No. 20A71

IN THE SUPREME COURT OF THE UNITED STATES

PATSY J. WISE, *et al.*,

Applicants,

v.

DAMON CIRCOSTA, in his official capacity as Chair of the North Carolina State Board of Elections, *et al.*,

Respondents,

&

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS, *et al.*,

Intervenor-Respondents.

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

INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF INJUNCTION

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QUESTION PRESENTED

Is an injunction warranted where (1) its issuance would require resolution of state law questions pending in state court proceedings, where the state trial and appellate courts have interpreted state law to reject Applicants' arguments; (2) Applicants lack Article III standing; and (3) Applicants have failed to establish a clear right to relief on the merits?

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PARTIES TO THE PROCEEDING

Applicants in *Wise v. Circosta*, No. 20A71, are Donald J. Trump for President, Inc.; Republican National Committee; National Republican Senatorial Committee; National Republican Congressional Committee; North Carolina Republican Party; Gregory F. Murphy, U.S. Congressman; Daniel Bishop, U.S. Congressman; Patsy J. Wise; Regis Clifford; Samuel Grayson Baum; and Camille Annette Bambini.

Applicants in *Moore v. Circosta*, No. 20A72, are Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Bobby Heath; Maxine Whitley; and Alan Swain. All Applicants in both cases were plaintiffs in the district court and appellants in the Fourth Circuit.

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Respondents in both cases are Damon Circosta, in his official capacity as Chair of the North Carolina State Board of Elections; Stella Anderson, in her official capacity as a member of the North Carolina State Board of Elections; Jefferson Carmon III, in his official capacity as a member of the North Carolina State Board of Elections; and Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections. The North Carolina State Board of Elections is also a Respondent in *Wise*. Respondents were defendants in the district court and appellees in the Fourth Circuit.

Intervenor-Respondents in both cases are the North Carolina Alliance for Retired Americans; Barker Fowler; Becky Johnson; Jade Jurek; Rosalyn Kociemba; Tom Kociemba; Sandra Malone; and Caren Rabinowitz. Intervenor-Respondents

were intervenor-defendants in the district court and intervenor-appellees in the Fourth Circuit.

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, no Intervenor-Respondent has a parent company or a publicly-held company with a 10 percent or greater ownership interest in it.

RELATED PROCEEDINGS

- *N.C. All. for Retired Ams., et al. v. N.C. State Bd. of Elections, et al.*, No. 20 CVS 8881 (Wake Cnty. Super. Ct.) — Court entered Consent Judgment on Oct. 2 and issued its Findings of Fact and Conclusions of Law on Oct. 5, Court denied Applicants' motions to stay on Oct. 16;
- *N.C. All. for Retired Ams., et al. v. N.C. State Bd. of Elections, et al.*, No. P20-513 (N.C. Ct. App.) — Court entered an administrative stay of the Wake County Superior Court's order entering the Consent Judgment on Oct. 15 and then lifted the stay, denying Applicants' Petitions for Writ of Supersedeas and Motions for Temporary Stay on Oct. 19; and
- *N.C. All. for Retired Ams., et al. v. N.C. State Bd. of Elections, et al.*, No. 40P20, (N.C. Sup. Ct.) — Court allowed the Republican Committees' motion for immediate action on their request for a temporary stay on Oct. 23 and that same day denied Applicants' motions for a temporary stay.

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INTRODUCTION[1]

Two North Carolina state courts (trial and appellate), a federal district court, and the Fourth Circuit, sitting en banc, have soundly rejected Applicants' requests to enjoin a state court Consent Judgment issued on state law grounds, and for good reason. Before entering the Consent Judgment, the Wake County Superior Court (the "State Court") conducted a lengthy hearing during which it considered (and rejected) the same arguments Applicants advance here. Importantly, the State Court found that: (1) Intervenor-Respondents (the "Alliance"), who were plaintiffs in the state court action, were likely to succeed on the merits of their claims; (2) the State Board of Elections ("NCSBE") had the statutory authority—as delegated by the North Carolina General Assembly—under North Carolina law to enter into the Consent Judgment and implement the corresponding relief, including the extension of the absentee ballot receipt deadline challenged here; (3) the terms of the Consent Judgment are fair, adequate, and reasonable; (4) the Consent Judgment is consistent with the state and federal constitutions; and (5) the resolution of that lawsuit serves "a strong public interest in having certainty in [the State's] elections procedures and rules." App. 188-98.

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Applicants have pursued multiple avenues to challenge this ruling, all of which have failed thus far. The North Carolina Court of Appeals refused to stay enforcement of the Consent Judgment, denying Applicants' emergency petitions for writs of supersedeas, and the case is now pending before the North Carolina Supreme Court,

[1] Intervenor-Respondents have filed identical responses in opposition to the applications for writs of injunction in both Nos. 20A71 and 20A72 and incorporate arguments against all Applicants herein.

which should have the final word on the validity of the Consent Judgment. Determined not to leave their state law questions in the hands of North Carolina courts, Applicants simultaneously sought refuge in federal district court and then in the Fourth Circuit, demanding in each instance that federal courts disregard bedrock principles of federalism and comity, not to mention Article III's jurisdictional requirements, and enjoin the state court judgment. But despite obtaining a limited, temporary restraining order that expired on October 16, Applicants' subsequent attempts to extend that injunction have failed, both because their requested relief would upend the electoral procedures currently in place, creating a significant risk of confusion, App. 52, and because their claims suffer from numerous jurisdictional and legal defects, App. 5.

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Given the procedural posture of this case, and Applicants' undisguised attempts to collaterally attack a state court ruling on state law grounds, this Court's well-trod decision in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), requires abstention, as unsettled questions of state law could moot or present the constitutional claims here in a significantly different procedural posture. But abstention is hardly the only reason this Court need not address the merits of Applicants' contentions. More fundamentally, Applicants lack Article III standing for each claim they seek to advance. Their claims under the Elections and Electors Clauses assert institutional injuries allegedly suffered not by Applicants, but by the General Assembly, which is not before the Court and has not authorized any Applicant to advance its interests in this action. And their equal protection claims,

asserted by individuals who have already voted successfully, do not seek to vindicate any personal injury or disadvantage, but instead attempt to prevent others from voting under a less burdensome regime—a theory which the en banc Fourth Circuit found to be "beyond [their] understanding"—while advancing wholly speculative theories of vote dilution that have been soundly rejected by courts across the country.

Election day is just over a week away, yet Applicants seek to alter, not maintain, the status quo. The procedures they wish to enjoin are currently in force. Voters are requesting and preparing to mail their absentee ballots with the expectation that those ballots will be accepted and counted if they are mailed by election day and delivered to election officials by November 12. An injunction pending appeal at this stage would risk the very confusion and potential disenfranchisement that this Court has cautioned against by imposing a new deadline on the receipt of absentee ballots that is six days earlier than advertised—all of this, once again, in the final week before election day. This Court's repeated warnings to avoid the voter confusion that inevitably comes with federal court injunctions issued close to elections compel the denial of Applicants' extraordinary request for an eleventh-hour revision of election procedures, particularly when two federal courts, citing the same risk of confusion, have already refused to grant Applicants' requested injunction.

Reasons abound to deny Applicants' extraordinary request before even reaching the merits of their claims, which advance anomalous interpretations of longstanding and long-settled constitutional dictates. Their implausible reading of the Elections and Electors Clauses invites federal courts to micromanage state

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election procedures and contradicts many decades of settled precedent. And their unbounded theory of disparate treatment seeks to create a constitutional injury whenever election laws change. Simply put, neither the law, the facts, nor the public interest support Applicants' injunction, which began as and still remains an improper and disruptive collateral attack on a state court judgment that threatens North Carolina's sovereignty to interpret and enforce its own laws. Applicants have thus fallen far short of the high burden required for the extraordinary relief they seek from this Court.

JURISDICTION

This Court lacks jurisdiction because no Applicant has Article III standing to maintain the claims raised in this litigation.

DECISIONS BELOW

The Fourth Circuit's denial of an injunction pending appeal is reported at *Wise v. Circosta*, No. 20-2104, 20-2107, 2020 WL 6156302 (4th Cir. Oct. 20, 2020), and available at App. 1-49. The district court's order denying a preliminary injunction is reported at *Moore v. Circosta*, No. 20-cv-911, 2020 WL 6063332 (M.D.N.C. Oct. 14, 2020), and available at App. 50-140.[2] The North Carolina Supreme Court's order allowing the Republican Committees' motion for immediate action on the request for a temporary stay is available at App. 141-42, and its orders denying Applicants' motions for a temporary stay are available at App. 143-46. The North Carolina Court of Appeals' order denying the petitions for writs of supersedeas and dissolving the

[2] The district court issued the same decision in *Wise v. Circosta*, No. 20-cv-912 (M.D.N.C. Oct. 14, 2020).

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temporary stay is available at App. 147-48. The North Carolina Superior Court's order entering the Consent Judgment is available at App. 149-87, along with its findings of fact and conclusions of law, available at App. 188-98.

STATEMENT OF THE CASE

I. Election Administration Amidst the COVID-19 Pandemic

The COVID-19 pandemic has wreaked havoc throughout the country, causing significant casualties and unforeseen disruptions to many aspects of day-to-day life. Known domestic infections have surpassed 8.5 million with more than 223,000 fatalities. As of today, North Carolina has over 255,000 confirmed cases and over 4,000 reported deaths from the virus, with new cases increasing rapidly.[3] Beyond posing a direct threat to individual and public health, the pandemic has upended the electoral process. Earlier this year, NCSBE sent letters to Governor Cooper, House Speaker Tim Moore, Senate President Pro Tempore Phil Berger, and several legislative committees, explaining many of the challenges of conducting an election during the pandemic and urging changes to North Carolina's voting laws and practices. App. 199-210. Though the General Assembly adopted some of the actions requested by NCSBE by passing HB 1169, it fell short of taking the necessary steps to protect the constitutional rights to vote and to free elections, which are strongly protected under North Carolina's constitution. N.C. Const. art. I, §§ 10, 12, 14, 19. In Governor Cooper's words, "much more work [wa]s needed to ensure everyone's right

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[3] *Covid in the U.S.: Latest Map and Case Count*, N.Y. Times (updated Oct. 24, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html; *North Carolina Covid Map and Case Count*, N.Y. Times (updated Oct. 24, 2020). https://www.nytimes.com/interactive/2020/us/north-carolina-coronavirus-cases.html.

to vote is protected." App. 211-12. In the course of passing HB 1169 in mid-June, the General Assembly did not consider whether an extension of North Carolina's ballot receipt deadline—which requires rejection of any ballot received after 5:00 p.m. three days after election day, even if it is postmarked by election day—was necessary to ensure North Carolinians' ballots would be counted. *See* N.C. Gen. Stat. § 163-231(b)(1)-(2).

Later this summer, unprecedented COVID-19-related mail delays surfaced in North Carolina and across the country, creating disruptions which USPS itself has warned threaten to disenfranchise voters through no fault of their own. Notably, the General Counsel of USPS sent a letter to North Carolina's Secretary of State on July 30, 2020 (which was received in mid-August) warning that, under North Carolina's "election laws, certain deadlines for requesting and casting mail-in ballots are 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." App. 213-14. Specifically, "there is a risk that . . . a completed ballot postmarked on or close to Election Day will not be delivered in time to meet the state's receipt deadline of November 6." App. 214. North Carolina itself sued USPS. App. 264-331.

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With election day now just over a week away, we have already reached the window in which USPS warned it would be too late to mail ballots to meet the original

receipt deadline, and North Carolina voters stand to be disenfranchised as a result of this collateral attack on a state court judgment.

II. The Underlying State Court Proceedings

In recognition of the unprecedented challenges facing North Carolina voters under these circumstances, the Alliance filed suit against NCSBE and its chair on August 10 and amended its complaint on August 18, *see* App. 216-57. The Alliance's lawsuit brought state constitutional challenges to various state laws that impose significant burdens on North Carolinians' access to the franchise in the November election in light of the COVID-19 pandemic, including, as relevant here, the requirement that an absentee ballot must be postmarked by election day and received no later than three days after election day to be counted, N.C. Gen. Stat. § 163-231(b)(2). Contrary to Applicants' statements, North Carolina's receipt deadline had not been adjudicated in any unrelated state or federal court proceeding. Wise Appl. at 2.

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Many Applicants here—the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, Donald J. Trump for President, Inc., the North Carolina Republican Party (collectively, the "Republican Committee Intervenors"), Speaker of the North Carolina House of Representatives Timothy Moore, and President Pro Tempore of the North Carolina Senate Philip Berger (collectively, the "Legislator Intervenors")—were granted intervention in this state court action. On August 18, the Alliance moved for a preliminary injunction. *See* App. 258-63. The Alliance submitted

extensive supporting evidence, including four expert reports, 17 voter and other witness affidavits, and numerous official documents. *See* App. 332-89.[4]

Before the preliminary injunction hearing, the Alliance and NCSBE—pursuant to NCSBE's authority to resolve disputes under N.C. Gen. Stat. § 163-22.2, and its emergency powers under N.C. Gen. Stat. § 163-27.1—reached a settlement and filed a joint motion for entry of a consent judgment. *See* App. 390-468. Under the Consent Judgment, which required the implementation of three Numbered Memos, 2020-19, 2020-22, and 2020-23, NCSBE agreed to: (1) count eligible ballots postmarked by election day, if received within nine days after election day (the same deadline as for military and overseas voters' ballots); (2) implement a cure process for minor ballot deficiencies, including missing voter, witness, or assistant signatures and addresses; (3) instruct county boards to designate manned ballot drop-off stations at early voting locations and county board offices for in-person ballot return; and (4) inform the public of these changes. App. 408-10. All parties to the Consent Judgment further agreed to bear their own fees, expenses, and costs. App. 410. The State Court scheduled a hearing for October 2 to consider the proposed Consent Judgment and Intervenors' objections.

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III. Federal Collateral Attacks on State Court Proceedings and Entry of the Consent Judgment

Rather than wait for the State Court to consider the proposed Consent Judgment, the Legislator and Republican Committee Intervenors, joined by several

[4] The Alliance can make available the exhibits to its Memorandum in Support of Motion for Preliminary Injunction at the Court's request.

individual plaintiffs, preemptively filed two federal lawsuits along with Motions for Temporary Restraining Orders to enjoin enforcement of the Consent Judgment before it was even entered. App. 469-588. On October 2, the State Court held a six-hour hearing, considered the *same* legal arguments raised by Applicants here, and entered the Consent Judgment implementing the Numbered Memos. *See* App. 169; 188-98. The State Court found that (1) NCSBE had legal authority to settle the case, App. 194-96; (2) the Alliance was likely to succeed on the merits, App. 193; (3) the terms of the Consent Judgment are "fair, adequate, and reasonable" and not illegal or collusive, App. 193; (4) the settlement is consistent with the state and federal constitutions, App. 196, and (5) the settlement serves "a strong public interest in having certainty in our elections procedures and rules," App. 194. The very next morning, a federal district court in the Eastern District of North Carolina granted Applicants' requested TROs to block entry of the Consent Judgment and transferred the case to the Middle District of North Carolina, where Applicants requested conversion of the TROs into preliminary injunctions. *See* App. 589-608.[5] Meanwhile, on October 5, the State Court issued its Findings of Fact and Conclusions of Law, emphasizing that the Consent Judgment *does not* enjoin any statutes but rather "retains fidelity to the purpose behind [certain state] statutes" and "makes only minor and temporary changes to election procedures to accommodate the exigencies of the COVID-19 pandemic." App. 192-93. Applicants immediately filed writs of supersedeas and motions for temporary stay in the state appellate court. App. 609-736.

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[5] The Eastern District of North Carolina issued the same order in both the *Wise* and *Moore* cases. The Middle District of North Carolina granted the Alliance's motions for intervention. App. 737-42.

IV. District Court's Denial of a Preliminary Injunction

On October 14, the Middle District of North Carolina denied Applicants' motions for preliminary injunction. *See* App. 50-140. The court determined that all Applicants lacked standing for their vote dilution, Elections Clause, and Electors Clause claims. *See* App. 91-92, 120-24. The court further held that only individual voters who had already cast ballots had standing to raise disparate treatment claims, and found that those Applicants had failed to establish a likelihood of success regarding their challenges to the postmark definition and ballot drop-off stations, including the entirety of Numbered Memo 2020-23. *See* App. 94, 110-11, 113. The court found "the guidance contained in Numbered Memo 2020-23 was already in effect at the start of this election as a result of [NCSBE's] administrative rules," and thus, even under its flawed equal protection analysis, Applicants failed to demonstrate a likelihood of success on the merits of their challenge to that Numbered Memo. App. 111. Likewise, because North Carolina's law does not define "postmark," NCSBE's definition of "postmark" under Numbered Memo 2020-22 also presented no issue. App. 113. Though the court erroneously found those few Voter Applicants were likely to succeed on their equal protection challenges to cure procedures for missing witness or assistant signatures and the ballot receipt deadline extension, *see* App. 101, the witness cure challenges were mooted by an order issued in *Democracy North Carolina v. North Carolina State Board of Elections*, No. 1:20CV457, 2020 WL 6058048 (M.D.N.C. Oct. 14, 2020), and the court declined to enjoin the receipt deadline extension, relying on this Court's ruling in *Purcell v. Gonzalez*, 549 U.S. 1

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(2006). *See* App. 117-18. On October 16, the district court denied Applicants' motion for a stay pending appeal, or alternatively to leave the TRO in effect pending appeal. *See* App. 743-45.

V. Ongoing State Court Proceedings

During the same period, on October 15, the state appellate court granted a temporary stay, pending a ruling on Applicants' petitions for writs of supersedeas. App. 790-91. Four days later, the state appellate court denied Applicants' petitions. App. 147-48. Accordingly, NCSBE promptly issued Numbered Memos 2020-22 and 2020-23, which were no longer subject to a TRO in federal court or a stay in state court. As a result, countless North Carolinians have relied on the extended ballot receipt deadline, made the choice to vote by mail as a result of the extension, and determined when to mail their ballots based on the new deadline. And, per *all* parties'—*including Applicants'*—mutual agreement and understanding and after giving notice to the state appellate court, NCSBE proceeded with a further revised version of Numbered Memo 2020-19, which implemented a cure process that did not treat the absence of a witness or assistance signature as a curable defect. As a result, that Numbered Memo is no longer at issue here.

On October 21, Applicants petitioned the North Carolina Supreme Court for writs of supersedeas and moved for temporary stays pending review of those petitions. App. 825-950. Just yesterday, the North Carolina Supreme Court denied the motions for temporary stay. App. 143-46. Applicants' petitions for writs of supersedeas are still pending.

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VI. Fourth Circuit En Banc (12-3) Decision

In the meantime, on October 15 and 16, Applicants noticed appeals to the Fourth Circuit and filed emergency motions for an injunction pending appeal. App. 746-89, 792-821. On appeal, Applicants did not challenge Numbered Memo 2020-23 (establishing separate absentee ballot drop-off stations) and challenged the further revised Numbered Memo 2020-19 only to the extent it incorporates the extended receipt deadline at issue in Numbered Memo 2020-22. Thus, the only issue before the Fourth Circuit was "whether to grant an injunction—which a district court ha[d] already denied—of the ballot-receipt extension"; accordingly, the ballot receipt deadline is the only issue properly before this Court. App. 7.

The Fourth Circuit consolidated Applicants' appeals and granted hearing en banc on October 19. App. 822-24. The following day, in a 12-3 decision, the Fourth Circuit denied Applicants' stay motions. Writing for the majority, Judge Wynn, emphasized that "*Purcell* strongly counsels *against* issuing an injunction here" because "the ballot-receipt extension has been the status quo ever since the [state] trial court approved the settlement (October 2)." App. 8-9 (citing *Andino v. Middleton*, No. 20A55, -- S. Ct. --, 2020 WL 5887393, at *1 (Oct. 5, 2020)). Judge Wynn noted—contrary to the dissent's unwarranted hyperboles—that the implementation of a mere six-day administrative extension of the receipt deadline does not suggest "the sky is falling." App. 4. And despite the dissent's incorrect statement that "the witness-requirement issue is also before [it,]" App. 8, the only issue Applicants raised was the receipt deadline. In an effort to apply their own policy judgments to the facts before

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them, the dissent "attempt[ed] to stretch *Purcell* beyond its clear limits to cover not just federal court action, but also action by state courts *and* state executive agencies acting pursuant to a legislative delegation of authority." App. 10. Joining three other state and federal courts in rejecting Applicants' claims, the Fourth Circuit held that in addition to *Purcell* and *Andino* admonishing federal courts *not* to intervene at this late stage, Applicants lacked standing to bring their Elections and Electors Clause challenges, *Pullman* abstention was appropriate, and notwithstanding these facts, Applicants were unlikely to succeed on the merits of any of their claims. App. 17-18.

Now, a mere ten days before election day, at a crucial time when North Carolina voters have relied on NCSBE's guidance regarding the receipt deadline to inform when they request and mail their absentee ballots (and where North Carolina is already within the window in which USPS warned ballots mailed may not be received in time to meet the unmodified receipt deadline), Applicants ask this Court to upend the status quo and risk the disenfranchisement of North Carolina voters in the process. Meanwhile, Applicants have continued to pursue parallel state court appeals and await a ruling from the North Carolina Supreme Court.

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ARGUMENT

Applicants bear a heavy burden to demonstrate that the extraordinary remedy of a writ of injunction is warranted. "The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction." *Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, J., in chambers). The Court has "consistently stated, and [its] own Rules so require, that such power is to be used

sparingly." *Id.; see* S. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised"). Issuance of such an "injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

To meet this heavy burden, first, "an applicant must demonstrate that 'the legal rights at issue are indisputably clear.'" *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers) (quoting *Turner Broad. Sys., Inc.*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers)). Second, "[a]n injunction is appropriate only if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)).

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I. The Application for injunction pending appeal seeks unprecedented intrusion into ongoing state court proceedings, and this Court should abstain.

Before addressing the merits of Applicants' request for extraordinary relief in the form of an injunction pending appeal, and the numerous reasons why they have failed to demonstrate a clear right to this remedy, the Court should take stock of the procedural posture of this litigation and the fundamental principles of federalism and comity that Applicants attempt to cast aside. What began as an undisguised, fully transparent attempt to bypass potential unfavorable rulings in ongoing state court

proceedings has escalated to competing, parallel legal proceedings in the federal and state courts of last resort, where many of the same Applicants have simultaneously raised identical state law questions for each court's review. "Few cases implicate the 'dual aims' of the *Pullman* abstention doctrine—avoiding advisory constitutional decisionmaking and promoting the principles of comity and federalism—more strongly than this one." App. 16 (quotation marks omitted). Because "state courts are the ultimate expositors of state law," North Carolina courts should have the last word. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975).

For these reasons, the overwhelming majority of the Fourth Circuit, sitting en banc, correctly determined that the doctrine established in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), warrants abstention in this case. *See* App. 14-17. This Court has announced that under *Pullman*, "[a]bstention is appropriate 'in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)). Though not required for *Pullman* abstention, "[w]here there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim, [the Court] ha[s] regularly ordered abstention." *Harris Cnty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975).

If the procedural posture of this case does not demand *Pullman* abstention, then it is unclear what does. Applicants have now asked no fewer than three federal

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courts to decide questions of state law, namely whether the state legislature has properly delegated to NCSBE the authority to enter the Consent Judgment and promulgate the accompanying Numbered Memos, while simultaneously litigating the same issues in state court, including, currently, the North Carolina Supreme Court.[6] App. 825-950. The State Court has already considered and rejected Applicants' narrow interpretation of NCSBE's authority in entering the Consent Judgment, and the state appellate court refused to stay that judgment when presented with the same arguments, *see* App. 188-98, 147-48. A federal district court reached the opposite conclusion, to be sure, *see* App. 79, but that conflicting decision simply suggests that the state law questions presented in this case are unsettled, which counsels in favor of abstention; state courts, being "the ultimate expositors of state law" should thus have the final word. *Mullaney*, 421 U.S. at 691.

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There is no question, as the Fourth Circuit acknowledged, "that the resolution of this state law question is 'potentially dispositive.'" App. 15. If the North Carolina Supreme Court agrees with the lower state courts that NCSBE acted within its authority, "there is plainly no Elections Clause problem." App. 15; *see* App. 42 (dissent agreeing "confident[ly] that [NCSBE] could legally extend voting" in numerous situations). Further, even if Applicants' equal-protection claims were colorable—they are not, *see infra* Section III—NCSBE's authority to promulgate the challenged

[6] Additionally, the Fourth Circuit also highlighted that "[w]hether ballots are *illegally* counted if they are received more than three days after Election Day"—which is a necessary determination for Applicants' otherwise unfounded equal-protection theory—"depends on an issue of state law from which [federal courts] must abstain." App. 13.

Numbered Memos negates the foundation of Applicants' disparate-treatment and vote-dilution theories: extending the receipt deadline would not contravene state law and could not result in any illegal ballots.[7] *See* App. 16-17; *see also* Wise Appl. at 19-20 (stating that whether ballots cast under Memos are "lawful" is "precisely what is in dispute" in Applicants' equal-protection challenges); Moore Appl. at 22, 24 ("[The deadline extension] subjects Heath and Whitley to 'arbitrary and disparate treatment' by 'contraven[ing] the fixed rules or procedures' . . . .").

This Court's other abstention decisions, while not expressly invoked by the Fourth Circuit, nonetheless underscore the principles of federalism and comity at stake here. In *Pennzoil Co. v. Texaco, Inc.*, for instance, the Court held that abstention is required when the losing party in a state court proceeding turns to federal court seeking to enjoin enforcement of the state court judgment, even if they allege federal constitutional violations. 481 U.S. 1, 13 (1987). The Court—citing "the importance to the States of enforcing the orders and judgments of their courts"—held that the federal court should "defer[] on principles of comity to the pending state proceedings," *Id.* at 13-14, 17, rather than render the state court's adjudication nugatory. And in *Growe v. Emison*, 507 U.S. 25 (1993), when a federal district court pre-empted

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[7] Given that "a state trial court approved of the ballot-receipt extension, and a state appellate court declined to enjoin it," it is highly likely that this state law question will be resolved in Respondents' favor. App. 15 n.9. "[A]ll evidence suggests that the state courts do not believe [NCSBE] acted beyond its authority in ordering the extension." App. 15 n.9; *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940) ("A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable.").

ongoing state court litigation and enjoined state officials from implementing a state court-ordered redistricting plan, this Court unanimously reversed, holding that the district court erred in not "stay[ing] its hand" and deferring to the state court action. *Id*. at 33, 37. Just as "Minnesota can have only one set of legislative districts," North Carolina can ill afford to have competing judgments that seek to establish absentee voting procedures with little more than a week left before election day. *Id*. at 35.

These collateral attacks on state court proceedings are precisely what federal abstention doctrines seek to avoid, particularly where Applicants have turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co.*, 481 U.S. at 14. As the Fourth Circuit noted, "[t]his fast-moving case is proceeding in state court and involves an ongoing election—two sound reasons for us to stay our hand." App. 5. And the fact that the resolution of actively pending state law questions could moot (or eliminate) Applicants' federal constitutional claims is all the more reason for this Court to abstain.

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II. Applicants cannot establish any right to relief under the Electors or Elections Clauses.

Should the Court proceed to the merits of the Applications, several threshold legal defects preclude any relief on Applicants' Electors and Elections Clause claims. First, their purported injuries rest entirely on the invasion of institutional rights held by the state legislature, which is not before the Court and whose interests cannot be advanced by individuals lacking authority to act on its behalf. Second, even if the General Assembly were a party to this action, the election directives Applicants challenge are entirely within the scope of authority delegated *by the General*

Assembly to NCSBE. The Fourth Circuit thus correctly determined that Applicants failed to demonstrate a likelihood of success, much less an indisputable right to relief as is required to obtain the extraordinary injunction Applicants seek here.

1. Applicants lack standing to assert violations of the Elections and Electors Clauses.

Both the district court and the en banc Fourth Circuit agreed that none of the Applicants who seek this Court's intervention into the administration of North Carolina's elections have suffered any cognizable injury under the Elections or Electors Clauses. 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). Applicants must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Moreover, prudential considerations require "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief 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)).

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This Court has made clear that individuals, including legislators, lack standing to vindicate purported institutional injuries suffered by the state legislature as a whole; yet that is precisely the claim that Applicants Moore and Berger—two individual legislators and presiding officers of the General Assembly—advanced in

their federal court action.[8] As the district court correctly explained: "the Supreme Court [has] found a lack of standing where '[legislative plaintiffs] have alleged no injury to themselves as individuals'; where 'the institutional injury they allege is wholly abstract and widely dispersed'; and where the plaintiffs 'have not been authorized to represent their respective [legislative chambers] in [an] action." App. 121-22 (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)).

Although Moore and Berger are leaders of their respective chambers of the General Assembly, their titles alone are insufficient to confer standing. *Cf. Raines*, 521 U.S. at 812; *Karcher v. May*, 484 U.S. 72, 81-82 (1987) (explaining that presiding legislative officers were proper parties only because state law authorized them to represent the state legislature in this type of litigation). To assert an institutional injury to the General Assembly as a whole, Moore and Berger must demonstrate that they have been authorized by the General Assembly to represent its interests in this lawsuit—a burden they cannot carry. App. 122 ("The General Assembly has not directly authorized Plaintiffs to represent its interests in this specific case."); *cf. Ariz.*

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[8] There is no question that Republican Committee Applicants and Voter Applicants lack standing to bring an Elections or Electors Clause claim, and Applicants provide no serious argument to assert otherwise. *See* Moore Appl. at 28-29 (arguing only that one voter plaintiff has standing to pursue and equal protection claim). Indeed, this Court has squarely held that private citizens do not have standing to bring an Elections Clause challenge of the type that Applicants press here. *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam). This edict also bars Applicants' Electors 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 also, 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). This is because "[t]he only injury [private citizen] plaintiffs allege is that . . . the Elections Clause . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *See Lance*, 549 U.S. at 441-42; Moore Appl. at 13-18.

State Legislature at 802 (holding state legislature could pursue Elections Clause challenge because it was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers") (quotation marks omitted).

To the extent Moore and Berger attempt to rely on N.C. Gen. Stat. § 120-32.6 ("Certain Employment Authority") and § 1-72.2 ("Standing of Legislative Officers"), "[n]either statute" "authorizes them to represent the General Assembly as a whole when acting as plaintiffs in a case such as this one." App. 123. These provisions state only that, in judicial proceedings challenging the validity or constitutionality of a North Carolina statute or constitutional provision, the Speaker of the House and the President Pro Tempore of the Senate jointly represent the General Assembly for the purpose of defending such challenged provisions. *See* N.C. Gen. Stat. §§ 120-32.6; 1-72.2. That is not the procedural posture through which this case appears. Moore and Berger are not defending an action challenging the validity or constitutionality of an act of the General Assembly, rather, they *initiated* this federal court action to challenge NCSBE's Numbered Memos and the Consent Judgment. App. 14.

Berger and Moore thus appear as individuals who lack authority to stand in the General Assembly's shoes. And because of their misplaced reliance on the state legislature's institutional rights, they failed to identify any particularized, concrete, or cognizable injury that they personally have suffered or will suffer as a result of the Numbered Memos. Instead, the only injury they allege is an institutional one shared by the entire General Assembly: that NCSBE has purportedly impermissibly stepped

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into the legislative space, usurping the General Assembly's power in the process. Moore Appl. at 16-21. *But see Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) ("[I]ndividual members lack standing to assert the institutional interests of a legislature.") (citing *Raines*, 521 U.S. at 829); *Corman v. Torres*, 287 F. Supp. 3d 558, 571-73 (M.D. Pa. 2018) ("United States Supreme Court precedent is clear—a legislator suffers no Article III injury when alleged harm is borne equally by all members of the legislature.").[9]

Even if Applicants could establish individual injuries, their Elections and Electors Clause claims necessarily "rest . . . on the legal rights or interests of third parties,'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499), and they have identified no "'hindrance' to the [General Assembly's] ability to protect [its] own interests," *id.* 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). Thus, applying the "usual rule" of prudential standing, *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 392 (1988), Applicants cannot assert claims on the General Assembly's behalf, and are certainly not entitled to the extraordinary remedy of an injunction pending appeal on those grounds. *Hughes v.*

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[9] 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.

City of Cedar Rapids, 840 F.3d 987, 992 (8th Cir. 2016); *see also Corman*, 287 F. Supp. 3d at 571-73.

2. Applicants' Elections Clause and Electors Clause claims fail on the merits.

While Applicants seek to re-define the scope of the Elections and Electors Clauses, the issue before this Court is far more straightforward. There is no legitimate question—as even the three dissenting Fourth Circuit judges upon whom both sets of Applicants rely recognized—that "[NCSBE], or other state election boards, [have authority] to make minor *ad hoc* changes to election rules in response to sudden emergencies." App. 41. Indeed, the dissenting judges rightly recognized the "long history, both in North Carolina and in other states, of this power being exercised" to facilitate "the smooth functioning of elections," App. 41-42, and expressed confidence that NCSBE could use such power to change the "time" of voting during emergencies in direct contravention of a state statute. App. 42 ("For example, if an electrical power outage halts voting in a precinct, we are confident that [NCSBE] could legally extend voting in that precinct.").

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This Court's decisions confirm this understanding. The Elections and Electors Clauses vest authority in "the Legislature" of each state to regulate congressional and presidential elections. U.S. Const. art. I, § 4, cl.1, art. II, § 1, cl. 2. This Court has held, however, that state legislatures can delegate this authority. *See, e.g.*, *Ariz. State Legislature*, 576 U.S. at 807 (noting that Elections Clause does not preclude "the State's choice to include" state officials in lawmaking functions so long as such involvement is "in accordance with the method which the State has prescribed for

legislative enactments" (quoting *Smiley v. Holm*, 285 U.S. 355, 367 (1932))); *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)).

Thus, the question Applicants ask this Court to consider is simply one of state law: whether NCSBE exceeded the statutory authority delegated by the General Assembly. As this Court has repeatedly recognized, such questions are wholly within the province of state courts. *Mullaney*, 421 U.S. at 691 ("This Court [] repeatedly has held that state courts are the ultimate expositors of state law.") (citations omitted)). In fact, one state court has already found that NCSBE was indeed authorized to issue the Numbered Memos, and the state appellate court has refused to stay that trial court's ruling.[10] Indeed, while pursuing this appeal, Applicants have simultaneously filed petitions for writs of supersedeas and motions for a stay in the North Carolina Supreme Court. App. 825-950.

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The Fourth Circuit also determined correctly that the Consent Judgment and its accompanying Numbered Memos are consistent with the General Assembly's delegation of authority to NCSBE. That is because North Carolina law confers upon NCSBE broad, general supervisory authority over elections as set forth in N.C. Gen. Stat. § 163-22(a). As part of its supervisory authority, NCSBE is empowered to "compel observance" of election laws and procedures as set forth in N.C. Gen. Stat. § 163-22(c). NCSBE's Executive Director, as the chief state elections official, has the

[10] Additionally, the North Carolina Supreme Court denied Applicants' requests for temporary stays, and their petitions for writs of supersedeas are still pending. App. 143-46.

authority to issue Emergency Orders pursuant to N.C. Gen. Stat. § 163-27.1 and 08 N.C. Admin. Code 01.0106 ("Emergency Powers of Executive Director"), 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. The State's election laws specifically contemplate instances in which the Executive Director's orders may not align with previously enacted laws during emergencies, and advise that the Executive Director "avoid," but do not prohibit, such conflict. N.C. Gen. Stat. § 163-27.1(a) ("In exercising those emergency powers, the Executive Director shall avoid *unnecessary* conflict with the provisions of this Chapter.") (emphasis added). Furthermore, the State Court's entry of the Consent Judgment invalidated the pre-existing ballot receipt deadline, and thus NCSBE "shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable," and, "upon recommendation of the Attorney General, to enter into agreement with the courts in lieu of protracted litigation until such time as the General Assembly convenes." *Id.* § 163-22.2.

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These provisions authorize NCSBE's Numbered Memos under firmly established tenets of North Carolina statutory construction, which provides the applicable standards for analyzing statutory delegations to NCSBE—and not the principles of federal administrative law upon which Applicants rely, *see* Wise Appl. at 15-17. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 515 (1989) (applying state canons of statutory interpretation when interpreting state law); *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 482 (4th Cir. 2007)

("[W]e are . . . obliged to interpret the [state] Act by applying the principles of statutory construction that would guide a[] [state] court in making such a decision."); *see generally Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("[T]he law to be applied in any case is the law of the state."). First, remedial statutes, such as N.C. Gen. Stat. § 163-27.1, must be construed liberally in the light of the evils sought to be eliminated, the remedies intended to be applied, and the legislative objective, *Burgess v. Joseph Schlitz Brewing Co.*, 259 S.E.2d 248 (N.C. 1979); *Puckett v. Sellars*, 69 S.E.2d 497 (N.C. 1952). The evil in this scenario is the disruption to the normal election schedule caused by COVID-19 and USPS delays, which supports the extension of the ballot receipt deadline to prevent the arbitrary disenfranchisement of voters who timely submit their ballots. Further, under North Carolina law, the interpretation of an enabling statute given by the regulatory agency involved—here, NCSBE—should be accorded considerable weight. *See High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 319 (2012) (noting that North Carolina courts "give great weight to an agency's interpretation" when evaluating the "limits of statutory grants of authority to an administrative agency"); *see, e.g.*, *Good Hope Health Sys., LLC v. N.C. Dep't of Health & Human Servs.*, 659 S.E.2d 456, 471, *aff'd.*, 362 N.C. 504 (2008) ("We hold that the Agency's interpretation of its enabling statutes is reasonable and due some deference.").

Applicants' general disregard for these state court judgments and legal standards is revealed yet again when they suggest that state courts should *not* be afforded deference in interpreting state law questions in light of the concurrence in

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Bush v. Gore, 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring). Putting aside that the majority did not adopt this reasoning, *Bush* was expressly "limited to the . . . circumstances" before the Court and has not been cited by a majority opinion of the Court since. *Id.* at 109. Even assuming Applicants are correct that a "significant departure" from statutory election laws "presents a federal constitutional question" (they are not), that is not the case before this Court. Moore Appl. at 27 (citing *Bush*, 531 U.S. at 113). North Carolina law already instructed voters to postmark their ballots by election day and allowed them to be received by election officials up to three days after election day; the modified receipt deadline simply extends that deadline for the delivery of ballots to coincide with the deadline applicable to military and overseas ballots and to account for well-documented USPS delivery delays. It is, in effect, a minor change in the timeline for receiving ballots that requires nothing different of the voters themselves who are still required to mail their ballots by election day. And contrary to the Wise Applicants' suggestion, North Carolina law imposes criminal penalties on unauthorized individuals who attempt to deliver ballots belonging to others, but does not automatically render those ballots invalid. *See* N.C. Gen. Stat. § 163-237(d) (criminalizing fraud in connection with absentee ballots). In this regard, there has been no change in the law.

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Finally, to the extent state regulations in the context of federal elections "implicate a uniquely national interest," Wise Appl. at 17 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983)), based on "federal constitutional power," the U.S. Constitution is clear about which branch of federal government has "the power

to alter those regulations or supplant them altogether," *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8-9 (2013). It is not the federal judiciary, nor even this Court, but Congress. The Elections Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as *Congress* declines to pre-empt state legislative choices." *Id.* (emphasis added) (quoting *Foster v. Love,* 522 U.S. 67, 69 (1997)). Therefore, it is the role of Congress, not this Court, to restrain North Carolina's election regulations under the Elections Clause. *See id.*

III. Applicants are not entitled to relief on their Equal Protection Clause claims.

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Voter Applicants' Equal Protection claims were "beyond [the Fourth Circuit's] understanding" because they rely on non-existent theories of constitutional harm and distort equal protection jurisprudence beyond recognition. As the Fourth Circuit recognized, Voter Applicants have cast their ballots successfully; none allege any personal disadvantage caused by the Numbered Memos. They merely complain that others may have an easier time voting—which is not only factually incorrect but assumes a previously unrecognized constitutional right to dictate how others vote—and make unsupported assumptions about vote dilution and fraud that even the district court refused to accept. Their Equal Protection Clause claims plainly fail on the merits and do not support an injunction pending appeal.

1. Applicants have not suffered a cognizable injury.

As cognized in their pleadings, Voter Applicants are injured because they have already voted under a more rigorous regime and voters following them will be able to vote with fewer restrictions. Though false, that is not an injury sufficient to

demonstrate an entitlement to prospective injunctive relief. Surely, Voter Applicants do not intend to vote again in the November election, and any injunction issued against the Numbered Memos would impose restrictions on other voters but confers no additional benefit (nor alleviates any injury) to Applicants in this case. This Court's decision in *City of L.A. v. Lyons*, 461 U.S. 95 (1983) is instructive. There, the plaintiff sued for injunctive relief seeking a ban on the Los Angeles Police using chokeholds because he had been previously subject to a chokehold. *Id.* at 99-100. This Court denied his relief because it was speculative that the plaintiff himself would be subject to a chokehold in the future, and although he could show he had once been subject to unconstitutional conduct, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).

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So too here. Even if Voter Applicants suffered a cognizable injury under the Equal Protection Clause by casting their ballots under a more restrictive regime, they cannot plausibly allege any continuing or future injury that an injunction could cure because they have already voted, successfully. Federal courts have great powers, but they do not possess time machines. *See, e.g.*, *Herron for Cong. v. Fed. Election Comm'n*, 903 F. Supp. 2d 9, 13 (D.D.C. 2012) ("[T]his court has no power to alter the past."). In the election context, previously-suffered voting injuries do not provide standing for prospective injunctive relief absent some reasonable contention that they will occur again. *See, e.g.*, *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d

977, 982 (6th Cir. 2020); *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 811 (8th Cir. 2007). Applicants have alleged no future prospect of disparate treatment, and Courts nationwide, including both the district court and the Fourth Circuit in this case, have found the only potential future harm plaintiffs have alleged—vote dilution—too speculative to establish standing. This alone should result in the denial of Applicants' request.

Applicants also fail to allege a theory of vote dilution that is concrete or particularized to them, as opposed to a generalized, speculative grievance that can be raised by any voter in North Carolina. Their claims rely entirely on the unsupported assumption that the power of their votes will be diluted by the casting of unlawful ballots as a result of the Consent Judgment, but it is hardly clear that this is even a correct use of the phrase "vote dilution" or can be the basis for any cognizable injury whatsoever. *See Duncan v. Coffee Cnty.*, 69 F.3d 88, 94 (6th Cir. 1995) ("[V]ote dilution is a term of art. Merely expanding the voter rolls is, standing alone, insufficient to make out a claim of vote dilution.").

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In any event, courts have consistently rejected this theory as a basis for standing because it is unduly speculative and impermissibly generalized. *See, e.g.*, *Carson v. Simon*, No. 20-cv-2030, at *8 (D. Minn. Oct. 11, 2020) (holding "allegations of vote dilution due to the counting of hypothetical, allegedly unlawful ballots is a generalized grievance that does not confer standing"); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *35 (W.D. Pa. Oct. 10, 2020) ("[A] claim of vote dilution brought in advance of an election on the theory of the risk

of potential fraud fails to establish the requisite concrete injury for purposes of Article III standing."); *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, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020) (distinguishing cognizable vote dilution in redistricting context and generalized dilution as a result of speculative voter fraud; "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*, 457 F. Supp. 3d 919, 926 (D. Nev. 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" as a result of allegedly inaccurate voter rolls "[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact."). And it is telling that Applicants point to no authority (beyond the initial district court that granted a TRO here) which has accepted anything remotely similar to the limitless vote dilution theory advanced in Applicants' briefs.

Having failed to identify a "concrete and particularized" injury to support their Equal Protection Clause claims, the Fourth Circuit correctly denied Applicants'

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request for an injunction pending appeal, and this Court should do the same. *See Spokeo*, 136 S. Ct. at 1548.

2. Applicants' equal protection claims fail on the merits because they are not subject to disparate treatment.

Compounding Applicants' lack of injury is the absence of any disparate treatment of Voter Applicants under any of the Numbered Memos that remain at issue. For instance, the receipt deadline extension ensures that all eligible ballots will be counted if they are mailed by election day and received by November 12. The deadline extension does not impose any greater or lesser requirement on voters, who are still required to submit their ballots by election day, and it applies to all mailed ballots, even those cast earlier by Voter Applicants should they arrive after November 6 (the original deadline). No ballot will be accepted or rejected based on differential standards, and Applicants fail to establish that their—or anyone else's—votes will be valued less than others. *See Bush*, 531 U.S. at 104-05.

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Here again, Applicants' reliance on this Court's decision in *Bush*—once more ignoring that decision's limited applicability—is misplaced. *See supra* at Section II.2. In *Bush*, this Court found that Florida voters were subject to unlawful arbitrary treatment due to the lack of "uniform rules" on *how* to implement post-election procedures for determining the intent of the voter and identifying a legal vote, resulting in county-to-county variation and subjecting voters to arbitrary acceptance or rejection of their ballots. *Id. Bush* thus stands for the proposition that arbitrary and disparate treatment in the *valuation* of one person's vote in relation to another's can implicate the Equal Protection Clause—concerns which are wholly absent in this

case. Under the election procedures currently in place, the validity of each ballot will be assessed under the same standards and Applicants fail to present any argument demonstrating otherwise.

As the district court found, a change in election procedures, even after voting has started, does not by itself trigger an equal protection violation. App. 98-99. Even the dissenting opinion from the Fourth Circuit's en banc order expressed confidence that election officials can "legally extend voting" in a precinct that suffered a power outage, for instance, which not only contradicts Applicants' disparate treatment theory, App. 42, but also underscores the flaw in Applicants' theory that the Equal Protection Clause forecloses all changes to election procedures—including those designed to protect the right to vote—once an election is underway.

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3. Applicants' theory of standing would result in a limitless expansion of the Equal Protection Clause.

While the factual premise of Applicants' equal protection claims—that they are subject to disparate treatment—is incorrect, the theory they advance is even more problematic. Their arguments suggest that any differential treatment, without any personal injury or disadvantage, creates a constitutional harm. That is a breathtaking expansion of the Equal Protection Clause. Accepting this theory would confer a constitutional injury on just about anyone every time a law changes; individuals who abided by a former law would presumably suffer an equal protection injury simply because other individuals may be subject to fewer restrictions. Taking Applicants' argument to its logical conclusion would lead to absurd results. It would mean that 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—just as North Carolina did on September 1 when it introduced its online registration portal. *See* Bipartisan Elections Act of 2020, 2020 N.C. Sess. Laws 2020-17 ("HB1169"). Yet that is precisely the argument Applicants have advanced, and which the Fourth Circuit found to be "beyond [their] understanding." App. 12; *but see Short v. Brown*, 893 F.3d 671, 677-78 (9th Cir. 2018) ("Nor have the appellants cited any authority explaining how a law that makes it easier to vote would violate the Constitution."). The Court should similarly reject Applicants' invitation to adopt a limitless expansion of the Equal Protection Clause. *Cf.* App. 12 ("Moreover, in a sharp departure from the ordinary voting-rights lawsuit, *no one was hurt by this deadline extension*.").

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IV. Granting Applicants' extraordinary requested relief will not aid the Court in its jurisdiction.

"An injunction is appropriate only if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)). Whether or not the court grants this extraordinary injunction has no bearing on the Court's jurisdiction; in either scenario, the impending election will occur, and the issues presented in this case are *just as likely* be mooted. *See Moore* Appl. at 26. Thus, Applicants cannot demonstrate that granting the injunction is necessary or appropriate to aid this Court's jurisdiction. The Court faces a choice between two options—staying its hand or exercising its exceedingly rare power to "issue an order *altering* the legal status quo," *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (emphasis in original)—

neither of which is more likely than the other to preserve the Court's jurisdiction. Under these circumstances, the Court should deny Applicants' requested relief.

Not only is this relief unnecessary to preserve the Court's jurisdiction, it is, in fact, unavailable to Applicants. This Court's Rules require Applicants to demonstrate "that adequate relief cannot be obtained in any other form or from any other court." S. Ct. R. 20.4(a). But Applicants have raised these *exact* claims before the North Carolina Supreme Court, App. 825-950, and they openly confess that—should that court deny their request for a stay—they "plan to seek appropriate relief from this Court, which could be as early as next week." Moore Appl. at 13 n.3. Thus, Applicants' admission of the availability of the state forum—which is the *proper forum* in which to pursue their claims, *see supra* Section I—is sufficient reason to deny the extraordinary relief they seek here, because "[e]ven without an injunction pending appeal, the applicants may continue their challenge to the regulations" in the state courts. *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers).

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Because Applicants cannot demonstrate that granting the injunction is necessary to aid the Court's jurisdiction, they rely largely on far-fetched allegations of irreparable harm. But this too is insufficient to warrant an injunction. *See id.* ("While the applicants allege they will face irreparable harm . . . , they cannot show that an injunction is necessary or appropriate to aid our jurisdiction."). Even assuming this factor *were* relevant (it is not), Applicants have not and will not suffer any injury, much less irreparable harm. And to the extent Applicants Wise, Heath,

and Whitley suffered an injury by voting under a more restrictive regime, improbable as that theory may be, they cannot plausibly allege they will endure this harm in the future, *see City of L.A.*, 461 U.S. at 111.

Finally, the equities and public interest weigh strongly against an injunction. The slight (or non-existent) harm to Applicants on the one hand must be weighed against the harm to NCSBE, the Alliance, and all North Carolina voters by entering an injunction pending appeal, which will be substantial. For instance, North Carolinians have already been notified of the receipt deadline and will take that into account in exercising their fundamental right to vote. Should the Court, at this late date, reverse NCSBE's guidance, countless North Carolinians who have relied on this guidance in deciding whether to vote by mail, and how early to mail their ballot, will be disenfranchised by a receipt deadline, revised just days before the election, which requires their ballots to be delivered to their county boards six days earlier than previously advertised. Indeed, according to USPS's warnings, it may already be too late for voters who requested absentee ballots to receive and return them by mail before the original deadline, which Applicants seek to reinstate. App. 213-15.

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V. The concerns animating *Purcell* counsel in favor of denying the requested relief.

Again, with election day just over a week away, we have already reached the window in which USPS warned it would be too late to mail ballots to meet the original receipt deadline, App. 213-15, and an untold number of voters have reasonably relied on the current receipt deadline in making their plans to vote. They cannot now go back in time and send their absentee ballots to comply with the original deadline, so

any change at this point poses a substantial risk of voter confusion and disenfranchisement. Under these circumstances, this Court's ruling in *Purcell* counsels against the extraordinary relief requested relief here. First, *Purcell* is a caution to a reviewing court—deprived of the full record before a lower court—not to act hastily close to elections. In that case, the district court considered evidence presented to it and denied a request for a preliminary injunction that would have prevented Arizona from enforcing a new identification requirement. 549 U.S. at 3-4. The Ninth Circuit granted an injunction pending appeal a little over a month before the upcoming election. This Court found that the Ninth Circuit erred in granting the injunction without giving appropriate deference to the findings and deliberations of the district court—particularly given the proximity to the election and the increasing risk of voter confusion caused by conflicting court orders as election day approaches. *Id.* at 4-5.

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Applicants' ongoing collateral attack on state court proceedings have effectively placed the reviewing federal courts in the same position as the Ninth Circuit in *Purcell*. Having failed to convince two state courts (trial and appellate), a federal district court, and the Fourth Circuit, sitting en banc, to grant their requested injunction, Applicants seek this Court's intervention, with just over a week remaining before election day, to enjoin election procedures that are currently in place. The consequences are significant and potentially disenfranchising for North Carolina voters, particularly those who have yet to mail their ballots to their county boards, and, under Applicants' requested injunction, would learn in the week before the

election that their mailed ballots must arrive at their county election board offices six days earlier than advertised.

While *Purcell* certainly does not prohibit the federal judiciary from interceding close to elections to defend the Constitution, it advises federal courts to tread carefully in deciding whether to do so. *Id.* at 4-6. The district court and Fourth Circuit acted entirely consistent with that admonition. And although the district court found (incorrectly) that Applicants had a likelihood of success on their equal protection claim, it decided that given the timing and the impending election, it would be inappropriate to enjoin NCSBE from implementing the Consent Judgment and the accompanying Numbered Memos. The Fourth Circuit likewise determined that *Purcell* was one of many reasons why an injunction is inappropriate here.

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This Court's recent cases invoking *Purcell* demonstrate why the district court and the Fourth Circuit's application of this doctrine is correct. Particularly revealing is *Andino*, where this Court applied *Purcell* to stay an injunction pending appeal. As Justice Kavanaugh noted in concurrence, "a State legislature's decision either to keep or make changes to election rules to address COVID-19 ordinarily 'should not be subject to second-guessing by an 'unelected federal judiciary.'" *See* Wise Appl. at 23-24 (citing *Andino*, 2020 WL 5887393, at *2). NCSBE, in consultation with the North Carolina Attorney General's Office, decided that it would provide certainty and clarity to North Carolina's election rules—and protect voters' constitutional rights—by entering into a Consent Judgment in state court, as it was authorized to do. *Purcell* and *Andino* counsel this Court not to interfere in that decision.

Purcell also instructs that to the extent possible, the federal judiciary should seek to maintain the status quo close to elections, and an injunction here would do just the opposite. Applicants misconstrue the current state of affairs, falsely suggesting that the Court would be *enforcing* the status quo by issuing an injunction. *See* Moore Appl. at 25. That is incorrect. The Consent Judgment and accompanying Numbered Memos have been implemented and currently have the force of law; this Court would alter, not maintain, the status quo by issuing the requested injunction. *See, e.g.*, *Growe*, 507 U.S. at 35 (noting that a state court redistricting order, by declaring the legislature's redistricting plan unconstitutional and "adopting a legislative plan to replace it, altered the status quo: The state court's plan became the law of Minnesota."). *Purcell* counsels against a federal court altering the status quo as Applicants request, a concern that applies with significant force where Applicants seek to alter election procedures and the deadlines for the receipt of ballots, with little more than ten days remaining before election day.

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CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that this Court deny Applicants' emergency application for writ of injunction.

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Respectfully submitted,

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