Nos. 20A71, 20A72

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 State Board of Elections, *et al.*,
RESPONDENTS.

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

v.

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

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, CONNECTICUT, ILLINOIS, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN OPPOSITION TO THE EMERGENCY APPLICATIONS FOR INJUNCTIVE RELIEF

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TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

ARGUMENT 3

I. States Must Have Flexibility To Accommodate Voters In Light Of COVID-19 And The Postal Service's Ongoing Crises 3

II. Memorandum 2020-22 Is Consistent With States' Longstanding Practice Of Allowing For And Responding To Mail Delays 8

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Burdick v. Takushi, 504 U.S. 428 (1992) 2, 3

Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) 1

Curtis v. Bindeman, 261 A.2d 515 (D.C. 1970) 13

Doe v. Walker, 746 F. Supp. 2d 667 (D. Md. 2010) 13

Gallagher v. N.Y. State Bd. Of Elections, No. 20-CV-5504,
2020 WL 4496849 (S.D.N.Y. Aug. 3, 2020) 9

Jones v. USPS, No. 20-CV-6516,
2020 WL 5627002 (S.D.N.Y. Sept. 21, 2020) 5

New York v. Trump, No. 20-CV-2340,
2020 WL 5763775 (D.D.C. Sept. 27, 2020) 5

Pa. Democratic Party v. Boockvar, No.133-MM-2020,
2020 WL 5554644 (Pa. Sept. 17, 2020) 11, 13

Pennsylvania v. DeJoy, No. 20-CV-4096,
2020 WL 5763553 (E.D. Pa. Sept. 28, 2020) 5, 6

Republican Nat'l Comm. v. Democratic Nat'l Comm.,
140 S. Ct. 1205 (2020) 13, 14

Storer v. Brown, 415 U.S. 724 (1974) 14

*United Haulers Ass'n v. Oneida-Herkimer Solid Waste
Mgmt. Auth.*, 550 U.S. 330 (2007) 1

United States v. Cunningham, No. 3:08-CV-709,
2009 WL 3350028 (E.D. Va. Oct. 15, 2009) 13

Washington v. Trump, No. 1:20-CV-03127,
2020 WL 5568557 (E.D. Wash. Sept. 17, 2020) 5

Wise v. Circosta, Nos. 20-2104, 20-2107,
2020 WL 6156302 (4th Cir. Oct. 20, 2020) (en banc) 12

Constitutional Provisions

U.S. Const. art. I, § 4, cl. 1 1

Statutes and Regulations

Cal. Elec. Code § 3020(b)(1), (d) 10, 12

D.C. Code § 1-1001.05(a)(10A) 10, 12

10 Ill. Comp. Stat. 5/1-3(25), 5/19-8(c) 10

Md. Code Regs. 33.11.03.08(B)(3) 11

2020 Mass. Acts Ch. 115 ..... 10, 12

Miss. Code. Ann. § 23-15-637(1)(a) 12

Mont. Code Ann. § 13-21-206(1) 11

Nev. Rev. Stat. § 293.317(2) 10

N.J. Stat. § 19:63-22 12

N.C. Gen. Stat. § 163-258.13 11

N.D. Cent. Code § 16.1-07-09 10

25 Pa. Cons. Stat. § 3511 11

Tex. Elec. Code Ann. § 86.007 10

Va. Code Ann. § 24.2-709(B) 10

Wash. Admin. Code § 434-250-120(1)(d)(i) 10

52 U.S.C. § 20301 *et seq.* 11, 14

52 U.S.C. § 20303(b) 14

52 U.S.C. § 20304(b)(2) 4

39 C.F.R. § 211.2(a) 8

State Executive and Legislative Materials

Ky. Exec. Order No. 2020-688 (Aug. 14, 2020) 12, 13

Ky. Sec'y of State Michael Adams, *2020 General Updates* (2020) 2

Off. of the Minn. Sec'y of State, Absentee Voting Administration Guide (2020) 10

Emergency Order—Updated 11/5/1018, N.C. State Bd. of Elections (Nov. 5, 2018) 12

Pa. Exec. Order 2012-14 (Oct. 31, 2012) 12

Greg Abbott, Governor of the State of Tex., Proclamation (July 27, 2020) 2

USPS, *Postal Operations Manual* § 443.3 (2020) 8

Other Authorities

Bryan Anderson & Camille Fassett, *Thousands of N.C. Voters Wait Weeks for Absentee Ballots*, Associated Press (Oct. 12, 2020) 4

Emily Badger et al., *Our Tracker Says the Mail Is Still Slow*, N.Y. Times (Oct. 20, 2020) 5

Kate Brumback & Larry Lage, *Arenas, Stadiums Find New Life as Safer Options For Voting*, Associated Press (Oct. 22, 2020) 2

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Erin Cox et al., *Postal Service Warns 46 States Their Voters Could be Disenfranchised by Delayed Mail-in Ballots*, Wash. Post (Aug. 14, 2020) 7

Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-In Ballots Rejected for Tardiness*, NPR (July 13, 2020) 6

William A. Galston, *Election 2020: A Once-in-a-Century, Massive Turnout?*, Brookings (Aug. 14, 2020) 3

Maryam Jameel & Ryan McCarthy, *Poorly Protected Postal Workers Are Catching COVID-19 by the Thousands. It's One More Threat to Voting by Mail*, ProPublica (Sept. 18, 2020) 5

Letter from Thomas J. Marshall, USPS Gen. Couns. & Exec. Vice President, to Elaine Marshall, N.C. Sec'y of State (July 30, 2020) 7

Adam Levy et al., *Surge of Ballot Requests Already Setting Records in the US*, CNN (Sept. 25, 2020) 4

Off. of the Inspector General, USPS, *Processing Readiness of Election and Political Mail During the 2020 General Elections* (Aug. 31, 2020) 8

Pew Rsch. Ctr., *Election 2020: Voters Are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting* (Aug. 13, 2020) 3, 4

Mary Pflum, *Despite DeJoy's Vows to Halt Changes, Serious Problems Persist, Postal Workers Say*, NBC News (Aug. 28, 2020) 5

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USPS FY2019 *Annual Report to Congress* 6

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

This case is not about changes to what voters must do to cast their ballot in the upcoming election. North Carolina's direction to voters has been consistent: "mail in your completed absentee ballot on or before Election Day." Instead, this case is about whether timely mailed ballots will be counted.

The District of Columbia and the States of California, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, Virginia, and Washington (collectively, the "*Amici* States") submit this brief as *amici curiae* in support of respondents and in opposition to applicants' emergency motions for injunctions pending appeal. Numbered Memorandum 2020-22 ("Memo 2020-22"), the policy at issue in this case, makes two accommodations in light of the COVID-19 pandemic and "[d]ue to current delays with mail sent with the U.S. Postal Service." Memo 2020-22, at 1. First, it extends the deadline by which timely mailed ballots must be received in order to be counted from three days after Election Day to nine days; and, second, it expands the mechanisms by which officials can determine the date on which an absentee ballot was mailed. Memo 2020-22, at 1.

In our federalist system, states play "a major role . . . in structuring and monitoring the election process." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see* U.S. Const. art. I, § 4, cl. 1. States also have an ongoing obligation to "protect[] the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). As the primary managers of the election process and protectors of the public health, states have an

obligation to protect each citizen's constitutional right to vote while ensuring that this right can be exercised safely. *Cf. Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

To that end, states across the nation have made various accommodations to their voting procedures in light of the COVID-19 pandemic and ongoing, egregious delays by the United States Postal Service ("USPS"). As mail-in voting has become increasingly popular, some states have set up or expanded the number of secure ballot drop boxes. *See, e.g.*, Ky. Sec'y of State Michael Adams, *2020 General Updates* (2020).[1] Others have extended the period for early voting, *see, e.g.*, Greg Abbott, Governor of the State of Tex., Proclamation (July 27, 2020),[2] or set up polling places in locations that allow social distancing, such as baseball fields, *see, e.g.*, Kate Brumback & Larry Lage, *Arenas, Stadiums Find New Life as Safer Options For Voting*, Associated Press (Oct. 22, 2020).[3] Although the *Amici* States have developed different approaches, they share a common interest in promoting civic participation while protecting public health by reducing the need for crowded in-person interactions during the voting process.

Several states, including North Carolina, have extended their receipt deadline for mail-in ballots that are properly cast on or before Election Day. This is in part to account for USPS delays in mail delivery—a factor over which voters and states have no control. And post-Election-Day receipt deadlines are not a new phenomenon.

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1 *Available at* https://bit.ly/33NC4I9.

2 *Available at* https://bit.ly/2HsitVw.

3 *Available at* https://bit.ly/2HtJPe7.

More than a third of states and the District of Columbia had such deadlines before this election, consistent with the notion that all ballots cast on or before Election Day should be counted. Prohibiting North Carolina from reasonably responding to the public health crisis and USPS emergencies by extending its deadline to receive timely mailed ballots would be a remarkable intrusion into states' traditional prerogatives.

ARGUMENT

I. States Must Have Flexibility To Accommodate Voters In Light Of COVID-19 And The Postal Service's Ongoing Crises.

The Supreme Court has recognized that "States retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433. That role comes with the attendant responsibility to administer elections in ways that both safeguard residents' health and facilitate citizens' voting rights. Memo 2020-22 exemplifies North Carolina's thoughtful embrace of both responsibilities.

Despite the ongoing public health emergency, election experts project that voter turnout this November will be "exceptional, perhaps the highest in over a century." William A. Galston, *Election 2020: A Once-in-a-Century, Massive Turnout?*, Brookings (Aug. 14, 2020) (internal quotation marks omitted).[4] Election officials thus face the unique challenge of overseeing the democratic process while preventing transmission of the novel coronavirus. Given the disruption caused by the pandemic, 49 percent of registered voters expect to face difficulties casting a ballot this fall. Pew Rsch. Ctr., *Election 2020: Voters Are Highly Engaged, but Nearly Half Expect to Have*

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[4] *Available at* https://brook.gs/3jAGF6a.

Difficulties Voting 4 (Aug. 13, 2020).[5] This is likely because the traditional practice of voting in-person, on the same day, and in designated locations, is hard to reconcile with public health directives to practice social distancing and limit person-to-person contact. *See* CDC, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others* (Sept. 11, 2020).[6]

Given the risks associated with in-person contact, the number of voters interested in absentee voting has "skyrocket[ed] around the country." Adam Levy et al., *Surge of Ballot Requests Already Setting Records in the US*, CNN (Sept. 25, 2020).[7] No less so in North Carolina, where, as of October 12, over 1.3 million registered voters had requested absentee ballots for the November election, up from 170,000 at the same point in the 2016 general election. *See* Bryan Anderson & Camille Fassett, *Thousands of N.C. Voters Wait Weeks for Absentee Ballots*, Associated Press (Oct. 12, 2020).[8]

Even during an ordinary election cycle, USPS constraints are a common consideration in setting deadlines for absentee ballots. *See, e.g.*, 52 U.S.C. § 20304(b)(2) (requiring "cooperation and coordination with [USPS]" concerning absentee ballots). But this year, the issues facing USPS are legion. The agency is in the grip of an unprecedented budget crisis, where it "cannot fund its current level of services and financial obligations." U.S. GAO, *U.S. Postal Service's Financial*

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5 *Available at* https://pewrsr.ch/2H4HvKx.

6 *Available at* https://bit.ly/34NCJJa.

7 *Available at* https://cnn.it/3iMhDQf.

8 *Available at* https://bit.ly/3jnlGCP.

Viability—High Risk Issue.[9] It has faced staffing shortages, with "[m]ore than 50,000 workers [taking] time off for virus-related reasons." Maryam Jameel & Ryan McCarthy, *Poorly Protected Postal Workers Are Catching COVID-19 by the Thousands. It's One More Threat to Voting by Mail*, ProPublica (Sept. 18, 2020).[10] And it continues to struggle with the fallout from recent high-profile operational changes imposed—and then partially rescinded—by the Postmaster General. *See, e.g.*, Mary Pflum, *Despite DeJoy's Vows to Halt Changes, Serious Problems Persist, Postal Workers Say*, NBC News (Aug. 28, 2020).[11] At a time when more Americans than ever are relying on USPS to exercise their fundamental right to vote, these delays have a significant impact on the franchise. *See* Emily Badger et al., *Our Tracker Says the Mail Is Still Slow*, N.Y. Times (Oct. 20, 2020).[12]

Numerous states have sued to limit the effect of USPS changes and delays on the election. And several courts have enjoined USPS from making further process changes that could cause additional delays. *See, e.g.*, *Pennsylvania v. DeJoy*, No. 20-CV-4096, 2020 WL 5763553, at *41 (E.D. Pa. Sept. 28, 2020); *New York v. Trump*, No. 20-CV-2340, 2020 WL 5763775, at *1 (D.D.C. Sept. 27, 2020); *Jones v. USPS*, No. 20-CV-6516, 2020 WL 5627002, at *9 (S.D.N.Y. Sept. 21, 2020); *Washington v. Trump*, No. 1:20-CV-3127, 2020 WL 5568557, at *6 (E.D. Wash. Sept. 17, 2020). Nevertheless, widespread and legitimate concerns persist about USPS's ability to

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9 *Available at* https://bit.ly/33PaEly (last visited Oct. 23, 2020).

10 *Available at* https://bit.ly/2SKDuNp.

11 *Available at* https://nbcnews.to/2GF3ibw.

12 *Available at* https://nyti.ms/33PPnYW.

deliver election mail within the timeframes historically dictated by state law. Despite numerous orders enjoining operational changes that caused delays in July and August, service performance (i.e., on-time delivery) by the USPS has failed to improve. *See* Notice Ex. C at 7, *Pennsylvania v. DeJoy*, No. 20-CV-4096 (E.D. Pa. Oct. 23, 2020), ECF No. 82-3 ("Service Performance Data") (listing service performance scores, which represent the percentage of mail delivered on time for each category of mail). The most recent data from USPS show that First-Class Mail is on time only 85.58 percent of the time nationwide, *id.*, over ten percent short of USPS's nationwide goal of 96.5 percent, USPS FY2019 *Annual Report to Congress* 20.[13] By comparison, service performance prior to July 2020 fell only to 89.52 percent despite the initial burdens of COVID-19. Service Performance Data 8. Performance is even worse in the northern half of North Carolina, where statistically, one in five letters sent as First-Class Mail will arrive late. *See id.* at 17 (Greensboro District).

Voters' experiences during the primary elections illustrate the real harms that can result from mail delays. By mid-July, more than "50,000 absentee or mail-in ballots [had been] rejected because they arrived past the deadline, often through no fault of the voter." Pam Fessler & Elena Moore, *Signed, Sealed, Undelivered: Thousands of Mail-In Ballots Rejected for Tardiness*, NPR (July 13, 2020).[14] The risks that timely absentee voters will be disenfranchised are even higher in the general election, where states are expecting as many as ten times the normal volume of

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13 *Available at* https://bit.ly/3ko3VVu.

14 *Available at* https://n.pr/3dDBznD.

election mail and USPS is straining to keep up. Erin Cox et al., *Postal Service Warns 46 States Their Voters Could be Disenfranchised by Delayed Mail-in Ballots*, Wash. Post (Aug. 14, 2020).[15]

Indeed, at the end of July, USPS officials wrote to the District of Columbia and 46 states—including North Carolina—to warn that voters' mail-in ballots might not be delivered in time to be counted even where voters complied with all state requirements and deadlines. *Id.* In particular, USPS officials warned North Carolina that "certain state-law requirements and deadlines appear to be incompatible with the Postal Service's delivery standards." Letter from Thomas J. Marshall, USPS Gen. Couns. & Exec. Vice President, to Elaine Marshall, N.C. Sec'y of State 2 (July 30, 2020).[16] Given USPS's delivery standards, "[t]here 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." *Id.* USPS officials recommended that "voters who choose to mail their ballots should do so no later than Friday, October 30"—a week before North Carolina's traditional receipt deadline. *Id.* Instead of effectively moving up the deadline for voters to mail in their ballots per USPS's delivery timeline, Memo 2020-22 merely preserves North Carolina's ability to count valid ballots mailed within the timeline previously given to voters—which remains unchanged.

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15 *Available at* https://wapo.st/3kdW38V.

16 *Available at* https://wapo.st/2GUtE9z, at 39-41.

The Memo's commonsense solution is particularly necessary given that the USPS Office of the Inspector General reported in August that—through no fault of voters' own—not all mail-in ballots will receive a postmark. Off. of the Inspector General, USPS, *Processing Readiness of Election and Political Mail During the 2020 General Elections* 3 (Aug. 31, 2020).[17] By law, USPS is required to postmark election mail, *see* 39 C.F.R. § 211.2(a); USPS, *Postal Operations Manual* § 443.3 (2020);[18] so USPS postmarks are typically useful evidence in determining whether a mail-in ballot was cast on or before Election Day. Unfortunately, due to envelopes sticking together or USPS personnel failing to manually mark each piece, USPS cannot guarantee that every piece of election mail will receive a postmark. *See* Off. of the Inspector General, *supra*, at 3. By affording voters the opportunity to evidence the date of their mailing through other commercial carriers' marks, or through the State's own ballot tracking system, North Carolina is ensuring that USPS's inability to comply with its own regulations does not result in the disenfranchisement of North Carolinians.

II. Memorandum 2020-22 Is Consistent With States' Longstanding Practice Of Allowing For And Responding To Mail Delays.

Extended ballot receipt deadlines are not new, though they have become increasingly common in light of COVID-19. Contrary to applicants' contentions, extended deadlines have not caused disorder or inequity. Nor has the use of evidence other than postmarks to demonstrate the date on which a ballot was mailed.

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17 *Available at* https://bit.ly/3j6z7a6.

18 *Available at* https://bit.ly/3m0Rtez.

Moreover, extensions are often granted by executive officials or courts, sometimes as they respond to fast-moving crises or natural disasters. Congress wisely granted states the flexibility to count votes cast on or before, but received after, Election Day. Given the twin challenges of the pandemic and USPS delays, states should be permitted to embrace that flexibility.

1. The applicants' invocations of "chaos," "confusion," and "disparate treatment," *e.g.*, Moore App. 15; Wise App. 2, 19, 24, are belied by both common practice and common sense. States and federal courts have time and again extended ballot receipt deadlines to *prevent* the disparate treatment of ballots. *See, e.g.*, *Gallagher v. N.Y. State Bd. of Elections*, No. 20-CV-5504, 2020 WL 4496849, at *21 (S.D.N.Y. Aug. 3, 2020) (extending receipt deadline where voters "followed the rules mandated by state and local election authorities, yet face[d] disenfranchisement through no fault of their own"). These extensions reflect that circumstances beyond voters' control—a global pandemic, greater absentee voter numbers, and increased strain on USPS—may prevent their timely cast ballots from being promptly delivered or appropriately postmarked. The date that matters to all voters, equally, is the date on which the ballot is cast. Extended receipt deadlines are one reasonable measure by which states may ensure that all timely cast ballots are counted. And, as in this case, states have several tools to ensure that only lawfully cast votes are counted, even when the mail is late or not properly marked by USPS.

Historically, numerous states have accepted absentee or mail-in ballots received after Election Day when the ballot was shown—via postmark or otherwise—

to have been cast on or before Election Day. The District of Columbia's law is illustrative. In the District, absentee ballots that are "postmarked or otherwise proven to have been sent on or before the day of the election, and received . . . no later than the 7th day after the election" shall be accepted. D.C. Code § 1-1001.05(a)(10A). Similarly, California has long deemed a mail-in ballot timely as long as it is "postmarked . . . [or] time stamped or date stamped by a bona fide private mail delivery company on or before election day" and election officials receive it within a specified time period. Cal. Elec. Code § 3020(b)(1), (d). Memo 2020-22 is just another example of the commonsense rationale embraced by states that postmarks function as "evidence of the time of mailing." *E.g.*, 2020 Mass. Acts Ch. 115 § 6(h)(3). And, like North Carolina, many states explicitly rely on the markings from *any* mail carrier to determine the timeliness of a ballot. *See, e.g.*, 10 Ill. Comp. Stat. 5/1-3(25), 5/19-8(c); Off. of the Minn. Sec'y of State, Absentee Voting Administration Guide § 9.1.1 (2020);[19] N.D. Cent. Code § 16.1-07-09; Tex. Elec. Code Ann. § 86.007; Va. Code Ann. § 24.2-709(B); Wash. Admin. Code § 434-250-120(1)(d)(i).

Nor is North Carolina alone in ensuring that USPS's inability to postmark each piece of election mail will not result in the disenfranchisement of its voters. For example, Nevada provides that "[i]f an absent ballot is received by mail not later than 5 p.m. on the third day following the election and the date of the postmark cannot be determined, the absent ballot shall be deemed to have been postmarked on or before the day of the election." Nev. Rev. Stat. § 293.317(2). Pennsylvania implements a

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[19] *Available at* https://bit.ly/3jirUE4.

similar practice. *See Pa. Democratic Party v. Boockvar*, No. 133-MM-2020, 2020 WL 5554644, at *31 (Pa. Sept. 17, 2020) ("[B]allots received within [three days after Election Day] that lack a postmark . . . or for which the postmark . . . is illegible, will be presumed to have been mailed by Election Day."), *stay pending appeal denied*, Order List, Nos. 20A53, 20A54 (U.S. Oct. 19, 2020). And besides postmarking, states have a variety of tools to determine whether a vote was cast by Election Day, like requiring the voter to declare under penalty of perjury or other criminal sanction that the vote was completed by the date indicated and complies with state law. *See, e.g.*, Md. Code Regs. 33.11.03.08(B)(3); 2020 Mass. Acts Ch. 115, § 6(g)(1); N.C. Gen. Stat. § 163-258.13.

What is more, at least 23 states and the District of Columbia accept ballots mailed on or before, but received after, Election Day. In addition to North Carolina and the District, these include Alaska, California, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, Utah, Virginia, Washington, and West Virginia. *See* Addendum. Yet others accept overseas and military absentee ballots received after Election Day under their statutes effectuating the Federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20301, *et seq*. *See* Mont. Code Ann. § 13-21-206(1); 25 Pa. Cons. Stat. § 3511.

This practice has only expanded during the COVID-19 pandemic, during which many states have extended their receipt deadlines to reduce the public health risks of voting in-person and accommodate the issues facing USPS. As examples,

Massachusetts and Mississippi have enacted new legislation to accept ballots mailed on or before Election Day, but received later. *See, e.g.*, 2020 Mass. Acts Ch. 115, § 6(h)(3); Miss. Code. Ann. § 23-15-637(1)(a) (effective July 8, 2020). And other states—like North Carolina—that previously had generous receipt deadlines have further extended them in light of this year's exigencies. *See, e.g.*, Cal. Elec. Code § 3020(d) (effective June 18, 2020) (extending three-day receipt deadline to 17 days for the November 2020 election); D.C. Code § 1-1001.05(a)(10A) (effective Oct. 9, 2020) (extending seven-day receipt deadline to ten days for the November 2020 election); N.J. Stat. § 19:63-22 (effective Aug. 28, 2020) (extending 48-hour receipt deadline to 144 hours).

2. It is common practice for receipt-deadline extensions to come from outside the state's legislative branch. As the en banc Fourth Circuit explained, the North Carolina Board of Elections "regularly" extends these deadlines in response to hurricanes. *Wise v. Circosta*, No. 20-2104, 2020 WL 6156302, at *2 n.2 (4th Cir. Oct. 20, 2020); *see, e.g.*, Emergency Order—Updated 11/5/1018, N.C. State Bd. of Elections (Nov. 5, 2018);[20] *cf.* Pa. Exec. Order 2012-14 (Oct. 31, 2012).[21]

Other states have similarly done so. To "ensure that Kentuckians c[ould] exercise their right to vote while protecting themselves and their families from COVID-19," Governor Andy Beshar issued an executive order permitting the acceptance of ballots mailed by November 3 and received by November 6. Ky. Exec.

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20 *Available at* https://bit.ly/37wocEJ.

21 *Available at* https://bit.ly/31BrKBw.

Order No. 2020-688 at 7 (Aug. 14, 2020).[22] Similarly, Pennsylvania's Secretary of State sought, and its Supreme Court granted, an order permitting ballots mailed by Election Day but received by November 6 to be counted. *Boockvar*, 2020 WL 5554644, at *18. The Secretary expressly acknowledged that, while she had previously opposed such extensions, she had reassessed her stance in light of information from USPS. *Id*. at *13. In upholding the policy, the Pennsylvania Supreme Court reasoned that "flexibility" was required to "guarantee that [a] ballot has time to travel through the USPS delivery system to ensure that the completed ballot can be counted in the election." *Id*. at *17. Accordingly, the court held that, "in light of the[] unprecedented numbers [of mail-in ballots] and the near-certain delays," it "c[ould] and should act to extend the received-by deadline . . . to prevent the disenfranchisement of voters." *Id.* at *18. Other courts have also recognized that reasonable receipt-deadline extensions provide "voters the same opportunity to have their votes counted as is afforded other [] voters" so that the results "represent the will of all [the state's] citizens." *Doe v. Walker*, 746 F. Supp. 2d 667, 682 (D. Md. 2010); *see also, e.g.*, *United States v. Cunningham*, No. 3:08-CV-709, 2009 WL 3350028, at *10 n.3 (E.D. Va. Oct. 15, 2009) (listing nine examples of federal courts granting deadline extensions in New York, Michigan, Idaho, Oklahoma, New Jersey, Colorado, and Georgia); *Curtis v. Bindeman*, 261 A.2d 515, 519 (D.C. 1970).

Indeed, earlier this year, this Court issued an order recognizing that a similar extension imposed in Wisconsin was designed "to ensure that the voters of Wisconsin

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[22] *Available at* https://bit.ly/34msk86.

can cast their ballots and have their vote count." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1208 (2020). And earlier this week, this Court declined to stay Pennsylvania's extended receipt deadline. *Boockvar*, *supra.* North Carolina's actions are thus consistent with both longstanding practice and recent efforts to ensure that voters' mail-in ballots are counted despite the influx of election mail caused by the pandemic and the problems afflicting USPS.

3. Finally, Congress has afforded states significant flexibility in administering elections—states select polling locations, set polling hours, and determine the methods by which votes are cast. *See, e.g.*, *Storer v. Brown*, 415 U.S. 724, 729-30 (1974). Consistent with this, Congress has also granted states the ability to determine when a ballot cast on or before Election Day is timely even if it is later received. Congress could certainly regulate these procedures. Indeed, in the UOCAVA, it carefully set out how military families and others living abroad may vote. *See* 52 U.S.C. § 20301 *et seq.* But even there, Congress allowed states to set the date by which ballots cast before Election Day would be counted. 52 U.S.C. § 20303(b). This further confirms the basic principle that the Constitution leaves to the states "the initial task" of prescribing the time, place, and manner of elections. *Storer*, 415 U.S. at 729-30. And given this once-in-a-century pandemic, coupled with USPS issues that are unprecedented in the modern era, states are in the best position to decide how to administer the upcoming general election, provided that they appropriately safeguard the constitutional right to vote. Memo 2020-22 reflects

North Carolina's careful judgement as to how to protect the franchise and public health. It should be left in place.

CONCLUSION

This Court should deny the emergency applications for injunctive relief.

Respectfully submitted,

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