

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:20-cv-00912-WO-JLW

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

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD
OF ELECTIONS; DAMON CIRCOSTA, in
his official capacity as Chair of the North
Carolina State Board of Elections; STELLA
ANDERSON, in her official capacity as
Secretary of State of the North Carolina State
Board of Elections; JEFF 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,

Defendants.

**STATE DEFENDANTS'
RESPONSE TO PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION [D.E. 43]**

INTRODUCTION¹

Plaintiffs' entire case is a re-run of arguments that they have already lost in state court. In their view, the state court was wrong to hold that the State Board of Elections had authority under state law to issue the Numbered Memoranda, and was wrong to hold that the Numbered Memoranda are consistent with the Equal Protection and Elections Clauses. In any other case, if a party found itself on the losing end of a legal argument in state court, the normal course would be to appeal to the state appellate courts.

This case should be no different. Well-settled principles of comity, equity, and federalism foreclose Plaintiffs' transparent effort to appeal a state-court judgment through a collateral attack in federal court. And, in fact, this case *is* no different: Plaintiffs have already filed a notice of appeal in state court and moved to stay the trial court's judgment.

Plaintiffs try to combat the black-letter law that bars this suit by claiming that the "twists and turns" taken by the State Board in responding to the COVID-19 crisis have created uneven standards for voters. *Moore* Br. 8. But Plaintiffs leave out a critical fact: Out of their four identified "twists and turns," two were necessitated by their own frivolous litigation. Plaintiffs cannot start a fire and then complain that the house is burning.

Plaintiffs' gamesmanship, moreover, is already having damaging consequences: Every day that this successive suit is permitted to continue, more defective ballots continue to pile up across the State. Until the Board is freed from the federal injunction that currently ties its hands, the county boards cannot process these ballots—whether to notify voters of their right to cure a deficiency or to spoil them. This Court should deny Plaintiffs' motion for further injunctive

¹ For the Court's convenience, Defendants have filed identical responses on the *Moore* and *Wise* dockets.

relief, dissolve the temporary restraining order, and allow county boards to resume processing these ballots, before it is too late.

STATEMENT OF FACTS

A. The COVID-19 Pandemic and the Board's Response

The COVID-19 pandemic has been widely recognized as the greatest public-health crisis in at least a century. In response to this unprecedented crisis, the State has made numerous modifications to election procedures to reduce the risk of spread. For example, on July 17, 2020, the Board's Executive Director issued an emergency order requiring county boards to meet a minimum number of weekend early-voting hours, minimum early-voting site numbers, and minimum sanitation and hygiene standards. Ex. A.

The need for the Board to make adjustments to election procedures in response to emergencies is nothing new. In recent years, the Board has twice extended the absentee-ballot receipt deadline, until 8 and 9 days after Election Day, for voters following hurricanes.²

B. USPS Delays

The Board has also been forced to consider the effect that delivery slowdowns at the United States Postal Service might have on the election. On July 30, 2020, USPS informed state officials that the State's absentee deadlines were "incongruous with the Postal Service's delivery standards." *Pennsylvania v. DeJoy*, No. 2:20-cv-04096 (E.D.P.A.), DE 1-1 at 53-55. USPS warned that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned on time or be counted." *Id.*

² Emergency Order 4, N.C. State Bd. of Elections (Nov. 5, 2018), <https://bit.ly/3isylIo>; Second Emergency Executive Order 4, N.C. State Bd. of Elections (Sept. 6, 2019), <https://bit.ly/2Gn7JaF>.

C. The Board Faces Numerous Lawsuits Challenging Election Laws

In recent months, the Board has been sued ten times (eight in state court, twice in federal) on claims that, in light of the pandemic and USPS slowdowns, the State's election procedures violate the North Carolina and U.S. Constitutions.

One suit, *Democracy NC v. NC Board of Elections*, is before this Court. The *Democracy NC* plaintiffs challenged various state election laws, including the procedures for curing deficient absentee ballots. On August 4, 2020, this Court rejected many of those claims. 2020 U.S. Dist. LEXIS 138492. But the court enjoined state officials from “permitting the disallowance or rejection, of absentee ballots without due process as to those ballots with a material error that is subject to remediation.” *Id.* at 182.

Shortly thereafter, the Board released guidance that allowed voters to cure voter-signature defects, but required voters to revote their ballots for witness-related defects. Ex. B.

The lawsuits raising constitutional claims against the State's election laws continued. One lawsuit was filed in state court in mid-August. *N.C. Alliance for Retired Americans v. N.C. State Bd. of Elections*, 20-CVS-8881 (Wake Cty. Super. Ct.). The *NC Alliance* plaintiffs challenged: (1) limitations on the number of hours and days for early voting; (2) the witness requirement for absentee ballots; (3) the lack of prepaid postage for absentee ballots; (4) the absentee-ballot receipt deadline; (5) voter-signature requirements; and (6) restrictions on assistance with absentee ballots.³

Another lawsuit—filed on September 8—specifically targeted the cure process set forth in the August 21 memorandum. Ex. C. The *DSCC* plaintiffs alleged that the cure process

³ Mr. Berger and Mr. Moore filed a notice of intervention as of right in *NC Alliance*.

established in the August 21 memorandum still failed to provide sufficient due process with respect to witness defects. *Id.* In addition, the plaintiffs alleged that the August 21 cure process was disparately affecting the rights of certain groups of voters, including racial minorities. *Id.*

In the wake of these new lawsuits—and cognizant of the need for continued compliance with this Court’s injunction in *Democracy NC*—the Board directed county boards not to disapprove any ballots until a new cure procedure could be implemented. Ex. D.

D. A State Court Approves the Board’s Decision To Enter a Consent Judgment

On September 15, the Board met to discuss a strategy to resolve the pending lawsuits and ensure an orderly election process. After lengthy discussion, the Board voted unanimously, on a bipartisan basis, to propose a settlement in *NC Alliance*. Ex. E.

On September 22, the *NC Alliance* plaintiffs and Board defendants filed a Joint Motion for Entry of a Consent Judgment. Under the proposed judgment, plaintiffs agreed to drop many of their demands, including expanded early voting, elimination of the witness requirement, and prepaid postage. The Board agreed to three modest and temporary adjustments in election procedures: (1) to extend the receipt deadline for absentee ballots mailed on or before Election Day to nine days after Election Day (matching the deadline for military and overseas voters); (2) to implement a cure process that allows voters to correct witness deficiencies in their absentee ballots by affirming, under penalty of prosecution, that they had, in fact, marked the ballot; and (3) to establish separate absentee ballot “drop-off stations” staffed by elections officials at each early-voting site and each county board office to reduce congestion and crowding. Ex. F.

On October 2, the state court held a hearing and approved the consent decree. The court made a series of rulings rejecting various objections to the decree, which were memorialized in a written order. Ex. G. It first ruled that the consent judgment was the product of an arms-length,

good-faith negotiation. *Id.*, ¶ 18. The court further ruled that plaintiffs had demonstrated a likelihood of success on the merits on their state-law claims, giving the Board a “strong incentive to settle this case,” both to provide certainty to voters as quickly as possible and to eliminate the risk that the Board would face a more sweeping judicial remedy late in the election cycle. *Id.*, ¶¶ 20-21.

Next, the court ruled that the Board had authority under state law to enter the consent decree. *Id.*, ¶¶ 22-25. This authority arose from two state statutes. The first authorizes the Board “to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes.” N.C. Gen. Stat. §163-22.2. The second authorizes the Executive Director to “exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by” a “natural disaster.” *Id.* § 163-27.1. The court held that “[t]he COVID-19 pandemic constitutes a natural disaster within the meaning of the statute.” *Id.*, ¶ 24. Based on these rulings, the state court held that neither the consent judgment, nor the Numbered Memoranda incorporated within it, violates the Elections Clause. *Id.*, ¶¶ 25, 29.

The court also held that neither the consent judgment, nor the Numbered Memoranda, violates the Equal Protection Clause. *Id.*, ¶ 30. More specifically, the court held that the Numbered Memoranda provide adequate and uniform statewide standards for counting votes, establish practical procedures to implement those standards, and do not dilute the value of anyone’s lawful vote. *Id.*

E. Plaintiffs File a Collateral Attack on the *NC Alliance* Judgment

On September 26—in between the filing of the motion for entry of the proposed consent judgment in *NC Alliance* and the state court’s hearing on that motion—Plaintiffs here filed suit

in the Eastern District of North Carolina. The federal suit challenged the constitutionality of the three Numbered Memoranda that form the basis of the consent judgment. Plaintiffs' claims mirror many of the claims that Plaintiffs' Berger and Moore raised in opposition to the *NC Alliance* consent judgment as intervenor-defendants.

The day after the state court's ruling rejecting the same claims that Plaintiffs raise here, the Eastern District granted Plaintiffs a temporary restraining order. That TRO *enjoined* the Board from implementing the Numbered Memoranda that the Board is *required* to implement under the *NC Alliance* consent judgment. The basis for the TRO was the district court's acceptance of the same equal-protection argument that the state court had rejected the day before.

ARGUMENT

I. Plaintiffs Have No Likelihood of Success on the Merits

A. Plaintiffs Are Collaterally Estopped from Raising Their Constitutional Claims in Federal Court.

Collateral estoppel, or issue preclusion, “bars the relitigation of specific issues that were actually determined in a prior action.” *Sartin v. Macik*, 535 F.3d 284, 287 (4th Cir. 2008). Under North Carolina law, issue preclusion applies where: (1) the issue is identical to the issue actually litigated and necessary to a prior judgment, (2) the prior action resulted in a final judgment on the merits, and (3) the plaintiffs in the latter action are the same as, or in privity with, the parties in the earlier action. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 349 S.E.2d 552, 557 (N.C. 1986). This test bars relitigation of Plaintiffs' constitutional claims.

As Plaintiffs seem to concede, *see Moore* Br. 4-6; *Wise* Br. 17, the first two prongs of the issue-preclusion test are clearly satisfied: Both constitutional issues that Plaintiffs raise here

were resolved by the state court in *NC Alliance*. There, the parties litigated whether the Numbered Memoranda violated the Elections or Equal Protection Clauses, and the state court held that they did not. Ex. G, ¶¶ 29, 30.

That leaves only the third factor—identity or privity of parties—which is also met here. To start, the legislative and political-committee Plaintiffs all intervened in *NC Alliance* and, thus, are identical parties. In the federal lawsuits, these Plaintiffs have added several individual voters and candidates. But these new additions do not allow Plaintiffs to evade the preclusive effects of the state-court judgment, because they are in privity with the legislators and political committees.

Privity exists when “the interests of one party are so identified with the interests of another that representation by one party is representation of the other’s legal right.” *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007). In similar cases, courts have recognized that privity exists between voters and the candidates or political parties that those voters support.

The Second Circuit’s decision in *Ferris v. Cuevas* is instructive. 118 F.3d 122 (2d Cir. 1997). There, organizers of a city referendum campaign sued in state court challenging the city’s refusal to put their referendum on the ballot. *Id.* at 124. The state court upheld the city’s refusal. *Id.* at 125. After the state judgment, several voters who had also favored the referendum sued in federal court. The voters sought the same relief that the organizers had sought in state court, and even engaged one of the same lawyers. *Id.* at 128. Emphasizing the close relationship between the voters and organizers, the identity of interest (forcing the referendum to appear on the ballot), and the identity of counsel, the Second Circuit barred the voters’ federal suit.

This situation calls for the same result. The legal interest pursued by the political committees and legislators in *NC Alliance* are in perfect alignment with the interest pressed by the newly added Plaintiffs here: They all seek to enjoin the Numbered Memoranda and exclude

votes cast in compliance with that guidance. In pursuing this interest in *NC Alliance*, moreover, the political committees purported to do so on behalf of the voters who supported their candidates and party. Ex. H, ¶ 6 (claiming an interest in representing the interests of “Republican voters throughout the state”). And in this case, as in *Ferris*, the same counsel are involved. Counsel for the voter and candidate Plaintiffs are the same attorneys who are representing the legislators and political committees here and in *NC Alliance*. For all these reasons, the legislators and political committees are in privity with the voter and candidate Plaintiffs, and issue preclusion bars relitigation of the constitutional issues in this case.

Plaintiffs resist this conclusion with a handful of meritless arguments. First, the *Wise* Plaintiffs argue that the *NC Alliance* judgment has no preclusive effect because it relates to a consent judgment. *Wise* Br. 17 (citing *Arizona v. California*, 530 U.S. 392, 414 (2000)). Plaintiffs misunderstand the law. Ordinarily, issue preclusion does not attach to a settlement itself because, by definition, a settlement means that the parties have decided not to litigate certain issues to final judgment. *See Arizona*, 530 U.S. at 414. The intervenor-defendants’ attack on the consent judgment, by contrast, *was* fully litigated. As a prerequisite to approval, the state court rejected their claims on the merits, issuing findings of fact and conclusions of law that foreclose Plaintiffs’ claims here. The consent judgment therefore has preclusive effect. *See Nash Cty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486-87 & n.5 (4th Cir. 1981) (“North Carolina law gives res judicata effect to consent judgments”); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375-76 (1996) (approving of *Nash*, because state law controls “on the preclusive force of settlement judgments”).

Next, the *Moore* Plaintiffs seem to argue that issue preclusion should not apply because, they say, there are reasons to doubt the validity of the *NC Alliance* court’s judgment. *Moore* Br.

4-5. But therein lies the rub. If Plaintiffs believe that the state court erred, the proper course is to notice an appeal to the state appellate courts—as the legislator and political-committee Plaintiffs have already done. The doctrine of issue preclusion is designed precisely to prevent parties from initiating new lawsuits instead of appealing adverse judgments in the ordinary course.

Finally, the *Moore* Plaintiffs urge this Court to defy the rules of issue preclusion to avoid a “manifest injustice.” *Moore* Br. 5-6. According to Plaintiffs, a state trial court “should not be allowed to prevent this Court from considering the merits” of their Elections Clause claim. *Id.* at 6. Plaintiffs’ logic is difficult to follow. The outcome of collateral estoppel is always that a subsequent court will find itself unable to consider a particular legal issue. The fact that the legal issue here arises under the federal Constitution does not convert that result into a “manifest injustice.” State courts, after all, “are presumptively competent to adjudicate claims arising under the laws of the United States.” *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

B. This Court Should Abstain Under *Pennzoil*.

Plaintiffs also have no answer to the Board’s *Pennzoil* argument—likely because the doctrine clearly applies and has only become stronger in the wake of the *NC Alliance* judgment.⁴ See TRO Response 20. The *Pennzoil* abstention doctrine bars federal courts from entering an injunction that would interfere with enforcement of a state-court judgment. *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13 (1987); *Sprint Comm’ns, Inc. v. Jacobs*, 571 U.S. 69, 73 (2013) (reaffirming *Pennzoil*). It is difficult to imagine a case that more clearly falls within that

⁴ The *Wise* Plaintiffs do argue that *Pullman* abstention should not apply. *Wise* Br. 16. But the Board’s TRO briefing made clear that its *Pullman* argument applied only if the state court failed to enter a final judgment before the federal court acted. TRO Response 16-19.

doctrine's scope: Injunctive relief here would bar the Board from complying with the *NC Alliance* judgment, and thus would make "execution of [the] state judgment[]" impossible. *See Pennzoil*, 481 U.S. at 14. Again, if Plaintiffs are unhappy with that judgment, the proper course is for them to appeal it.

C. Plaintiffs Lack Standing.

Plaintiffs' claims also fail because Plaintiffs lack standing to raise them. Starting with the Elections Clause: The Supreme Court has specifically held that private voters lack standing to sue under this clause, because they can allege nothing more than a "generalized grievance" "that the law . . . has not been followed." *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). The same rule applies to the other Plaintiffs here, who are individual candidates, political committees, and legislators. In fact, the only party that would have standing to sue under the Elections Clause would be the state legislature itself. After all, Plaintiffs themselves claim only that the Board has "usurped *the General Assembly's* authority" to administer federal elections. *Wise* Br. 10 (emphasis added), *see Moore* Br. 2-3. And "a party may assert only a violation of its own rights." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988).

The legislators claim that, as the "leader[s]" of the North Carolina legislative chambers, they "represent[] the institutional interests of th[ose] bod[ies] in this case." *Moore* DE 1, ¶¶ 7, 8. But they point to no authority that empowers the Speaker and President Pro Tem to represent their entire respective chambers in litigation of this kind. *See Raines*, 521 U.S. at 829 (noting that the plaintiffs "had not been authorized to represent their respective Houses of Congress"). Although the legislators do cite two state statutes, their reliance on those laws to bolster their authority is misplaced. Those statutes allow the Speaker and President Pro Tem to appear as intervening defendants in actions "in which the validity or constitutionality of an act of the

General Assembly or a provision of the North Carolina Constitution is challenged.” N.C. Gen. Stat. §§ 1-72.2(a)-(b), 120-32.6. But here, the legislators are *plaintiffs*, and they are seeking to challenge only *executive* action, not to defend the validity of statutes or even to challenge the validity of the statutes on which that executive action was based. Accordingly, neither statute grants the legislators the authority to represent the General Assembly as a whole.⁵

Plaintiffs also lack standing to bring their equal-protection claim. The standing analysis is straightforward for the legislators, candidates, and political committees: The right to participate in elections on an equal basis is a right that belongs to voters alone. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

But the Plaintiff-voters also lack standing to bring an equal-protection claim in these circumstances. Plaintiffs cannot demonstrate that they have been subject to disparate or arbitrary treatment. The Memoranda apply equally to all voters. And even if a voter could theoretically have standing to sue because he was subjected to a different cure process than other voters, *these* voters could not: Plaintiffs’ ballots were accepted without the need to invoke any cure process at all. *Moore* DE 1, ¶¶ 9-10. Surely Plaintiffs cannot claim an injury for *not* having to go through a remedial process put in place for other voters.

Plaintiffs’ claim that they are denied equal protection because the value of their votes will be diluted by unlawful votes fares no better. This argument ignores a determinative fact: a state court has already held that votes counted in accordance with the Memoranda are *lawful* under state law. Ex. G, ¶ 30. Plaintiffs are not harmed by other voters casting lawful votes. And even

⁵ The legislators further claim the right to represent the interests of *the entire State* in this case. But as the state court held in *NC Alliance*, allowing two legislators to represent the State’s interests in litigation would violate the North Carolina Constitution. Ex. G, ¶ 27.

if a court had not already determined that cured ballots were valid, Plaintiffs' vote-dilution claim alleges a generalized injury that is insufficient to confer standing because their "asserted interests are the same . . . as for every other registered voter in the state." *United States v. Florida*, 4:12cv285, 2012 WL 13034013, *1 (N.D. Fla. Nov. 6, 2012); *see Paher v. Cegavske*, 3:20-cv-00243, 2020 WL 2748301, *4 (D. Nev. May 27, 2020); *ACLU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

D. Plaintiffs' Election Clause Claim Is Meritless.

The *Wise* and *Moore* Plaintiffs both claim that the Board's alteration of procedures for processing absentee ballots violates the Elections Clause. *Moore* Br. 6; *Wise* Br. 10. The *Wise* plaintiffs claim that these changes violate the Electors Clause as well. *Wise* Br. 11. They are wrong. As the state court already held in the *NC Alliance* case, the Board's decision to issue the Numbered Memoranda fell within with its lawfully delegated authority under state law and, thus, was consistent with the U.S. Constitution.

The Electors Clause states that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. Const. art. II, § 1, cl. 3. This Clause has often been interpreted in tandem with the Elections Clause, which similarly authorizes "the Legislature" to "prescribe[]" the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 829-30 (2015) (Roberts, C.J., dissenting); *Donald J. Trump for President, Inc. v. Bullock*, CV 20-66-H-DLC, 2020 WL 5810556, at *11 (D. Mont. Sept. 30, 2020).

Together, these Clauses establish that, under the U.S. Constitution, "the Legislature" of each State is to be primarily responsible for establishing the guidelines for federal elections. But,

as more than a century of Supreme Court precedent has taught, the term “the Legislature” does “not mean the representative body alone.” *Ariz. State Legislature*, 576 U.S. at 805 (describing the Court’s holding in *Davis v. Hildebrant*, 241 U.S. 565 (1916)).

Instead, the Supreme Court’s case law makes two things clear: First, States “retain [the] autonomy” to serve as “laboratories” and “determine [their] own lawmaking processes” in their respective constitutions. *Id.* at 816-17, 824. For example, if a state’s constitution requires that elections laws be passed by a General Assembly subject to the Governor’s veto, the Governor’s involvement does not violate the Elections Clause. *Id.* at 807; *see Smiley*, 285 U.S. at 368, 372-73. Similarly, if a state’s constitution empowers its residents to approve or disapprove certain election laws, that, too, is permissible under the Elections Clause. *Hildebrant*, 241 U.S. at 566-67.

Second, the Clauses’ references to “the Legislature” do not preclude a State’s representative body from “delegat[ing its] legislative authority” over elections to an executive body. *Ariz. State Legislature*, 576 U.S. at 814; *see Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) (“The Elections Clause, therefore, affirmatively grants rights to state legislatures [to] . . . delegate lawmaking authority.”); *Bullock*, 2020 WL 5810556, *11-12 (Montana legislature’s delegation of authority over federal elections is constitutional); *Paher*, 2020 WL 2089813, *8-10 (same, for Nevada legislature’s delegation to the Secretary of State). “The dominant purpose of the Elections Clause,” after all, “was to empower Congress to override state election rules,” not to restrict the range of options available to state legislatures in crafting an elections framework. *Ariz. State Legislature*, 576 U.S. at 814-15.

This freedom to delegate is why state legislatures throughout the country—including North Carolina’s General Assembly—have been able to enact statutes empowering non-

legislative actors to help regulate federal elections. *See* N.C. Gen. Stat. § 163-22. Indeed, if “the Legislature” truly meant a State’s legislative body alone—and delegation were impermissible—then *every State’s* election regime would likely be unconstitutional. Under that incredible reading of the Constitution, state legislatures could never empower executive officials to make interstitial policy decisions regarding the “Times, Places, and Manner” of an election. Nor could they authorize executive officials to make minor modifications to the laws governing elections in the event of an emergency, such as a hurricane or a software glitch. That simply cannot be the law, as the Supreme Court and other federal courts have confirmed. *Ariz. State Legislature*, 576 U.S. at 814; *Corman*, 287 F. Supp. 3d at 573; *Bullock*, 2020 WL 5810556, *11-12; *Paher*, 2020 WL 2089813, *8-10.

Here, the North Carolina General Assembly has chosen to delegate to the State Board the authority to make interstitial modifications to the State’s elections regime, particularly where—as here—such adjustments are needed to react to unexpected circumstances. *See Cooper v. Berger*, 809 S.E.2d 98, 112 n.11 (N.C. 2018) (“consistent with much modern legislation, the General Assembly has delegated to the members of the Bipartisan State Board the authority to make numerous discretionary decisions”). In past election cycles, the State Board has employed this authority to make necessary modifications in response to emergencies like hurricanes or floods. Similarly here, the State Board has exercised its delegated authority in response to a once-in-a-lifetime pandemic and a flurry of subsequent lawsuits challenging the State’s election laws. The state court in *NC Alliance* has specifically held that these measures fell within the Board’s delegated statutory authority, and were therefore consistent with the federal Constitution. Ex. G, ¶¶ 22-25, 29 (citing N.C. Gen. Stat. §§ 163-22.2, -27.1).

This state-law ruling, of course, is binding on the federal courts. It is a bedrock principle of federalism that “state courts are the ultimate expositors of state law.” *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). The Supreme Court has repeatedly indicated that federal courts are not to review whether a state court has correctly interpreted the laws of that state—including in the context of an Elections or Electors Clause claim. *See, e.g., Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874); *see also Hildebrant*, 241 U.S. at 568 (deferring to the Ohio Supreme Court’s “conclusive” interpretation of the Ohio constitution); *Smiley*, 285 U.S. at 363-64 (treating the Minnesota Supreme Court’s assessment of the Minnesota constitution as dispositive). The federal valence of Plaintiffs’ argument to this Court, moreover, does not alter the fact that, to find an Electors Clause violation, this Court must first conclude that the State Board violated two state statutes. For that reason, even if this Court did have authority to construe state law in ways that differed from state courts, it would be jurisdictionally barred from issuing the injunction that Plaintiffs seek here. *See Pennhurst*, 465 U.S. at 106, 124-25.⁶

E. Plaintiffs’ Equal Protection Claim Lacks Merit.

Plaintiffs raise two theories to justify their equal-protection claims. Both lack any basis in the law.

First, invoking *Bush v. Gore*, Plaintiffs claim that the consent judgment would deny voters equal protection because it would create “arbitrary and nonuniform” procedures that will disfavor voters who had their ballots counted before the Memoranda went into effect. *Moore Br.* 3. But *Bush* actually shows why the consent judgment is consistent with equal protection.

⁶ Even if this Court were to consider anew the Board’s authority to issue the Numbered Memoranda, there would be no reason to depart from the state court’s ruling that the Memoranda fell within the scope of the Board’s delegated authority. *See* TRO Response 23-26.

In *Bush*, the Supreme Court held that Florida's plans for recounting votes during the 2000 presidential election would deny equal protection if they went forward, because the state had not adopted "uniform rules" to determine if votes should be counted. *Bush v. Gore*, 531 U.S. 98, 106 (2000). The Court said that Florida's recount plans denied voters equal protection because "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another." *Id.* at 107. Nevertheless, the Court also made clear that Florida *could have* proceeded with a recount if it had developed "adequate statewide standards for determining what is a legal vote," *even after* the election was over. *Id.* at 110. The only reason that Florida was not permitted to develop these uniform standards was because too little time existed to develop them before the State needed to select its presidential electors. *Id.*

Here, the consent judgment does precisely what *Bush* contemplated: It establishes uniform and adequate standards for determining what is a legal vote, all of which apply statewide, well in advance of Election Day. Indeed, the only thing stopping uniform statewide standards from going into effect is the TRO entered in these cases.

The Supreme Court's two-day-old order in *Middleton* similarly refutes Plaintiffs' equal-protection theory. *See Andino v. Middleton*, 592 U.S. __ (Oct. 5 2020). In granting a stay of a South Carolina district court's order reducing that State's absentee-ballot witness requirement from two to one, the Supreme Court specifically ordered that "any ballots cast before this stay issued and received within two days of this order" must be counted. *Id.* That is, the Court directed South Carolina to apply different procedures for counting absentee ballots, solely based on when the ballots were cast. Under Plaintiffs' logic, this directive from the Supreme Court violates the Equal Protection Clause. That cannot be the case.

Moreover, if Plaintiffs were correct that any change made during an election to ensure that all persons can vote denies equal protection to those who have already voted, the consequences would be profound: If it is unconstitutional to extend the receipt deadline for absentee ballots to address mail disruptions, then it would also be unconstitutional to extend hours at polling places on Election Day to address power outages or voting-machine malfunctions. *See* N.C. Gen. Stat. § 163-166.01 (granting Board the power to grant this relief). Likewise, the steps that the Board has repeatedly taken to ensure that people can vote in the wake of natural disasters like hurricanes would be invalid if those steps are implemented after voting begins. These emergency adjustments are not theoretical. In the last three years alone, the Board has twice extended the receipt deadline for absentee ballots after hurricanes displaced voters. *See supra* n.2.

Second, Plaintiffs argue that the consent judgment denies voters equal protection because it “dilut[es]” their votes by allowing “unlawful votes to be counted.” *Moore* Br. 3. But the consent judgment in no way lets votes be cast unlawfully. It instead simply establishes uniform standards that help county boards ascertain which votes are lawful. The state court that approved the consent judgment has already held that, under North Carolina law, votes cast consistent with the procedures in the Memoranda are lawful. Ex. G, ¶ 25. Even if this Court disagreed with that state-law holding, sovereign immunity would bar it from entering an injunction that requires the Board to comply with the federal court’s reading of state law. *See Pennhurst*, 465 U.S. at 106, 124-25.⁷

⁷ Plaintiffs claim that the consent judgment contravenes *Purcell*. *See Wise* Br. 11-16. But, as the Board has explained, that argument stands the *Purcell* principle on its head. *See Democracy NC*, DE 163, at 18-19. *Purcell* is a rule of discretion under which “lower federal

II. The Remaining Factors Counsel Against Injunctive Relief.

As set forth at greater length in the Board's TRO briefing, *see* TRO Response 28-30, Plaintiffs cannot establish the other three *Winter* factors either: They are not facing irreparable harm; the equities do not tip in their favor; and injunctive relief is not in the public interest. Indeed, the best way to serve the public interest would be for this Court to deny Plaintiffs' motion and lift the TRO. Doing so would free the Board from the competing injunctions that currently tie its hands and would provide greatly needed clarity on the procedures for the current election period.

CONCLUSION

The Board respectfully requests that the Court deny Plaintiffs' motion for a preliminary injunction and dissolve the temporary restraining order entered on October 3, 2020.

This the 7th day of October, 2020.

JOSHUA H. STEIN
Attorney General

/s/ Alexander McC. Peters
Alexander McC. Peters
N.C. State Bar No. 13654
Chief Deputy Attorney General
N.C. Dept. of Justice
Post Office Box 629
Raleigh, NC 27602
Telephone: (919) 716-6900

courts should ordinarily not alter the election rules on the eve of an election.” *RNC v. DNC*, 589 U. S. ____ (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)) (emphasis added). It does not allow federal courts to *bar States* from lawfully adjusting *their own election rules*. If it did, then state election administration would be paralyzed, unable to respond to new circumstances, such as software malfunctions, hurricanes—or a global pandemic.

Facsimile: (919) 716-6763
Email: apeters@ncdoj.gov

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 7th day of October, 2020, he electronically filed the foregoing Response to Plaintiffs' Motion for a Preliminary Injunction with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

This the 7th day of October, 2020.

/s/ Alexander McC. Peters
Alexander McC. Peters
Chief Deputy Attorney General

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 5,493 words as measured by Microsoft Word.

This the 7th day of October, 2020.

/s/ Alexander McC. Peters
Alexander McC. Peters
Chief Deputy Attorney General