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, PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, BOBBY HEATH, MAXINE WHITLEY, and ALAN SWAIN,

Plaintiffs-Appellees,

v.

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, JEFF CARMON, III, in his official capacity as a member of the North Carolina State Board of Elections, and KAREN BRINSON BELL, in her official capacity as the Executive Director of the North Carolina State Board of Elections,

Defendants-Appellants.

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

EMERGENCY MOTION FOR A TEMPORARY ADMINISTRATIVE STAY

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The Appellants, the members of the North Carolina State Board of Elections and the Board's Executive Director (the "Board Defendants"), respectfully request that this Court enter a temporary administrative stay of the decision below. A temporary administrative stay would allow for the Court's orderly consideration of the Board Defendants' forthcoming motion for a stay pending appeal, which will be filed later today.[1] An immediate stay is also necessary because the Board is under competing injunctions that are currently preventing it from taking any action to inform thousands of voters who have cast ballots with minor deficiencies—and allow them to cure those problems so they can exercise their right to vote.

In the order on review, the district court enjoined the State Board from implementing narrow changes to election procedures that are designed to facilitate the orderly processing of absentee ballots during

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[1] This morning, October 4, 2020, the Board filed a notice of appeal in this case in the district court. App. 44. The Board filed this emergency motion as soon as the appeal was docketed.

The Board has also appealed from a nearly identical lawsuit filed on the same day by a related group of plaintiffs. *See Wise v. Circosta,* 20-2063 (4th Cir.). Like the district court orders, which are identical, the Board Defendants have filed nearly identical stay motions in both appeals.

this unprecedented election cycle, when a global pandemic has led to a striking increase in the numbers of voters who choose to vote by mail. Those changes are not only authorized by state law, but are narrowly tailored to address exigent circumstances that threaten to destabilize the voting process. The district court held that such changes violate the equal protection rights of voters who cast their ballots before those changes were in place. App. 14-15.

These modest procedural changes resulted from the State Board's good-faith effort to resolve nearly a dozen lawsuits currently pending against it, in state and federal court. These lawsuits bring claims under the U.S. and North Carolina constitutions, seeking much more drastic alterations to various state election procedures in light of the unprecedented global pandemic.

To settle this flood of litigation and bring clarity and certainty to the State's election procedures well in advance of election day, the State Board voted unanimously on a bipartisan basis to agree to a consent decree that made a few minor changes to those procedures that were far short of what plaintiffs had demanded. These changes: (1) extended the deadline for receipt of absentee ballots mailed on or before Election Day

to nine days after Election Day, to match the state statutory deadline for military and overseas voters; (2) implemented a cure process that allows voters to correct deficiencies in their absentee ballots by attesting under penalty of perjury that they had, in fact, marked the ballot; and (3) established separate absentee ballot "drop off stations" staffed by county board officials at each early voting site and at each county board of elections to reduce congestion and crowding. App. 34-36.

In a state-court order that was entered *before* the district court here issued the decision below, the State Board was ordered to implement these modest changes as part of a consent decree. App. 41. The state court explicitly ruled that the Board has the statutory authority to make these changes under state law. This authority arises from two statutes that allow the Board to make alterations when necessary to respond to emergencies like a pandemic or a hurricane, and to resolve election-related litigation. N.C. Gen. Stat. §§ 163-22.2, -27.1. The state court further ruled that the constitutional objections to the new procedures—objections repeated by the same plaintiffs in this federal lawsuit—were meritless.

In light of these rulings, the State Board is now subject to directly conflicting legal obligations. In one order, a state court has required the Board to implement these changes. And in another *later* case, the one here, a federal district court has barred the Board from doing so—based on claims that had already been litigated in the state-court action. Meanwhile, thousands of ballots with curable deficiencies—like a valid signature simply put in the wrong place on the ballot envelope—remain in limbo, with the Board not even able to contact voters to inform them that they should cure their ballot. A temporary stay is therefore warranted to relieve the Board from the impossible situation of being subject to conflicting court orders—where compliance with one order would violate the other order, and vice versa.

A temporary stay is further warranted because, as will be explained further in the forthcoming motion for a stay pending appeal, the district court's order is wrongly decided—and emphatically so.

At the outset, the district court's order is subject to several procedural bars. First, the order is barred by collateral estoppel, because these same parties had already litigated these same claims to judgment in state court. Indeed, the legislator-plaintiffs (who are

intervening defendants in the parallel state-court action) have already appealed the state court's ruling on those same claims to the North Carolina Court of Appeals. *See Sartin v. Macik*, 535 F.3d 284, 287 (4th Cir. 2008). Second, the plaintiffs lack standing to bring their equal protection claims, because plaintiffs have suffered no cognizable harm to their right to vote. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (2006). And third, the federal courts were required to abstain from deciding plaintiffs' claims, because those claims represent an impermissible collateral attack on a final state-court order. *See Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13 (1987). But the district court declined to meaningfully address any of these procedural arguments in its order. App. 12. That is, the court entered a TRO enjoining the State Board from implementing its election procedures without any reasoned analysis for why the court had *jurisdiction* to even consider this case.

The district court's reasoning on the merits of plaintiffs' claims is also incorrect. In the order on review, the district court held that *any* change to election procedures to ensure that people can vote after voting has started denies equal protection to voters under the U.S. Constitution. App. 14-15. This is so, according to the district court,

even where, as here, those changes are authorized by state law. App. 14-15. If this reasoning were correct, it would be unconstitutional for the State Board to provide accommodations to voters affected by natural disasters like hurricanes—as the Board has done repeatedly during past elections. This ruling would also mean that any relief ordered by a court to *comply* with the Constitution during the run-up to an election would itself be unconstitutional.

For these reasons, the Board Defendants respectfully request that the Court issue an immediate and temporary administrative stay of the decision below, to last only as long as necessary to consider the motion for a stay pending appeal. The Board Defendants will file this latter motion later today.

Finally, because of this case's procedural posture, the Board Defendants include a jurisdictional statement below that explains why the district court's order is subject to immediate appeal, even though it was labeled as a temporary restraining order. If this Court has any question about its jurisdiction to decide this appeal, however, the Board Defendants respectfully request that the Court order a temporary administrative stay while the Court considers its jurisdiction.

JURISDICTIONAL STATEMENT

The district court entered a temporary restraining order, after full briefing and a hearing, on October 3, 2020. Because the district court's order serves effectively as an injunction, this Court has jurisdiction under 28 U.S.C. §1292(a)(1); *see Com. of Va. v. Tenneco, Inc.*, 538 F.2d 1026, 1029-30 (4th Cir. 1976). This Court also has jurisdiction under the All Writs Act to stay the district court's order. 28 U.S.C. § 1651.

Given the exigencies of the ongoing election process, the Board Defendants respectfully submit that seeking an initial stay from the district court is impracticable.[2] *See* Fed. R. App. P. 8(a)(2)(A)(i).

[2] This Court recently recognized that Rule 8's impracticability standard is satisfied when a trial court order affects election procedures in the weeks leading up to an election. *Middleton v. Andino*, No. 20-2022, 2020 WL 5739010, at *1 (4th Cir. Sept. 24, 2020) (granting an emergency motion to stay the district court's preliminary injunction, under Rule 8's impracticability standard), *reh'g en banc granted, order vacated*, No. 20-2022, 2020 WL 5752607 (4th Cir. Sept. 25, 2020); *see id.* Dkt 2-1 at 2 (invoking Rule 8's impracticability standard to bypass seeking a trial-court stay); *see also In re Abbott*, 954 F.3d 772, 778 (5th Cir. 2020) (granting an emergency motion to stay the district court's TRO where no motion to stay was first filed in the district court).

A. A temporary restraining order may be appealed immediately when the order serves effectively as a preliminary injunction.

This Court has jurisdiction over appeals from "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1). Although a preliminary injunction issued under Rule 65(a) of the Federal Rules of Civil Procedure is appealable under section 1292(a)(1), a temporary restraining order (TRO) issued under Rule 65(b) generally is not. *Com. of Va. v. Tenneco, Inc.*, 538 F.2d 1026, 1029-30 (4th Cir. 1976). However, it is well established that when a TRO acts effectively as a preliminary injunction, it is subject to immediate appeal. *Id.*

To determine whether a TRO is effectively a preliminary injunction, courts consider three factors: (1) the order's practical effects, (2) the order's procedural history, and (3) the order's disruption to the status quo. Here, all three factors point in favor of treating the district court's order as a preliminary injunction.

Under the first factor, "courts do not look to the terminology of the order but to its substantial effect." *Lewis v. Bloomsburg Mills, Inc.*, 608 F.2d 971, 973 (4th Cir. 1979). Specifically, courts examine whether,

absent immediate appeal, an order could result in irreparable harm that is "substantial" and "potentially irreversible." *Hope v. Warden York Cty. Prison*, 956 F.3d 156, 160 (3d Cir. 2020).[3]

Courts have recognized that this standard is satisfied when an order affects the procedures that are to be used in an upcoming election. *E.g.*, *Ne. Ohio Coal. for Homeless & Serv. Employees Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999 (6th Cir. 2006). For example, in *Blackwell*, the State of Ohio appealed a TRO that was issued in October of an election year that restrained the enforcement of the State's absentee ballot voter identification procedures. *Id.* at 1002. The court easily concluded that this order threatened irreparable harm to the State. *Id.* at 1006. After all, if the TRO were allowed to remain in effect in the weeks leading up to the election, it would be difficult to

[3] *See also, e.g.*, *Blackwell*, 467 F.3d at 1005-06 ("[C]ourts have allowed interlocutory appeal of TROs which threatened to inflict irretrievable harms before the TRO expired."); *Ross v. Rell*, 398 F.3d 203 (2d Cir. 2005) (holding that a TRO is appealable when it is has "serious, perhaps irreparable consequence" and can only be "effectively challenged" by immediate appeal); *United States v. State of Colo.*, 937 F.2d 505, 508 (10th Cir. 1991) (stating that, to be appealable, a TRO "must have irreparable consequences" and "the order must be one that can be effectively challenged only by immediate appeal").

retroactively implement the enjoined absentee-ballot election procedures after the TRO expired. *Id.* Accordingly, the Court concluded that it had jurisdiction because "[t]he nature and effect" of the TRO made it tantamount to a preliminary injunction. *Id.* at 1005-06.

The same analysis applies here. The district court's order enjoins the State from using absentee ballot procedures that were lawfully implemented under state law. Although the injunction is set to expire on October 16, 2020—two weeks after entry of the order—that period represents nearly *half* of the remaining period during which absentee-ballots may be submitted before the election. Moreover, during the period in which the district court's injunction is in place, all 100 county boards of elections are scheduled to meet at least twice to process absentee ballots. During these meetings, because of the district court's order, the county boards will be enjoined from implementing *any* cure process, because the State is now subject to competing injunctions, one requiring a particular cure process and the other enjoining that exact process. Thus, like in *Blackwell*, the district court's order is

immediately appealable because it threatens the State and its voters with irreparable harm.

The second factor courts consider is whether the process leading up to entry of the order resembles the adversarial presentation of argument that usually precedes a preliminary injunction. *Id.*; *Hope*, 956 F.3d at 160; *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 804 (9th Cir. 2002). This consideration flows directly from the civil rules. Under Rule 65, a federal court "may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1). By contrast, a TRO may be issued without notice to the adverse party. Fed. R. Civ. P. 65(b)(2). These differences reflect that a TRO "should be restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70 of Alameda Cty.*, 415 U.S. 423, 439 (1974).

Thus, this Court has held that an order labeled as TRO was effectively an injunction when it was issued after notice and a hearing

in which all parties to the order participated. *See Tenneco*, 538 F.2d at 1030

Here, this factor strongly points in favor of the district court's order being deemed an appealable injunction. The trial court entered its order after receiving multiple rounds of lengthy briefing from all parties, and holding two hearings at which all parties attended and presented argument. App. 9, 12. It also issued a lengthy opinion in which it issued a novel ruling on the scope of the Equal Protection Clause in the election context. *See* App. 1-20. The order below thus bears the hallmarks of a preliminary injunction.

The final factor that courts examine to determine whether an order is effectively an injunction is whether the order preserves, or upends, the status quo. *Hope*, 956 F.3d at 160 (3d Cir. 2020) ("a purported TRO" may be immediately appealable when it "goes beyond preservation of the status quo"); *see also Blackwell*, 467 F.3d at 1006; *Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978).

Here, the district court's order disrupted the status quo. Before the district court acted here, a state court in *NC Alliance* had entered an order that required the State Board to implement certain election

procedures —two of which the State Board had already informed county boards of elections staff would become effective upon entry of the consent judgment. App. 34-36. Many of the county boards processed ballots over the weekend and, because of the TRO, were told by the State Board to simply set aside any ballots affected by the TRO. None of the affected voters could be contacted to inform them that there is a problem with their ballots because the district court's TRO enjoined the only existing cure process. Nor could those voters be contacted and asked to follow a different cure procedure without the State Board risking contempt of the state-court consent judgment. The district court's TRO therefore introduced confusion into the State's election process, by subjecting the Board to directly contradictory court orders.

B. In the alternative, this Court may treat the appeal as petition for writ of mandamus.

This Court may also review the district court's order by construing this appeal as a petition for writ of mandamus. 28 U.S.C. § 1651; *see Petition of A & H Transp., Inc.*, 319 F.2d 69, 70 (4th Cir. 1963) ("we have treated the notice of appeal as a petition for a writ of mandamus[.]"); *see also In re Abbott*, 954 F.3d 772, 782, 796 (5th Cir.

2020) (granting petition for writ of mandamus to review a TRO and directing the district court to vacate the TRO).

A party seeking mandamus relief must show that there is no other adequate means to attain the desired relief and that the party has a "clear and indisputable right" to the requested relief. *In re Murphy-Brown, LLC*, 907 F.3d 788, 795 (4th Cir. 2018) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 389-81 (2004)). Additionally, "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *In re Trump*, 958 F.3d 274, 281 (4th Cir. 2020) (quoting *Cheney*, 542 U.S. at 381). Here, for all the same reasons that a stay is warranted, these considerations allow for mandamus relief.

CONCLUSION

Defendants respectfully request that this Court enter a temporary administrative stay of the order below.

Respectfully submitted,

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October 5, 2020

CERTIFICATE OF SERVICE

I certify that on this 5th of October, 2020, I filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

/s/ Ryan Y. Park

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 2,829 words and was prepared using Century Schoolbook, 14-point font.

/s/ Ryan Y. Park