No. 20-2104

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PATSY J. WISE, *et al.*,

Plaintiff-Appellants,

v.

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

Defendants-Appellees,

and

BARKER FOWLER, et al.

Intervenors/Defendants

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

APPELLANTS' REPLY IN SUPPORT OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

Bobby R. Burchfield
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, D.C. 20006
Telephone: (202) 737-0500
Email: bburchfield@kslaw.com
Counsel for Appellants

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INTRODUCTION

The principal issue in this motion is whether an injunction pending appeal is appropriate while this Court reviews the district court's decision to deny a preliminary injunction. The district court denied the injunction solely because it interpreted *Purcell v. Gonzalez*, 549 U.S. 1, 127 S. Ct. 5 (2006), as precluding it from issuing one, even though it would have otherwise issued the injunction to prevent a likely violation of Plaintiffs' right to equal protection. In these circumstances, Plaintiffs have established a compelling basis for an injunction to maintain the status quo while this Court considers their appeal on an expedited basis.

Defendant Board of Elections ("BOE") and Intervenor North Carolina Alliance for Retired Persons ("Alliance" or "Alliance-Intervenors") reassert the arguments properly rejected below. What they cannot deny, however, is that if *Purcell* applies in this case, it supports protection of state election statutes as written in the face of efforts to change them after voting has started. And if *Purcell* does *not* apply here, it cannot serve as an impediment to the entry of any injunction. Either way, the issues are substantial and an injunction to maintain the status quo is appropriate while this Court reviews the appeal.

The BOE's arguments lack force because of its everchanging position. For three months, it successfully defended the statutes as written. But then, on September 22—after voting started on September 4 and hundreds of thousands of voters requested and returned absentee ballots—the BOE announced a settlement with the Alliance-Intervenors and issued several Numbered Memos which, if implemented, would substantially override North Carolina's election code. The abrupt shifts by BOE expose not only the weakness of its arguments but also the need for an injunction pending appeal to allow full (and expedited) merits briefing of this case.[1] And there is no risk of delay from granting an

[1] Numerous courts have recently reversed or stayed decisions that would have changed state election laws in the weeks before Election Day. *See, e.g.*, *Democratic Nat'l Comm. v. Bostelmann*, Nos. 20-28-35, 20-2844, Order Granting Stay, Dkt. 76, at *3 (7th Cir. Oct. 8, 2020) (per curiam) (staying extension of Wisconsin voter registration and absentee ballot receipt deadlines); *Ariz. Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020) (staying order enjoining Arizona's absentee ballot signature deadline); *New Ga. Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *1 (11th Cir. Oct. 2, 2020) (staying lower court order that "manufactured its own ballot deadline" in contravention of Georgia law); *Mich. Alliance for Ret. Ams. v. Secretary of State*, No. 354993, at *2, 12 (Mich. Ct. App. Oct. 16, 2020) (staying injunction against Michigan's ballot receipt deadline); *see also Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) (affirming order denying an injunction that would have required Indiana to permit unlimited mail-in voting).

injunction because on October 18 the BOE issued a revised memo which allows voters to cure minor deficiencies (such as signing a ballot in the wrong place) while requiring spoliation of ballots that lack a witness (thereby honoring the Witness Requirement).[2] Plaintiffs do not oppose this new version, so BOE can proceed to process absentee ballots consistent with the statutes as written even if an injunction issues.[3]

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO HEAR THIS CASE.

A. Plaintiffs Have Standing To Pursue Their Claims.

The district court properly found that Plaintiff Wise has standing to pursue her Equal Protection claim under an arbitrary and disparate treatment theory. IA262–64. Alliance-Intervenors raise three arguments. *See* Alliance-Intervenors' Br. at 11–16.

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[2] *See* Numbered Memo 2020-19 (version 3, dated Oct. 17, 2020), IA619.

[3] Contrary to the BOE's assertion, *see* BOE Br. at 4, the standard for an injunction pending appeal is the test cited in our motion, *see* Pls.' Mtn. at 13. *Lux v. Rodrigues*, 561 U.S. 1406, 1307 (2010) (Roberts, C.J., in chambers), applies only to injunctions pending appeal issued by a *Circuit Justice*.

First, the Alliance-Intervenors' reliance on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), is misplaced. The Supreme Court held that an individual exposed to a police chokehold in the past lacked standing to enjoin future use of chokeholds because his previous exposure did not "establish a real and immediate threat" that he would again be subjected to one. *Id.* at 105, 111. Here, Plaintiff Wise *will* incur injury in *this* election because she has already voted. As the district court found, if the Board implements its Numbered Memos, it is a certainty that Plaintiff Wise will have voted under a different (and more demanding) regime than voters who vote in compliance with those Memos.[4] IA263.

Next, the Alliance-Intervenors argue that Ms. Wise cannot be harmed by lawfully-cast votes. But this argument begs the question of whether the challenged Numbered Memos are constitutional, which is the disputed merits issue and cannot be used to defeat standing. *See Fla. Audubon Soc. v. Bentsen*, 94 F.3d 658, 664 n.1 (D.C. Cir. 1996) (for the

[4] Plaintiff Wise can also show future injury if ballots that would otherwise be invalid under the statutes (such as the Receipt Deadline) are counted. *See James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005) ("To permit unlawful votes to be counted along with lawful ballots in contested elections effectively disenfranchises those voters who cast legal ballots …").

purpose of standing, the court "does not review the merits of a claim" and assumes "during the standing inquiry that the plaintiff will eventually win the relief he seeks").

Finally, the Alliance-Intervenors construct two *reductio ad absurdum* arguments. They assert that Plaintiffs' standing theory would "confer[] a constitutional injury on just about anyone anytime a law changes" and that Plaintiffs "take issue with the fact that future voters may face fewer barriers to casting their ballots." Not so. Plaintiffs' claims arise not from a legitimate expansion of voting opportunities, but from a back room deal that would implement sweeping changes to duly-enacted voting statutes *during the election*, after 889,833 absentee ballots have been cast.[5]

B. Collateral Estoppel Does Not Apply Here.

The BOE argues that Plaintiffs' constitutional claims are barred by collateral estoppel, or issue preclusion. BOE Br. at 10. But, as Judge Osteen explained, "consent agreements ordinarily are intended to preclude any further litigation *on the claim presented* … [and they]

[5] *See* https://dl.ncsbe.gov/?prefix=Press/NC%20Absentee%20Stats%20for%202020%20General%20Election/ (Oct. 16, 2020).

ordinarily occasion *no issue preclusion* unless it is clear that the parties intend their agreement to have such an effect." IA251 (quoting *Arizona v. California*, 530 U.S. 392, 414 (2000) (emphasis added)).[6] Notably, the BOE does not contest the district court's finding that the Consent Judgment claims no issue preclusive effect. *Id.*[7] And *Nash Cty. Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486–86 & n.5 (4th Cir. 1981), cited by BOE, *see* BOE Br. at 13, actually confirms that the "issue of the res judicata effect of a consent judgment" is governed by federal law.[8] Finally, *Ferris v. Cuevas*, 118 F.3d 122 (2d Cir. 1997), is not persuasive because it is an out-of-circuit case applying New York law and the appellants in that case conceded (unlike here) that they had an interest

[6] North Carolina courts recognize that consent judgments do not necessarily have an *issue preclusive* effect. *See, e.g., N.C. Dep't of Trans. v. Laxmi Hotels of Spring Lake, Inc.*, 817 S.E.2d 62, 68 (2018).

[7] Indeed, the Alliance-Intervenors' counsel argued that while these proceedings in federal court "address[ed] the cure procedures, among others, they really have nothing to do with" the issues in *Alliance*. No. 20-CVS-8881, Oct. 2, 2020 Hr'g Tr. at 13.

[8] *Nash* continues that, in diversity actions, unlike this federal question action, this issue would be controlled by state law. 640 F.2d at 48–87 & n.5.

identical to that of the prior plaintiffs, *see Leaf v. Refn*, 742 F. App'x 917 (6th Cir. 2018) (explaining the weaknesses in *Ferris)*.[9]

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EQUAL PROTECTION CLAIMS.

Two lower courts have correctly rejected the BOE's attacks on the merits of Plaintiffs' equal protection claims. First, the BOE ineffectively argues that there is no disparate treatment because the Numbered Memoranda would apply to all voters. To the contrary, the challenged Numbered Memoranda were issued on September 22, 2020, are not retroactive, and have not yet become effective. Thus, on their face, they do not apply to the more than 889,833 voters who have already cast their absentee ballots.[10] The challenged Numbered Memoranda treat these

[9] Judge Osteen was also correct on abstention, which must be applied "parsimoniously." *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463 (4th Cir. 2005). *Pennzoil* abstention is limited to civil proceedings "that implicate a State's interest in enforcing the orders and judgments of its courts," *Pennzoil Co. v. Texaco, Inc.* 481 U.S. 1, 11 (1987), whereas Plaintiffs are challenging only the legality of the Numbered Memos. *Pullman* abstention does not apply because this appeal presents no unsettled issues of state law, *see* IA248-49, and does not involve a "sensitive area of social policy upon which the federal courts ought not to enter," *Moore v. Sims*, 442 U.S. 415, 428 (1979).

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

voters differently than voters who submit ballots ***after*** the Memos become effective.

Second, with respect to Plaintiffs' Equal Protection claim based on vote dilution, the BOE begs the question by contending that the Numbered Memoranda do not allow votes to be cast unlawfully. It erroneously assumes that the changes made by the challenged Memos to the statutes enacted by the North Carolina General Assembly are valid. Strikingly, the BOE fails to dispute that the Numbered Memos "flout North Carolina's election statutes, contradict the decisions in *Chambers* and *Democracy North Carolina*, and are causing disruption among county election boards." Dkt. No 4, Mot. at 8. The lawfulness of these changes is very much in doubt.

III. THE *PURCELL* DOCTRINE SUPPORTS AN INJUNCTION, AS DO THE EQUITIES AND PUBLIC INTEREST.

A. Plaintiffs Have Not Misconstrued *Purcell*.

As shown, Judge Osteen mistakenly construed *Purcell* as precluding him from issuing an injunction.

If (as BOE suggests) *Purcell* does not apply in this context, then it did not preclude Judge Osteen from issuing the injunction he held to be

justified. *See* IA308 ("[U]nder *Purcell* and recent Supreme Court orders relating to *Purcell*, this court is of the opinion that it is required to find that injunctive relief should be denied at this late date, *even in the face of what appear to be clear violations*.") (emphasis added). Only if *Purcell* prohibited the lower court from entering an injunction that was otherwise justified can the denial of the injunction be affirmed. But *Purcell* counsels against changes to state election laws in the weeks before an election ***regardless of the source of those changes***, since maintaining the status quo is preferable to alterations that create confusion. *See* Pls.' Mtn. at 19–21; *see Purcell*, 549 U.S. at 4–5.

The BOE and Alliance-Intervenors point out, as Plaintiffs acknowledged (Pls.' Mtn. at 20–21), that in *Purcell* and *Andino* the Supreme Court prevented federal courts from issuing injunctions that would have *changed* state election procedures. *See* BOE Br. at 6–8; Alliance-Intervenors' Br. at 20–21. They fail to grasp the posture of this case. *See Purcell*, 549 U.S. at 4–5. Here, Judge Osteen found an imminent violation of Plaintiffs' constitutional right to equal protection, but construed *Purcell* as preventing the court from issuing the injunction it would have otherwise issued. As shown in our motion, however, an

injunction actually *fulfills* the very purposes of *Purcell*—protecting the state election laws, maintaining the status quo, ensuring order in the days before an election, and preventing voter confusion.

The BOE is also wrong that Plaintiffs are trying to transform *Purcell* into a substantive rule of constitutional law. BOE at Br. at 6. Rather, the issue is whether the lower court correctly interpreted and applied *Purcell*. Nor do Plaintiffs question the BOE's power to respond to specific emergencies like a hurricane or power outage. *See* BOE Br. at 8–9. Instead, Plaintiffs object to the BOE's attempt to implement, in the midst of voting, a new state-wide voting regime that overrides explicit provisions of the duly-enacted election code (which reflects the General Assembly's changes to address the COVID-19 pandemic).[11]

B. The Equities and Public Interest Favor an Injunction Pending Appeal.

The BOE and Alliance-Intervenors' concerns about voter disenfranchisement, conflicting court orders, and election confusion lack merit. BOE Br. at 5–9; Alliance-Intervenors' Br. at 21–22.

[11] Only the state legislature, subject to certain congressional enactments, can appoint electors, U.S. Const. art. II, § 1, cl. 2, and prescribe "[t]he Times, Places, and Manner" for congressional elections, id. art. I, § 4, cl. 1. *Purcell* is consistent with this principle.

First, the BOE and Alliance-Intervenors argue that granting an injunction pending appeal would disenfranchise "thousands of lawful North Carolina voters" who submit absentee ballots with "minor, curable deficiencies." BOE Br. at 5–6; *see also* Alliance-Intervenors' Br. at 14–15. This is inaccurate: on October 18, 2020, the BOE issued a revised version of Numbered Memo 2020-19 (version 3). This third version eliminates the duplicitous evisceration of the Witness Requirement in the challenged version of Numbered Memo 2020-19 (second version). Both the Plaintiffs herein and the Legislative Plaintiffs in *Moore* have expressed no opposition to this third revision. ***Thus, even with the injunction requested by Plaintiffs in place, BOE can proceed to process absentee ballots consistent with the statutes as written***. And enjoining the BOE's 9-day Receipt Deadline will have no practical effect at this point because even under the revisions, voters must postmark their ballots by Election Day; whether received 3 days or 9 days thereafter is not an imminent issue.

Second, the BOE argues that an injunction would prevent it from "following procedures that a state court has held are necessary to protect voters' rights under the North Carolina Constitution." BOE Br. at 5; *see*

also Alliance-Intervenors' Br. at 21–22. But the BOE is not "following procedures" mandated by an independent state court judgment. Instead, it seeks to comply with procedures that it concocted with the Alliance-Intervenors through secret, back-room negotiations, and the Consent Judgment's findings of fact *disclaim* any violation of federal law. *See* IA323.

Finally, these arguments are just a distraction from Plaintiffs' substantial constitutional claims. Judge Osteen found a likelihood of success on the merits based on those claims, but declined to issue a preliminary injunction solely because, in his view, *Purcell* precluded him from issuing one. Plaintiffs respectfully submit that the court misread *Purcell*. At the very least, the lower court's reading of *Purcell* creates a substantial issue requiring consideration by this Court,[12] and an injunction pending appeal is necessary to maintain the status quo to give this Court time to consider this important issue.

[12] The BOE and Alliance-Intervenors disagree about *Purcell*'s meaning, which underscores the need for thorough consideration of this issue. *Compare* Alliance-Intervenors' Br. at 19 *with* BOE Br. at 6.

CONCLUSION

Plaintiffs urge this Court to enter an injunction pending this Court's decision on appeal.

Respectfully submitted,

/s/ Bobby R. Burchfield
Bobby R. Burchfield
Matthew M. Leland
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
T: (202) 626-5524
E: bburchfield@kslaw.com
mleland@kslaw.com

R. Scott Tobin, N.C. Bar No. 34317
TAYLOR ENGLISH DUMA LLP
4208 Six Forks Road, Suite 1000
Raleigh, North Carolina 27609
T: (404) 640-5951
E: stobin@taylorenglish.com

Counsel for Plaintiffs-Appellants

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 2520 words and was prepared using Century Schoolbook, 14-point font.

/s/ Bobby R. Burchfield
Bobby R. Burchfield

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19th day of October, 2020, I caused this Emergency Motion to Stay Injunction Pending Appeal and for Administrative Stay 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, and that I have electronically mailed the documents to all non-CM/ECF participants.

/s/ Bobby R. Burchfield
Bobby R. Burchfield