IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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 STATE BOARD OF ELECTIONS; STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS,

Defendants,

and

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

(Proposed)
Intervenor-Defendants.

[PROPOSED] INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Civil Action No. 1:20-CV-912

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INTRODUCTION

Plaintiffs ask this Court to enjoin a consent judgment entered by the state court to protect the constitutional rights of North Carolina voters during an unprecedented public health crisis. In seeking immediate recourse in federal court to overturn an unfavorable state court judgment, Plaintiffs flout well-established rules of procedure, comity, and jurisdiction; mount claims unsupported by any authority or evidence; and undermine the constitutional rights of Proposed Intervenors North Carolina Alliance for Retired Americans and seven individual voters (together, the "Alliance"). This Court should deny Plaintiffs' motion for a preliminary injunction.

BACKGROUND

The COVID-19 pandemic has significantly disrupted day-to-day life. North Carolina has over 220,000 confirmed COVID-19 cases and 3,670 reported deaths, with cases rapidly increasing. Since March, North Carolina has been under a series of "Safer at Home" Orders, the latest of which "very strongly encourage[s]" people over 65 "**and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes." Ex. 1. Meanwhile, the CDC is warning the country to brace for "the worst fall from a public health perspective, we've ever had." Ex. 2.

Due to the pandemic, voters are casting absentee ballots at record-breaking levels, but there are significant flaws in North Carolina's system. First, most of the over 1.1 million North Carolinians who have requested absentee ballots are new to voting absentee, and thus more susceptible to making immaterial errors that result in ballot rejection. *See* Ex. 3 at 41. North Carolina's ballot receipt deadline also threatens to disenfranchise thousands of voters during the pandemic. Ballots submitted through the U.S. Postal Service ("USPS") and received after 5:00 p.m. three days after Election Day are rejected, even if postmarked by Election Day. *See* N.C.G.S. § 163-231(b)(1), (2). But in a July 30 letter to North Carolina's Secretary of State,

USPS's General Counsel warned that North Carolina's receipt deadline is "incongruous with the Postal Service's delivery standards," and that "there is a significant risk" that "ballots may be requested in a manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted." Ex. 4.

Against this backdrop, the Alliance sued the North Carolina State Board of Elections ("NCSBE") in Wake County Superior Court (the "State Court"), challenging these and other elections laws as imposing undue burdens on the right to vote in violation of the North Carolina Constitution. Ex. 5. The Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc., the North Carolina Republican Party, Speaker of the North Carolina House of Representatives Timothy Moore, and President Pro Tempore of the North Carolina Senate Philip Berger were granted intervention. On August 18, the Alliance moved for a preliminary injunction. *See* Ex. 3. The Alliance submitted over 500 pages of supporting evidence, including four expert reports, 17 affidavits, and numerous official documents.[1]

Before the preliminary injunction hearing, the Alliance and NCSBE reached an agreement to resolve the Alliance's claims and filed a Joint Motion for Entry of a Consent Judgment. Under the Consent Judgment, NCSBE agreed to: (1) count eligible ballots postmarked by Election Day, if received within nine days (i.e., the same deadline for military and overseas voters), *see* N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b); (2) implement a cure process for minor ballot deficiencies, including missing voter, witness, or assistant signatures and addresses; and (3) instruct county boards to designate manned ballot drop-off stations at early voting locations and county board offices for in-person ballot return. Ex. 2. In exchange, the

[1] The Alliance can make these exhibits available at the Court's request.

Alliance agreed to withdraw the preliminary injunction motion and dismiss all claims upon entry of the Consent Judgment. The State Court scheduled a hearing for October 2.

Rather than wait for that hearing, the various Republican Plaintiffs, with a handful of individuals, preemptively filed this federal suit and an emergency motion for a temporary restraining order ("TRO") to enjoin enforcement of the Consent Judgment and the accompanying Numbered Memos. ECF No. 1.[2] On October 2, the State Court held a six-hour hearing, considered evidence and arguments, and ultimately entered the Consent Judgment. *See* Ex. 6. In doing so, it found that (1) NCSBE had legal authority to settle the case, *id.* at 7-9; (2) the Alliance was likely to succeed on the merits, *id.* at 6; (3) the settlement's terms are "fair, adequate, and reasonable" and not illegal or collusive, *id.*; (4) it is consistent with the state and federal constitutions, *id.* at 9, and (5) it serves "a strong public interest in having certainty in our election procedures and rules," *id.* at 7; *see* Ex. 7.

Less than two hours later, the Eastern District held a short hearing on Plaintiffs' TRO. The court neither allowed the Alliance to present its case nor addressed the extensive evidence upon which the State Court relied. ECF No. 17. The following morning, the Eastern District court granted Plaintiffs' TRO and, without ruling on the Alliance's motion to intervene, the Eastern District transferred the case to this Court. ECF No. 25.[3] Defendants NCSBE has since filed a notice of appeal in the Fourth Circuit, and both NCSBE and the Alliance have sought an emergency stay of the Eastern District's TRO. Plaintiffs subsequently filed a motion for

[2] Plaintiffs reference subsequent Numbered Memos that are not part of the Consent Judgment. Rather, Memo 2020-29 simply clarifies how to resolve address errors, *see* ECF No. 43-5, and Memo 2020-27 responds to a separate federal lawsuit, *see* ECF No. 43-3. Memo 2020-28 is an effort to minimize the damage caused by Plaintiffs' federal collateral attack on the Consent Judgment. *See* ECF No. 43-5.

[3] Notwithstanding transfer to this Court, the present case is unrelated to *Democracy NC* and instead involves a Consent Judgment entered in State Court.

preliminary injunction in this Court to extend the TRO they secured from the Eastern District. In the meantime, on October 5, the State Court issued its Findings of Fact and Conclusions of Law, and Republican Plaintiffs immediately filed a notice of appeal and motion for temporary stay of the Consent Judgment in the North Carolina Court of Appeals.

LEGAL STANDARD

Plaintiffs are not entitled to a preliminary injunction unless they demonstrate that: (1) they are "likely to succeed on the merits" of their case, (2) they will "suffer irreparable harm" absent "preliminary relief," and (3) the "balance[ing] of [the] equities" weighs in their favor. *Cantley v. W. Va. Reg'l Jail and Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014). Courts do not "impose a [preliminary] injunction lightly, as it is 'an extraordinary remedy . . . to be applied only in the limited circumstances which clearly demand it.'" *Id*. (quoting *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (en banc)).

ARGUMENT

I. This Court should abstain in deference to ongoing state court proceedings.

Plaintiffs' attempt to use a federal court action to bypass unfavorable rulings in ongoing state court proceedings implicates fundamental principles of federalism and calls for abstention. Collateral attacks on state court proceedings are precisely what federal abstention doctrines seek to avoid, particularly where, as here, Plaintiffs have clearly turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Unsurprisingly, then, Plaintiffs' efforts implicate numerous abstention doctrines, all of which counsel this Court to decline jurisdiction. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases." *Id*. at 11 n.9. "Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Id*.

First, Plaintiffs' claims are precluded under *Pennzoil*. *See* 481 U.S. 1. In *Pennzoil*, the losing party in a state court proceeding sued in federal court to enjoin enforcement of the state court judgment, alleging that the state's process for compelling compliance violated the U.S. Constitution. *Id*. at 13. The U.S. Supreme Court, citing "the importance to the States of enforcing the orders and judgments of their courts," held that the federal court could not entertain the suit:

> Not only would federal injunctions in such cases interfere with the execution of state judgments, but they would do so on grounds that challenge the very process by which those judgments were obtained. So long as those challenges relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand.

Id. at 13-14; *see also Schall v. Joyce*, 885 F.2d 101, 110 (3d Cir. 1989) (applying *Pennzoil* to hold "it would be inappropriate for the federal court to proceed on an injunctive claim to render the state judgment nugatory").

Such is the case here. Plaintiffs' federal lawsuit seeks to render the State Court's adjudication nugatory by enjoining enforcement of the Consent Judgment. But the *state courts*, not the federal courts, provide the proper avenue for Plaintiffs' challenge. Plaintiffs can press their federal constitutional claims through the state appellate process; indeed, after securing the TRO in federal court, Plaintiffs appealed the State Court's judgment, raising the same federal constitutional claims they bring here. This Court should therefore "defer[] on principles of comity to the pending state proceedings." *Pennzoil*, 481 U.S. at 17.

Second, the *Pullman* doctrine also warrants abstention. Under *Pullman*, "[f]ederal courts should abstain . . . where a case involves an open question of state law that is potentially dispositive inasmuch as its resolution may moot the federal constitutional issue." *W. Va. Citizens Def. League, Inc. v. City of Martinsburg*, 483 F. App'x 838, 839-40 (4th Cir. 2012) (internal quotation marks omitted). *Pullman* abstention is particularly appropriate when a federal court

must evaluate a legislature's allegedly ambiguous delegation of power to other actors. *Cf. K Hope, Inc. v. Onslow Cnty.*, 107 F.3d 866, Nos. 95-3126, 95-3195, 95-3127, 95-3196, 95-3153, 95-3197, 1997 WL 76936, at *1 (4th Cir. 1997) (requiring abstention when constitutional questions could be avoided by state court's resolution of whether a "County's enactment of the ordinance constituted a valid exercise of the power granted to counties by the North Carolina legislature"). Plaintiffs contend that abstention is improper only because the "pertinent voting statutes are clear and unambiguous," ECF No. 43 at 16,[4] but Plaintiffs completely ignore issues of state-delegated authority at the center of their challenges here. Specifically, Plaintiffs ask the federal court to determine whether NCSBE has the authority to enter the Consent Judgment and promulgate the Numbered Memos submitted therewith. These arguments—premised on misinterpretations of state (and federal) law—were raised by Republican Plaintiffs in the State Court, which rejected them after careful consideration. *See* Ex. 6 at 7-9.

Rather than first appealing the State Court's conclusions, Plaintiffs improperly sought a second opinion in federal court. The Eastern District then overstepped by temporarily enjoining enforcement of the State Court's judgment. But if the reviewing state court agrees with Plaintiffs, there is nothing left for this court to decide; neither the Consent Judgment nor the Numbered Memos would survive. Thus, Plaintiffs' claims plainly raise "unsettled questions of state law that may dispose of the case and avoid the need for deciding the constitutional question." *Meredith v. Talbot Cnty., Md.*, 828 F.2d 228, 231 (4th Cir. 1987).

[4] This unsupported assertion is a misrepresentation of the statute and is incorrect as a matter of law. Whether the Numbered Memos conflict with North Carolina election laws presents additional state law disputes. To provide one example, N.C.G.S. § 163-226.3(a)(5) is silent on the *validity* of ballots that are returned by unauthorized individuals. Rather, the North Carolina Administrative Code precludes the rejection of ballots solely because of unauthorized return. *See* 08 N.C. Admin. Code 18.0102. Yet, Plaintiffs' gripe with Numbered Memo 2020-23 is that it conflicts with North Carolina's ban on assisting voters with absentee ballot return.

Third, Plaintiffs' claims run afoul of the *Rooker-Feldman* doctrine. *See D.C. Ct. of Appeals v. Feldman,* 460 U.S. 462 (1983). Republican Plaintiffs are "[t]he losing party in state court" who have "filed suit in a U.S. District Court," "complaining of an injury caused by the state-court judgment and seeking federal-court review and rejection of that judgment." *Skinner v. Switzer,* 562 U.S. 521, 531 (2011). Contrary to the Eastern District's TRO, "lower federal courts possess no power whatever to sit in direct review of state court decisions." *Feldman,* 460 U.S. at 482 n.16; see 28 U.S.C. § 1257. Plaintiffs do not dispute that *Rooker-Feldman* would bar their claims to the extent that they challenge the State Court's decision; rather, they argue that they only challenge "the procedures in [NCSBE's] Numbered Memos," and not the consent judgment. But their Complaint says otherwise; the paragraph states that "[t]his is an action to vindicate properly enacted election laws and procedures against . . . [a] Consent Judgment," ECF No. 1 at 2. And to the extent this suit does challenge the Numbered Memos, they are—as Plaintiffs *explicitly* state— "part and parcel" of the State Court's Consent Judgment. *Id.* at 8.

Finally, *Colorado River* also counsels abstention to permit resolution of the parallel state court proceeding. *See Ackerman v. ExxonMobil Corp.,* 734 F.3d 237, 248 (4th Cir. 2013). Notwithstanding that additional parties without standing joined the federal action, these are parallel proceedings that demand abstention. *Cf. Lumen Constr., Inc. v. Brant Constr. Co., Inc.,* 780 F.2d 691, 695 (7th Cir. 1985) ("If the rule were otherwise, the Colorado River doctrine could be entirely avoided by the simple expedient of naming additional parties."). All relevant factors—including avoiding piecemeal litigation, the order and relative progress of the cases, the critical issues of state law at stake, and the adequacy of the state court to continue addressing these issues—weigh heavily in favor of abstention. *See Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463-64 (4th Cir. 2005).

The Fourth Circuit has recognized that "[t]he list of areas in which federal judicial interference would 'disregard the comity' that Our Federalism requires is lengthy" and specifically includes states' interest in "enforcing state court judgments," which "cuts to the state's ability to operate its own judicial system." *Harper v. Pub. Serv. Comm'n of W. Va*., 396 F.3d 348, 352 (4th Cir. 2005). Plaintiffs cannot turn to federal court in a transparent effort to relitigate the same claims that failed before the State Court. This blatant "attempt to . . . avoid adverse rulings by the state court . . . weighs strongly in favor of abstention." *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989). If any case demands abstention, it is this one.

II. Plaintiffs lack standing.

As a threshold matter, this Court lacks jurisdiction to hear these claims. At its "irreducible constitutional minimum," standing requires: (1) an injury-in-fact, that is (2) fairly traceable to the defendant's conduct, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish injury, a plaintiff must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* Plaintiffs neither meet these requirements for Article III standing, nor have prudential standing to assert the legal interests of the North Carolina Legislature.

A. Plaintiffs do not have standing to raise their Equal Protection claims.

Despite granting the TRO, the Eastern District incorrectly assumed without evaluation that Plaintiffs had standing: they do not.[5]

[5] The various Republican organizations lack both organizational and representational standing. First, they do not have standing to assert the rights of their members where those voters lack standing. Second, their diversion-of-resources allegations are baseless. The Consent Judgment lessens the burden on resources because it expands voting rights; plaintiffs need to do *less* to ensure that their individual members' ballots count. Because the Memos are not restrictive, they

First, the individual voter Plaintiffs ("Voter Plaintiffs") fail to allege a theory of vote dilution that is particularized to them, as opposed to a generalized grievance that could be raised by any voter in North Carolina. Voter Plaintiffs' claims are entirely based on the notion that the power of their votes will be diluted by the casting of unlawful ballots. But courts have repeatedly rejected this identical theory as a basis for standing, because it is both unduly speculative and impermissibly generalized. *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev. Sept. 18, 2020) ("As with other '[g]enerally available grievance[s] about the government,' plaintiffs seek relief on behalf of their member voters that 'no more directly and tangibly benefits [them] than it does the public at large.'" (quoting *Lujan*, 504 U.S. at 573-74)); *Martel v. Condos*, No. 5:20-cv-131, slip op. at 9 (D. Vt. Sept. 16, 2020), Ex. 8 ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Paher v. Cegavske*, No. 3:20-cv-00243-MMD-WGC, 2020 WL 2089813, at *5 (D. Nev. Apr. 30, 2020) ("Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter."); *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). The same is true here. Because Plaintiffs fail to allege a "concrete and particularized" injury, *Lujan*, 504 U.S. at 560, this Court need not reach the merits.

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could keep existing voter mobilization efforts in place with no changes. An interest in finality of election rules are shared by all parties and are the purpose of the Consent Judgment, which puts an end to ongoing litigation). By initiating new lawsuits, Plaintiffs are flouting this purported interest.

Second, the relief ordered by the State Court does not personally injure Voter Plaintiffs in any way. The Consent Judgment makes it easier to vote for the Voter Plaintiffs and the rest of North Carolinans alike. Plaintiff Wise elected to vote well before Election Day and has not alleged any injury or burden in connection with casting her ballot; rather, her ballot has likely already been accepted. *See* ECF No. 1. Allowing other lawful voters to cure immaterial issues with their ballots does not infringe on Plaintiff Wise's right to vote or have her vote counted. Nor does the fact that voters who prefer to submit their ballots in person can do so at manned drop-off stations to minimize health risks. The same is true of accepting ballots postmarked by Election Day that arrive before the canvass, the same deadline established for military and overseas voters' ballots. N.C.G.S. §§ 163-258.10, 163-258.12(a), 163-182.5(b). The Numbered Memos simply ensure that lawful voters are not disenfranchised as a result of curable mistakes and USPS delivery delays outside of their control. In short, Voter Plaintiffs have no legitimate interest in invoking the power of the federal judiciary to prohibit other lawful voters from having their ballots counted.

Third, Voter Plaintiffs's concern over possible "ballot harvesting" by non-party actors is not causally connected to their Equal Protection claims. It is conjectural. Because such speculation is not "fairly . . . trace[able]" to NCSBE, the Consent Judgment, or anything else implicated in these lawsuits, but rather is "th[e] result [of] the independent action of some third party not before the court,'" *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)), this purported injury does not support standing.

B. Plaintiffs lack standing to assert violations of the Elections and Elector Clauses.

The TRO was not based on Plaintiffs' Elections or Electors Clause arguments, and for good reason: they lack standing to bring these meritless claims. The Supreme Court has squarely

held that a private citizen does not have standing to bring an Elections Clause challenge. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This edict also bars Plaintiffs' Elector Clause claim because the two clauses play functionally identical roles. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 839 (2015) (Roberts, C.J., dissenting) (noting that Electors Clause is "a constitutional provision with considerable similarity to the Elections Clause"); *see, e.g.*, *Castañon v. United States*, 444 F. Supp. 3d 118, 140-41 (D.D.C. 2020); *De La Fuente v. Simon*, 940 N.W.2d 477, 493 n.15 (Minn. 2020).

Even if Plaintiffs could establish Article III standing, they lack prudential standing to bring Counts I and II. These claims are predicated solely on the General Assembly's purported rights under the Elections Clause, Plaintiffs have no authority or standing to assert the rights of the General Assembly. *See Corman v. Torres*, 287 F. Supp. 3d 558, 573 (M.D. Pa. 2018) ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly."). Thus, their claims necessarily "rest . . . on the legal rights or interests of third parties.'" *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). But they have identified no "'hindrance' to the [Legislature's] ability to protect [its] own interests." *Kowalski*, 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). "Absent a 'hindrance' to the third-party's ability to defend its own rights, this prudential limitation on standing cannot be excused." *Corman*, 287 F. Supp. 3d at 572 (quoting *Kowalski*, 543 U.S. at 130). Applying the "usual rule" of prudential standing, *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 392 (1988), Plaintiffs "do[] not have third-

party standing" to assert claims on the Legislature's behalf. *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 992 (8th Cir. 2016); *see also Corman*, 287 F. Supp. 3d at 571-73.[6]

III. Plaintiffs are unlikely to succeed on the merits.

A. Plaintiffs' differential treatment of voters claim is meritless.

The Numbered Memos will not lead to unequal treatment of ballots. Plaintiffs are correct: the Equal Protection Clause requires states to "avoid arbitrary and disparate treatment of the members of its electorate." *Bush v. Gore*, 531 U.S. 98, 105 (2000). But that line of case law is wholly irrelevant here.

The Numbered Memos apply equally to all voters. Numbered Memo 2020-22 requires election officials to count all otherwise eligible ballots that are mailed by Election Day and received within nine days of the election. To the extent Numbered Memo 2020-22 introduces a new deadline, it affects only the counting of ballots for election officials after Election Day has passed—not when voters themselves must submit their ballots. All North Carolina absentee voters still must mail their ballots by Election Day.

The same is true of Numbered Memo 2020-23, which affects the drop-off procedure for absentee ballots at early voting locations. Early voting begins on October 15, and all voters who choose to return their ballots at early voting locations will be able to utilize the ballot drop-off stations that Numbered Memo 2020-23 implements. Finally, Numbered Memo 2020-19, which has been recently revised, expands the list of curable deficiencies for all voters, including those who made errors prior to its implementation on September 22, 2020.

[6] The opinion of the three-judge panel in *Corman* is highly instructive. There, as here, individual legislators brought in federal court a collateral attack on a state court judgment. *See id.* at 561. The panel ultimately concluded that these parties lacked both Article III and prudential standing to bring their claims in federal court. *See id.* at 573-74.

At bottom, their equal protection claim fails because Plaintiffs have not articulated, let alone demonstrated, how their right to vote—or anyone else's—is burdened or valued unequally. *See Bush v. Gore*, 531 U.S. 98, 98, 104-05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote *over that of another*.") (emphasis added); *Short v. Brown*, 893 F.3d 671, 679 (9th Cir. 2018) (explaining the Equal Protection Clause "bars a state from burdening a fundamental right for some citizens *but not for others*") (emphasis added). Nor could they. As the state court determined, the Consent Judgment *lessens* the burden on Plaintiffs Clifford, Bambini, and Baum's right to vote. *See* Ex. 6. And Plaintiff Wise has already successfully voted.

Plaintiffs take issue with the fact that future voters may face fewer barriers to casting their ballots, even though Plaintiffs have alleged no barriers to successfully casting their own. There is no authority to suggest that making exercise of a fundamental right easier for future actors is barred by the equal protection doctrine. *Cf. Short*, 893 F.3d at 677-78 ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution."). That position is especially troubling here, where the Alliance has shown, in the ongoing state court litigation, that the rules that preceded the Numbered Memos burdened their fundamental right to vote—and the State Court found it is likely to succeed on the merits of its claims. *See* Ex. 6 at 6. Taking Plaintiffs' argument to its logical conclusion would lead to absurd results. For example, under Plaintiffs' novel understanding of the Equal Protection Clause, someone who is already registered to vote could challenge the introduction of online voter registration in the State because that "easier" procedure was unavailable to them at the time of registration. Ultimately, Plaintiffs' position would allow just about any voter to block any and all new procedures on the grounds that they benefit others, inviting the Court to adopt a limitless

expansion of federal court jurisdiction to vindicate a previously unrecognized right to dictate how others vote.

Nor does the timing of the Numbered Memos raise equal protection issues. Election procedures often change after voting has started to ensure that the fundamental right to vote is protected. For example, in 2018, a federal court enjoined Florida's signature matching procedures and ordered a cure process *after* the election. *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d 1017, 1031 (N.D. Fla. 2018), *appeal dismissed as moot sub nom. Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790 (11th Cir. 2020). That same year, a Georgia federal court enjoined Georgia's signature matching scheme and ordered a cure process in the middle of the absentee and early voting periods. *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *appeal dismissed sub nom. Martin v. Sec'y of State of Ga.*, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018). Two years earlier, following a hurricane in the final week of the voter registration period, a federal court extended Florida's voter registration deadline. *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016); *see also Ga. Coal. for the Peoples' Agenda, Inc., v. Deal*, 214 F. Supp. 3d 1344, 1345 (S.D. Ga. 2016) (enforcing deadline during emergency "would categorically deny the right to vote" to thousands). In each case, the fact that some voters had already successfully voted or registered made no difference. The same reasoning applies here; to hold otherwise would effectively proscribe all constitutional protections once voting has started.

B. Plaintiffs' vote dilution argument lacks merit.

Plaintiffs' vote dilution claim is equally meritless; federal courts simply do not recognize such a cause of action. Vote dilution is a viable basis for federal claims in certain contexts, such as when laws are crafted that structurally devalue one community's votes over another's. *See,*

e.g., *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 406-07 (E.D. Pa. 2016); *see also Reynolds v. Sims*, 377 U.S. 533, 563-64, 568 (1964). Plaintiffs here, by contrast, have not alleged that the Consent Judgment or Numbered Memos value another group of votes over their own, and so they have failed at the most basic step of pleading a vote dilution claim.

Ultimately, "[t]he Constitution is not an election fraud statute." *Minn. Voters All. v. Ritchie*, 720 F.3d 1029, 1031 (8th Cir. 2013) (quoting *Bodine v. Elkhart Cnty. Election Bd.*, 788 F.2d 1270, 1271 (7th Cir. 1986)). There is simply no authority for transmogrifying vote dilution cases into a weapon that voters may use to enlist the federal judiciary to make it more difficult for millions of others to vote, based on unfounded voter fraud fears. *Cf. Short*, 893 F.3d at 677-78. To the contrary, courts have routinely—and appropriately—rejected such efforts. *See Minn. Voters All.*, 720 F.3d at 1031-32 (affirming Rule 12(b)(6) dismissal of vote dilution claim); *see also Cortés*, 218 F. Supp. 3d at 406-07 (rejecting claim of vote dilution "based on speculation that fraudulent voters may be casting ballots elsewhere in the" state on motion for preliminary injunction). Plaintiffs have failed to allege facts that give rise to a plausible claim for relief, or even alleged a cognizable legal theory.

C. Plaintiffs are unlikely to succeed on their Elections Clause and Electors Clause claims.

The U.S. Supreme Court has held that state legislatures can delegate the authority vested in them by these clauses—including to state officials like NCSBE. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting Elections Clause does not preclude "State's choice to include" state officials in lawmaking functions so long as it is "in accordance with the method which the State has prescribed for legislative enactments" (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *id.* at 816-17 ("States retain autonomy to establish their own governmental processes." (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999))); *id.* at 841 (Roberts, C.J.,

dissenting) (Supreme Court precedents hold "the Elections Clause did not prevent a State from applying the usual rules of its legislative process" "to *supplement* the legislature's role in the legislative process"); *Corman*, 287 F. Supp. 3d at 573 ("The Supreme Court interprets the words 'the Legislature thereof,' as used in that clause, to mean the lawmaking processes of a state." (quoting *Ariz. State Legislature*, 576 U.S. at 816)).[7]

Accordingly, the Consent Judgment and NCSBE's actions under it cannot constitute violations of either clause because they do not exceed NCSBE's authority as granted by the General Assembly. As an initial matter, NCSBE has broad, general supervisory authority over elections as set forth in N.C.G.S. § 163-22(a). As part of its supervisory authority, NCSBE is empowered to "compel observance" by county boards of election laws and procedures as set forth in N.C.G.S. § 163-22(c). Notably here, NCSBE's Executive Director, as the chief state elections official, has the authority to issue Emergency Orders pursuant to N.C.G.S. § 163-27.1 and 08 N.C. ADMIN. CODE 01.0106, which authorize her to exercise emergency powers to conduct an election where the normal schedule is disrupted. *See, e.g.*, Numbered Memo 2020-14; Numbered Memo 2020-19. Contrary to Plaintiffs' contention, ECF No. 43 at 14 n.5, the State's election laws *specifically* contemplate that the Executive Director may not be able to avoid conflict with previously enacted laws during emergencies. N.C.G.S. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid *unnecessary* conflict with the provisions of this Chapter.") (emphasis added).

Second, to the extent that the ongoing state court proceedings result in entry of the Consent Judgment invalidating the three-day ballot receipt deadline, NCSBE "shall have the

[7] As set forth above, *supra* Section II.B, the Elections and Electors Clause play functionally identical roles, and cases interpreting the former inform interpretation of the latter.

authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable." *Id.* § 163-22.2. These statutes, enacted by the General Assembly, clearly plan for and require the *precise* actions taken by NCSBE here. Any suggestion otherwise is meritless as the State Court explicitly found in entering the Consent Judgment. Ex. 6 at 7-9. To find otherwise, this federal court would have to reach a conclusion regarding state law that conflicts with that reached by the State Court. The proper forum for the Plaintiffs' objection to the State Court's interpretation of state law is the North Carolina state courts, where litigation is continuing on appeal. Plaintiffs cannot avoid this result by clothing their argument in the trappings of the Elections Clause.

Recently, a federal court rejected Plaintiff RNC's nearly identical challenge to election modifications made by the Executive branch in response to COVID-19. *Donald J. Trump for President, Inc. v. Bullock*, CV 20-66-H-DLC, 2020 WL 5810556 (D. Mont. Sept. 30, 2020). Like NCSBE's authority, Montana law provides the Governor with certain powers to respond to an "emergency or disaster." *Id.* at *10. The court held that this provision "constitute[s] a fundamental part of the legislative enactments governing the time, place, and manner of elections" and—given that "the term 'Legislature' as used in the Elections Clause is not confined to a state's legislative body"—directives issued pursuant to those emergency powers do not violate the Elections Clause. *Id.* at *11-12. This Court should similarly reject Plaintiffs' challenge.

IV. Purcell does not require the federal court to issue an injunction and is not a substitute for demonstrating the other factors necessary for a preliminary injunction.

Rather than address the other factors necessary for a preliminary injunction, Plaintiffs launch into an extended soliloquy about the *Purcell* doctrine, failing to grasp that *Purcell* is a

creation of the federal judiciary meant to stay its hand close to elections in deference to state election administrators. *See* ECF No. 43 at 15-20. Indeed, the cases Plaintiffs rely on involve the U.S. Supreme Court instructing lower federal courts to avoid issuing injunctions that threaten to interfere in state elections. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1205-07 (2020) ("This Court has repeatedly emphasized that *lower federal courts* should ordinarily not alter the election rules on the eve of an election."); *Purcell v. Gonzalez,* 549 U.S. 1, 4-5 (2006); *see also Common Cause v. Thomsen*, No. 19-CV-323-JDP, 2020 WL 5665475, *1 (W.D. Wis. Sept. 23, 2020) ("The Supreme Court has instructed that federal courts should refrain from changing state election rules as an election approaches.") (quoting *Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251, at *4 (7th Cir. Aug. 20, 2020)). Plaintiffs forget that *they* are the ones asking a federal court for an injunction, contrary to the principle articulated in *Purcell* and its progeny.

This is a significant oversight. To the extent *Purcell* applies here, it counsels *against* Plaintiffs' requested relief. *Purcell* is not a principle meant to limit state election administrators, but rather the federal judiciary. *See Paher*, 2020 WL 2089813, at *11 (noting there is "no support" for treating state election administrators and courts the same under *Purcell*). By hanging their hat on *Purcell*, Plaintiffs are asking this *federal* court to invalidate a compromise agreed to by the state entity charged with elections administration based on principles of deference to state government in federal proceedings close to elections. The irony speaks for itself.

V. Plaintiffs do not establish irreparable harm.

Plaintiffs barely mention—let alone establish—irreparable harm, which alone is fatal to their motion. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 283 (4th Cir. 2002) (holding that plaintiff must "must make a clear showing of irreparable harm" which "must be neither

remote nor speculative, but actual and imminent"). Plaintiffs seem to claim that their harm is self-evidently based on their invocation of *Purcell*, *see* ECF No. 43 at 17 (noting, without factual support, that an injunction will "prevent[] irreparable harm to Plaintiffs"), but *Purcell* involves the equitable powers of federal courts, not any harm to these plaintiffs. Plaintiffs have no harm for the reasons they lack any cognizable injury, *see supra* Section II, and their failure to come close to meeting the irreparable harm standard alone requires denial of their request for a preliminary injunction.

VI. The equities and public interest weigh against a preliminary injunction.

Plaintiffs fail to address the remaining factors, likely because both weigh strongly against them. First, as a legal matter, both the balance of the equities and the public interest favor a party likely to suffer a constitutional injury. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[U]pholding constitutional rights surely serves the public interest."). The Alliance demonstrated myriad burdens on their right to vote before the State Court, leading that court to determine they had a likelihood of success on the merits. *See* Ex. 6 at 6. By contrast, Plaintiffs have articulated no injuries whatsoever. Indeed, Plaintiff Wise has already successfully voted, and the consent judgment lessens the burden on the other Plaintiffs' right to vote.

Here, these factors weigh particularly strongly in the Alliance's favor. The Alliance and NCSBE negotiated a good-faith settlement in the State Court to reduce the burden on the right to vote and provide election administrators with clear guidance to ensure access to the franchise during a global pandemic. Now, Plaintiffs (including many parties to the state court litigation) seek to attack the State Court's judgment through a collateral federal proceeding. They have injected continued uncertainty into North Carolina's election for nothing more than policy disagreements with NCSBE, irreparably damaging the constitutional rights of the Alliance—as

well as thousands of other voters—in the process. Neither the equities nor the public interest supports the issuance of an injunction.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Convert the TRO into a Preliminary Injunction should be denied.

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Respectfully submitted,

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**Notice of Special Appearance pursuant to Local Rule 83.1(e) forthcoming*

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.2(f)(3), undersigned counsel certifies that the Memorandum in Support of Proposed Intervenors' Motion to Intervene as Defendants, including body, headings, and footnotes, contains 6,246 words as measured by Microsoft Word.

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