, 827 F.3d 314, 321 (4th Cir. 2016) (emphasis added). Further, neither the Plaintiff voters nor candidates are parties

to the state lawsuit, rendering *Rooker-Feldman* inapplicable to them. *See Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994).

Colorado River: Finally, this case does not warrant abstention under *Colorado River*, which "*permits* federal courts, under exceptional circumstances, to refrain from exercising jurisdiction in deference to pending, parallel state proceedings." *Ackerman v. ExxonMobil Corp.*, 734 F.3d 237, 247 (4th Cir. 2013) (emphasis added). The "exceptional circumstances" that are required for *Colorado River* are "considerably more limited than the circumstances appropriate for abstention," as they arise based on concerns for judicial efficiency rather than comity. *See Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 462 (4th Cir. 2005) (citation omitted). Multiple applicable factors weigh against *Colorado River* abstention here, including: (1) the convenience of the federal forum, especially because the Middle District of North Carolina originally heard the constitutional challenges that served as the basis for the Numbered Memoranda;[8] (2) the nature of the Plaintiffs' claims, all of

[8] Indeed, the BOE's briefing repeatedly emphasized that it considers the Numbered Memoranda to be responsive to relief ordered *in federal court*. *See* Ex. 7, *N.C. Alliance for Retired Ams.*, No. 20 CVS 881, BOE Br. in Support of Consent Judgment, at 11, 24, 29 (Sept. 30, 2020).

which rest on alleged violations of federal law; and (3) the insufficiency of the state litigation, which is not guaranteed to move quickly enough for the Plaintiffs to receive relief before the general election. *See Chase Brexton Health Servs.,* 411 F.3d at 466. Federal courts are generally "bound by a virtually unflagging obligation to exercise the jurisdiction given them," and this case is no exception. *Colorado River*, 424 U.S. at 817 (citations omitted).

C. Plaintiffs' Claims Are Meritorious.

The voter Plaintiffs have the right to vote on equal terms with other North Carolinians. This means the right to "participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). The North Carolina Supreme Court's decision in *James v. Bartlett*, 359 N.C. 260 (2005) is very persuasive. The court found that the BOE erred in allowing provisional ballots cast by voters outside the precincts in which they resided to be counted because to do so would violate state law. *Id.* at 271. Although the court was reluctant to discount ballots that were voted in violation of state law, it concluded that was necessary because to allow those ballots to be cast would

"effectively 'disenfranchise[]'" those voters who cast legal ballots. *Id.; see also Baker*, 369 U.S. at 206.

As shown above, *see* pages 5–6, the Memos would disregard four provisions of North Carolina's voting laws: (1) the Receipt Deadline; (2) the Witness Requirement; (3) the Postmark Requirement; and (4) the Assistance and Delivery bans.

If the Memos go into effect, voters, like Plaintiff Wise, who voted before will be disenfranchised by election officials counting ballots that are invalid under the General Statutes. As of September 22, 2020, the day the Memos were issued, 153,664 North Carolinians had already cast absentee ballots; as of October 13, 2020, 492,825 had cast their ballots.[9] In fact, many absentee ballots have already been spoiled for failure to comply with the statutes. In Cumberland County, "hundreds of voters" have been informed that their ballots had "witness deficiencies" and "were mailed new Absentee Ballots" so they could fulfill the Witness Requirement. Ex. 8, *Moore v. Circosta*, No. 20-cv-00911-WO-JLW, Dkt. 60-3 Linda Devore Aff. at ¶ 19 (Sept. 30, 2020).

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[9] *See* BOE, *How Many Voters Have Cast their Ballots?* (Sept. 22, 2020; Oct. 13, 2020) https://www.ncsbe.gov/results-data/absentee-data.

The Memos would also increase the risk of voter fraud in the upcoming general election. To see the importance of these requirements, the Court need look no further than the 2018 fraud perpetrated by McCrae Dowless, which involved a ballot harvesting scheme that resulted in the invalidation of the election results in North Carolina's ninth congressional district. *Democracy N.C.*, 2020 WL 4484063, at *34. Dowless and his co-conspirators collected absentee ballot request forms and absentee ballots, falsified witness certifications, discarded ballots from voters suspected of supporting Dowless's disfavored candidate, and submitted forged absentee ballots—all for the purpose of "get[ting] as many Republican votes in before election day as possible." *See id.* The Witness Requirement, Assistance Ban, and Delivery Ban proved to be impediments that Dowless and his associates attempted to evade by staggering the timing of their submission of the ballots, limiting the number of times a witness's signature appeared on ballots, and keeping the pen colors and dates consistent with those of the absentee voter. Ex. 9, BOE Order (Mar. 13, 2019) ¶¶ 52–57, 65; *see also* Ex. 10, Lockerbie Aff. ¶¶18, 21. Moreover, the Witness Requirement was pivotal to discovery and prosecution of the scheme. *See* Ex. 10, Lockerbie Aff. ¶¶

18, 21. Permitting the Memos to take effect and eliminate the Witness Requirement, Assistance Ban, and Ballot Delivery Ban, would leave North Carolina without the ability to enforce the very requirements that hindered Dowless's plan, enabled the BOE to discover and investigate the scheme, and ultimately resulted in a new election with valid results. The General Assembly was well aware of the Dowless scheme and revised the absentee voting laws in June 2020 with these very issues in mind.

The *Alliance* Intervenors do not address Plaintiffs' Election and Electors' Clause claims, but Plaintiffs are likely to succeed on those claims as well. The Elections Clause mandates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const., art. I, § 4, cl. 1. Analogously, the Electors Clause of the United States Constitution provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors" for President. U.S. Const., art. II, § 1, cl. 2.

There is no question that the General Assembly is North Carolina's "Legislature." *See* N.C. Const. art. II, § 1; *Hawke v. Smith*, 253 U.S. 221, 227, 40 S. Ct. 495, 497, 64 L. Ed. 871 (1920) (noting the term

"Legislature" in the U.S. Constitution refers to "the representative body [that] ma[es] the laws of the people."). But the General Assembly did not approve the Memos, which plainly contradict the General Statues and legislation passed to address voting during the COVID-19 pandemic. *See* above at pp. 4–7. Nor has the General Assembly delegated authority to the Board of Elections to rewrite the election laws based on the very COVID emergency the General Assembly has already addressed. *See Adams v. North Carolina Dept. of Nat. & Econ. Resources*, 249 S.E.2d 402, 410 (NC 1978) ("The 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.").

II. THE EQUITIES AND PUBLIC INTEREST FAVOR THE INJUNCTION

A. The TRO Maintains the Status Quo and Does Not Harm the *Alliance* Intervenors.

The TRO does no harm to the *Alliance* Intervenors. While they claim that the TRO encumbers their "right to vote," Br. at 20, all North Carolina voters are free to cast absentee ballots according to the valid state election laws enacted by the General Assembly, statutes that have very recently survived challenges before a federal judge and a three-judge

state court. State and federal courts determined that it is minimally burdensome for even high-risk voters to comply with those requirements. In *Chambers*, the day before the first absentee ballots were mailed to voters, a three-judge panel in North Carolina state court denied a motion to preliminarily enjoin the Witness Requirement on the grounds that the plaintiffs in that case were unlikely to prevail on the merits of their challenge. *Chambers*, No. 20-CVS-500124, at 6. Similarly, the *Democracy N.C.* plaintiffs lost on the claims that are relevant here: namely, their constitutional challenges to the Witness Requirement, Assistance Ban, and Delivery Ban. *See Democracy N.C.*, 2020 WL 4484063 at *1, 51–52, 64. The court determined plaintiffs were unlikely to succeed in striking down the Witness Requirement, because the health risk from fulfilling the requirement was minimal even for elderly, high-risk voters, while the benefit to State from fraud deterrence was significant. *Id.* at *24–33. The other challenged provisions, including the ballot Assistance and Delivery Bans, served the purposes of "combating election fraud" and enabling the State to administer orderly elections, making them likely to survive plaintiffs' constitutional challenges. *Id.* at *38, 51–52.

Contrary to the sweeping changes that would be made by the new Memos, the TRO merely maintains the status quo while the courts attempt to resolve the Constitutional challenges that Plaintiffs have raised, *id.* at *14, and does not cause irreparable damage. *See Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011) (state not harmed from injunction that prevents it from violating the Constitution).

B. Staying the TRO Would Irreparably Harm the Plaintiffs and all North Carolinians.

By contrast, staying the TRO would irreparably harm the Plaintiffs and all North Carolinians. The individual voter Plaintiffs have voted, or intend to vote, in accord with the statutes as passed by the General Assembly. The candidates have educated supporters of the requirements of those statutes. The Republican Committee Plaintiffs have expended considerable resources to get out the vote for their preferred candidates in North Carolina and to educate voters about North Carolina's election laws. *See Wise*, Dkt. 4, Ex. 16–18. As of September 25, they had already contacted, through door knocking, telephone calls, or mailings, more than 7.6 million households in North Carolina with pleas to vote for the Republican ticket and instructions on how to do so in accord with the

legitimate election regime. *Id.* These investments will be wasted if the Memos go into effect.

The changes in the Memos—after absentee voting has already begun—will also cause widespread voter confusion. Indeed, the three-judge panel in *Chambers* found that altering the Witness Requirement the day before absentee ballot voting began would harm all North Carolinians and "would likely lead to voter confusion about the process for voting by absentee ballot." *Id.* at *7. Similarly, the *Democracy N.C.* the court found that it was not the court's role to "undertake a wholesale revision of North Carolina's election laws," particularly so close to an election. 2020 WL 4484063, at *45 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5 (2006) (per curiam)).

Absentee voting has been underway for over a month, with 1,321,515[10] absentee ballots requested and 492,825[11] marked and returned. This is precisely the election eve change that the Supreme Court forbade in *Purcell*, 549 U.S. 1, and has repeatedly barred, *see Andino*, 2020 WL 5887393 (staying Sept. 18 injunction of South

[10] *See* https://www.ncsbe.gov/ for an updated total.

[11] *See* https://www.ncsbe.gov/results-data/absentee-data.

Carolina's absentee ballot witness requirement under *Purcell*). If it was improper in *Andino* to alter the South Carolina absentee ballot witness requirement in ***September,*** it is certainly improper for this Court to allow elimination of the witness requirement enacted by the General Assembly and effectively overrule *Chambers*. With only three weeks left before the election, we are within the "sensitive timeframe" under *Purcell*. *See Purcell*, 549 U.S. at 3 (applying principle where court of appeals granted injunction on October 5, with election on November 7); *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014) (collecting cases where Supreme Court stayed injunctions on voting requirements issued between 30 and 55 days before the election, and observing "the common thread" that these decisions "would change the rules of the election too soon before the election date").

CONCLUSION

For the foregoing reasons, Plaintiffs urge the Court to deny *Alliance* Intervenors' request for an emergency stay of the TRO pending appeal.

Dated: October 13, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief with the type-volume limitations of Fed. R. App. P. 27(d)(2)(A) because this motion contains 5198 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. (32)(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in fourteen-point Century Schoolbook.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2020, I caused the foregoing to be filed with the Court electronically using the CM/ECF system, which will send a notification to all counsel of record, effecting service on them. *See* 4th Cir. R. 25(a).

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