CASE No. 20-2062

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, *et al.*,
Plaintiffs – Appellees,

—v.—

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

On Appeal from the United States District Court for the Middle District of North Carolina

Case No. 1:20-cv-00911-WO-JLW

PROPOSED INTERVENOR-APPELLANTS' MOTION FOR EMERGENCY STAY PENDING APPEAL

MARC E. ELIAS
UZOMA N. NKWONTA
LALITHA D. MADDURI
JOHN M. GEISE
JYOTI JASRASARIA
ARIEL B. GLICKMAN
Perkins Coie LLP
700 13th Street, NW, Suite 800
Washington, DC 20005-3960
Telephone: (202) 654-6200

BURTON CRAIGE
NARENDRA K. GHOSH
PAUL E. SMITH
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: (919) 942-5200

MOLLY MITCHELL
Perkins Coie LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702
Telephone: (208) 343-3434

Attorneys for Proposed Intervenor-Appellants North Carolina Alliance for Retired Americans, Barker Fowler, Becky Johnson, Jade Jurek, Rosalyn Kociemba, Tom Kociemba, Sandra Malone, and Caren Rabinowitz

LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), Counsel for Proposed Intervenors informed the parties of their intent to file this motion. Counsel for Appellants consents to the grant of this motion. Counsel for Appellees did not indicate their consent or opposition prior to filing.

INTRODUCTION

Proposed Intervenors North Carolina Alliance for Retired Americans and seven individual voters (together, the "Alliance") request an emergency stay of the district court's temporary restraining order ("TRO") enjoining enforcement of a North Carolina state court judgment regarding the November election.

On October 2, the Wake County Superior Court (the "State Court") entered a consent judgment resolving the Alliance's challenges under the North Carolina Constitution to restrictions on absentee and in-person voting in the upcoming election. After extensive briefing and argument from the Alliance, Defendant State Board of Elections ("NCSBE"), and Intervenors Timothy Moore, Philip Berger, and several Republican Party entities, the State Court ruled that the Alliance had established a likelihood of success on its claims and that the Alliance and NCSBE's Consent Judgment is consistent with the state and federal constitutions. Less than 24 hours later, the federal district court usurped the State Court's authority and granted Appellees' requested TRO, enjoining enforcement of the State Court's judgment.

In seeking immediate recourse in federal court to overturn an unfavorable state court judgment, Appellees flouted well-established rules of procedure and comity, not to mention the Alliance's constitutional rights. By endorsing Appellees' impermissible collateral attack on the Consent Judgment, the district court violated fundamental principles of abstention and standing and is likely to be reversed on the

merits. Meanwhile, with each passing day, the Alliance and thousands of North Carolinians stand to be irreparably harmed by their eligible votes not being counted. An emergency stay is not only justified but necessary to protect voters' rights under the North Carolina Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

The COVID-19 pandemic has caused significant casualties and disruptions to day-to-day life. North Carolina has over 217,600 confirmed COVID-19 cases and 3,653 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 65 years or older **and people of any age who have serious underlying medical conditions**" "to stay home and travel only for absolutely essential purposes." IAA010. Meanwhile, the Centers for Disease Control and Prevention is warning the country to brace for "the worst fall from a public health perspective, we've ever had." IAA030.

In response, voters are casting absentee ballots at record-breaking levels. Over 1.1 million North Carolinians have requested absentee ballots, with many more expected before the October 27 request deadline. *See* N.C.G.S. § 163-230.1(a). Most are new to voting absentee, and thus more susceptible to making immaterial errors that cause rejection. *See* IAA283.

North Carolina's ballot receipt deadline further 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 they are postmarked by Election Day. *See* N.C.G.S. § 163-231(b)(1), (2). But USPS mail delays persist across the country. In a letter to North Carolina's Secretary of State on July 30, 2020, 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." IAA307-09.

Against this backdrop, the Alliance sued NCSBE and its Chair in the State Court, challenging election laws and procedures that, in light of the pandemic, impose undue burdens on the right to vote in violation of the North Carolina Constitution. IAA343-47. Speaker of the North Carolina House of Representatives Timothy Moore, President Pro Tempore of the North Carolina Senate Philip Berger, the Republican National Committee, National Republican Senatorial Committee, National Republican Congressional Committee, Donald J. Trump for President, Inc., and the North Carolina Republican Party were granted intervention. On August 18, the Alliance moved for a preliminary injunction. *See* IAA243-48. 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, along with the proposed Consent Judgment and Numbered Memos 2020-19, 2020-22, and 2020-23. *See* IAA023-242. Under the Consent Judgment, NCSBE agreed to: (1) count eligible ballots postmarked by Election Day, if received within nine days (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; (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. IAA041-043. In exchange, the 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, Appellees Berger and Moore, with a handful of individuals, preemptively filed this federal suit to enjoin enforcement of the Consent Judgment before the State Court could act. IAA352-74. The Alliance

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

immediately moved to intervene, but that motion remains pending. *See* IAA375-497. On October 2, the State Court held a six-hour hearing, considered evidence and arguments, and ultimately entered the Consent Judgment, which implements the Numbered Memos. *See* IAA498-508. In doing so, it found that (1) NCSBE had legal authority to settle the case, IAA504-06; (2) the Alliance was likely to succeed on the merits, IAA503; (3) the terms of the Consent Judgment are "fair, adequate, and reasonable" and not illegal or collusive, *id.*; (4) the settlement is consistent with the state and federal constitutions, IAA506, and (5) the settlement serves "a strong public interest in having certainty in our election procedures and rules," IAA504; *see* IAA509-31.

Less than two hours later, the district court held a short hearing on Appellees' TRO. The court neither allowed the Alliance to present its case nor mentioned the extensive evidence upon which the State Court relied. *See* IAA532. The following morning, the district court granted Appellees' TRO. *See* IAA533-52. Without ruling on the Alliance's motion to intervene, it transferred the case to the Middle District. *Id.*

As of this filing, the Middle District has not ruled on the Alliance's motion to intervene and has instead set a hearing for October 8. In the meantime, on October 5, the State Court issued its Findings of Fact and Conclusions of Law, and Appellees

Moore and Berger immediately filed a writ of supersedeas and motion for temporary stay of the Consent Judgment in the North Carolina Court of Appeals.

LEGAL STANDARD

To merit a stay pending appeal, appellants must show that they are likely to succeed on the merits, they will be irreparably injured absent a stay, the equitable balance favors a stay, and a stay benefits the public. *Nken v. Holder*, 556 U.S. 418, 434 (2009).[2]

ARGUMENT

I. The district court abused its discretion in exercising jurisdiction in this case.

Appellees' 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,

[2] Review of a TRO is warranted here where a hearing was held before the TRO was entered, and its practical effects are like a preliminary injunction. *Virginia v. Tenneco, Inc.*, 538 F.2d 1026, 1030 (4th Cir. 1976). By October 16, when the TRO expires, many thousands of North Carolinians will have voted. It may be too late to change course and the TRO will have "effectively granted the plaintiff[s] all of the relief which [they] sought." *Id.*; *see Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) ("[T]he requirement of finality is to be given a 'practical rather than a technical construction.'") (citation omitted). Other Circuits have exercised their discretion to review TROs under similar circumstances. *See Hope v. Warden York Cnty. Prison*, 956 F.3d 156, 161 (3d Cir. 2020) (recently hearing TRO appeal given "serious, perhaps irreparable consequence[s]" that "can be effectually challenged only by immediate appeal") (citing cases from four other Circuits).

Appellees have *explicitly* turned to federal court to "interfere with the execution of state judgments." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987); *see* IAA554-55 (inviting federal court to "enter [a TRO] immediately—before the state court acts"). The district court should have abstained under multiple well-established doctrines; issuing the TRO was a clear abuse of discretion.

First, Appellees' 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. Appellees' federal lawsuit seeks to render the State Court's adjudication nugatory by enjoining enforcement of the Consent Judgment.

But the state courts provide the proper avenue for Appellees' challenge. Indeed, Appellees are well aware that they can press their federal constitutional claims through the state appellate process, as they appealed the State Court's judgment after securing the federal TRO. 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). This is particularly so 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"). State delegation of authority is at the center of Appellees' challenges here. Specifically, Appellees asked 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 Appellees Berger and Moore in the State Court, which rejected them after careful consideration. IAA504-06.

Rather than first appealing the State Court's conclusions to a reviewing state court, Appellees improperly sought a second opinion in federal court, which then overstepped by temporarily enjoining enforcement of the State Court's judgment. But if the reviewing state court were to agree with Appellees, there would be nothing left for the federal court to decide; neither the Consent Judgment nor the Numbered Memos would survive. Thus, Appellees' 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).[3]

Third, Appellees' claims run afoul of *Rooker-Feldman*. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). With the entry of the Consent Judgment, Moore and Berger 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 district court's TRO, "lower federal courts

[3] Appellees' federal constitutional claims can be *and already have been* raised in state court.

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.

Finally, *Colorado River* also counsels abstention to permit resolution of parallel state court proceedings. *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."). The 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).

This 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). Appellees 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). Appellees' end-run fares no better merely because they have joined additional parties that lack standing and raise meritless claims. *See infra* Section II. If any case demands abstention, it is this one.

II. The district court erred in adjudicating Appellees' claims because they lack standing.

The district court also erred in issuing the TRO because, as a threshold matter, it lacked jurisdiction. *See* IAA587-91, IAA621-27. 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). Appellees' claims fail to meet this baseline.

Though raised by both NCSBE and the Alliance, the court failed to confront Appellees' lack of standing. The court limited its analysis of the TRO to the Equal Protection Clause claims of individual voters ("Voter Appellees"), which the court found to "raise profound questions concerning arbitrariness and vote dilution[]" because the Numbered Memos purportedly "created multiple, disparate regimes under which North Carolina Voters cast absentee ballots[.]" IAA546-47. The district

court's unspoken conclusion that Appellees somehow had standing for such claims is flawed for at least three reasons.

First, Voter Appellees 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 Appellees' claims are entirely based on the notion that the power of their votes will be diluted by the casting of unlawful ballots as a result of the Consent Judgment or Numbered Memos. But courts have repeatedly rejected this identical theory as a basis for standing, both because it is 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), IAA679 ("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 Appellees fail to allege a "concrete and particularized" injury, *Spokeo*, 136 S. Ct. at 1548, the district court erred by entering any relief in Appellees' case at all.

Second, the relief ordered by the State Court does not personally injure Voter Appellees in any way. They elected to vote well before Election Day and have not alleged any injury or burden in connection with casting their ballots. To the contrary, Voter Appellees' ballots have already been accepted. *See* IAA355. Allowing other lawful voters to cure immaterial issues with their ballots (e.g., an incomplete address for the observer) does not infringe on Voter Appellees' right to vote or have their vote counted. Nor does the fact that voters who prefer to submit their ballots in person can do so at manned drop-off stations without unnecessarily risking their health. The same is true of the State's acceptance of 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 these lawful voters are not disenfranchised as a result of curable mistakes and USPS delivery delays outside of their control. Voter Appellees have no legitimate interest in invoking the power of the federal judiciary to prohibit other lawful voters from having their ballots counted.

Third, Voter Appellees failed to plead any facts that could establish causation as to their Equal Protection claims. Voter Appellees' theory of harm requires an attenuated chain of causation based entirely on conjecture about "ballot harvesting" by non-party actors. 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 confer standing for Voter Appellees' Equal Protection claims.

III. Appellees are not likely to succeed on the merits of their claims.

Even if the federal court action were not barred under abstention or standing doctrines, the TRO should still be stayed because Appellees are unlikely to succeed on the merits of their claims.[4] *See* IAA503.

A. Appellees' unequal evaluation of ballots claim is meritless.

The district court erred in finding that the Numbered Memos would lead to "the unequal evaluation of ballots." IAA663; *see* IAA546-47. The Numbered

[4] The TRO was not based on Appellees' Elections Clause arguments, and for good reason: those arguments are patently unlikely to succeed. Per the U.S. Supreme Court, the Elections Clause permits state legislatures to delegate their authority to state officials like NCSBE. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 807 (2015). As the State Court held, the Legislature delegated to NCSBE the authority to enter the Consent Judgment and promulgate these Numbered Memos. *See* IAA504-06.

Memos apply equally to all voters. Numbered Memo 2020-22 allows all otherwise eligible ballots that are mailed by Election Day to count if received within nine days of the election—including Appellees Heath's and Whitley's ballots. 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.

Even operating under their misconstrued theory, Appellees have failed to articulate, let alone demonstrate, that their right to vote—or anyone else's for that matter—has been burdened or that their votes will be valued less than others'. *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. Heath and Whitley have already successfully voted, and their ballots will count.[5]

At bottom, Appellees take issue with the fact that future voters may face fewer barriers to casting their ballots, even though Appellees have alleged no barriers to successfully casting their own. There is no authority to suggest that a law that makes 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* IAA503. Taking Appellees' argument to its logical conclusion would lead to absurd results. For example, under Appellees' novel understanding of the Equal Protection Clause, someone who is already registered to vote could challenge the introduction of online

[5] Indeed, the State Board instructed county boards not to reject any ballots in mid-September in anticipation of the updated cure process. Appellees allege that their ballots were accepted on September 17 and 21, respectively. Had they made an error on their ballots, whether related to the witness requirement or otherwise, they would have been subject to the cure process formally announced on September 22.

voter registration in the State because that "easier" procedure was unavailable to them at the time of registration. Ultimately, Appellees' 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 release of the Numbered Memos give rise to an equal protection claim. Election procedures are regularly changed 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 had already concluded. *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. Appellees' vote dilution argument lacks merit.

Appellees' vote dilution claim is equally meritless, as 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). In these equal protection cases, plaintiffs allege that their votes are devalued as compared to similarly-situated voters in other parts of the state. Appellees here, by contrast, have not alleged an equal protection claim suggesting that the Consent Judgment or Numbered Memos value some other 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 the vote dilution line of cases into a weapon that voters may use to enlist the federal judiciary to make it more difficult for millions of their fellow citizens to vote, based on unfounded and speculative fears of voter fraud. *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). Appellees have failed to allege facts that give rise to a plausible claim for relief, or even alleged a cognizable legal theory.

IV. The Alliance will be irreparably harmed absent a stay.

The Alliance and its members will indisputably be irreparably harmed absent a stay. The right to vote is protected under the First and Fourteenth Amendments, and the threatened "loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 520-21 (4th Cir. 2002) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1997)); *see also Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm."). This injury is even more irreparable given the impending election; "once the election occurs, there can be no do-over and no redress." *See*

League of Women Voters of N.C. v. North Carolina, 769 F.3d at 224, 247 (4th Cir. 2014). In the State Court, the Alliance presented more than 500 pages of evidence, including four expert reports and 17 voter and other witness affidavits, of the unconstitutional burdens on the right to vote resulting from the ongoing enforcement of challenged North Carolina laws. The State Court found that the Alliance was likely to succeed on those claims, and rather than risk an adverse ruling, NCSBE agreed to a settlement that provided substantial and meaningful relief from these burdens for North Carolina voters. Now, the district court's TRO unconstitutionally encumbers the rights of the Alliance to the franchise without regard to this evidence. The Alliance's threatened injuries thus constitute textbook irreparable harm.

V. The equities and public interest favor a stay.

Finally, the last two factors strongly favor a stay. First, as a legal matter, the Fourth Circuit has found that both the balance of the equities and the public interest weigh in favor of a party likely to suffer a constitutional injury. *See Giovani Carandola*, 303 F.3d at 521 ("[U]pholding constitutional rights surely serves the public interest."). The Alliance has clearly demonstrated myriad constitutional injuries if the district court's ruling is not stayed, *see* IAA499-500, 503, and, for the reasons stated above, Appellees have articulated none; indeed, Voter Appellees have already successfully voted.

Second, these factors are particularly strong here. 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 throughout the State with clear guidance to ensure access to the franchise during an unprecedented public health crisis. Now, Appellees (two of whom were 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 North Carolina voters—in the process. Neither the equities nor the public interest is supported by upholding the district court's ruling.

CONCLUSION

For the foregoing reasons, the Alliance respectfully requests that this Court stay the district court's TRO.

DATED: October 6, 2020

PERKINS COIE LLP

By: s/ Marc E. Elias

Marc E. Elias
MElias@perkinscoie.com
Uzoma N. Nkwonta
UNkwonta@perkinscoie.com
Lalitha D. Madduri
LMadduri@perkinscoie.com
John M. Geise
JGeise@perkinscoie.com
Jyoti Jasrasaria
JJasrasaria@perkinscoie.com
Ariel Glickman
AGlickman@perkinscoie.com

Perkins Coie LLP
700 13th St. N.W., Suite 800
Washington, D.C. 20005-3960
Phone: (202) 654-6200
Fax: (202) 654-6211

Molly Mitchell
MMitchell@perkinscoie.com

Perkins Coie LLP
1111 W. Jefferson St., Suite 500
Boise, ID 83702
Telephone: 208.343.3434
Facsimile: 208.343.3232
MMitchell@perkinscoie.com

Burton Craige
BCraige@pathlaw.com
Narendra K. Ghosh
NGhosh@pathlaw.com
Paul E. Smith
PSmith@pathlaw.com

Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
Telephone: (919) 942-5200

Attorneys for Proposed Defendant-Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(C), 32(a)(5), and 32(g)(1), I certify that this motion has 5,051 words and was prepared using Times New Roman, 14-point font.

s/ Marc E. Elias

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of October, 2020, I caused this *Proposed Defendant-Intervenors' Motion for Emergency Stay Pending Appeal* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to counsel of record.

I also hereby certify that on this 6th day of October, 2020, I caused this *Proposed Defendant-Intervenors' Motion for Emergency Stay Pending Appeal* to be emailed to counsel for appellants and appellees, addressed as follows:

Alexander McC. Peters
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
Attorney for Defendants

Nicole Jo Moss, N.C. Bar No. 31958
Cooper & Kirk, PLLC
1523 New Hampshire Avenue NW
Washington DC, 20036
nmoss@cooperkirk.com

Nathan A. Huff, N.C. Bar No. 40626
Phelps Dunbar LLP
GlenLake One
4140 Parklake Avenue, Suite 100
Raleigh, North Carolina 27612-3723
Nathan.Huff@phelps.com

This the 6th day of October, 2020.

s/ Marc E. Elias
Marc E. Elias