

No Federal Injunction Against Extension of Absentee-Ballot Receipt Deadline in North Carolina

Moore v. Circosta (4:20-cv-182 and 5:20-cv-507)
(James C. Dever III) and *Wise v. North Carolina State Board
of Elections* (Richard E. Myers II and James C. Dever III,
5:20-cv-505) (E.D.N.C.) and *Moore v. Circosta* (1:20-cv-911)
and *Wise v. North Carolina State Board of Elections*
(1:20-cv-912) (William L. Osteen, Jr., M.D.N.C.)

Two federal actions filed in the Eastern District of North Carolina challenged modifications to election rules that accommodated a state-court settlement and the dangers of a global infectious Covid-19 pandemic. A district judge granted a temporary restraining order and transferred the cases to the Middle District where related litigation was pending. The Middle District judge denied the plaintiffs additional relief, and the Eastern District order expired. The court of appeals and the Supreme Court denied the plaintiffs injunctive relief.

Subject: Absentee and early voting. *Topics:* Absentee ballots; Covid-19; equal protection; matters for state courts; case assignment; intervention.

Federal litigation that began in the Eastern District of North Carolina was transferred to the Middle District as related to litigation pending there. An Eastern District judge issued a temporary restraining order against modifications to election procedures accommodating the global infectious Covid-19 pandemic. The order expired, and the Middle District judge declined additional immediate relief, as did the court of appeals and the Supreme Court.

Judge Dever's First Case

Senior members of the two chambers of North Carolina's legislature and three voters filed a federal complaint in the Eastern District of North Carolina on Saturday, September 26, 2020, against officials of North Carolina's board of elections alleging that policies established by the board for 2020 congressional elections usurped the legislature's authority.¹ With their complaint, the plaintiffs filed a motion for a temporary restraining order.²

Judge James C. Dever III set the case for a video status conference on Monday.³ That same day, the court transferred the case from the district's

1. Complaint, *Moore v. Circosta*, No. 4:20-cv-182 (E.D.N.C. Sept. 26, 2020), D.E. 1; *Moore v. Circosta*, 494 F. Supp. 3d 289, 298, 304 (M.D.N.C. 2020).

2. Temporary-Restraining-Order Motion, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 26, 2020), D.E. 8.

3. Order, *id.* (Sept. 28, 2020), D.E. 17; Transcript, *Moore v. Circosta*, No. 5:20-cv-507 (E.D.N.C. Sept. 28, 2020, filed Oct. 11, 2020), D.E. 49.

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Eastern Division to its Western Division, retaining the same judge but giving the case a new case number.⁴

Judge Dever, however, denied a defense request to transfer the case to the Middle District, where a pending case sought modifications to North Carolina's plans for the November general election to accommodate the global infectious Covid-19 pandemic.⁵ Judge William L. Osteen, Jr., gave the plaintiffs in that case preliminary injunctive relief on August 4.⁶

Judge Dever's Second Case

On September 28, the defendants in Judge Dever's case filed a notice that the case was related to another case filed in the Eastern District on September 26 against North Carolina election officials,⁷ "an action to vindicate properly enacted election laws and procedures against an improper and ultra vires backroom deal publicly announced earlier this week."⁸ With their complaint, the plaintiffs in that case filed a motion for a temporary restraining order.⁹

On September 28, Judge Richard E. Myers II ordered a response within two days to a defense motion to transfer the case to the Middle District.¹⁰ On September 29, the court transferred the case to Judge Dever.¹¹

Temporary Restraining Order

Judge Dever heard the cases together on October 2.¹² He issued a temporary restraining order against state election officials on October 3, enjoining them from Covid-inspired changes to absentee-voting procedures after absentee voting had begun.¹³ He also agreed to transfer the cases to Judge Osteen.¹⁴

4. Order, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 28, 2020), D.E. 18; see Docket Sheet, *Moore*, No. 5:20-cv-507 (E.D.N.C. Sept. 26, 2020).

5. Opinion, *Moore*, No. 5:20-cv-507 (E.D.N.C. Sept. 30, 2020), D.E. 26, 2020 WL 6591307; see Motion, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 28, 2020), D.E. 14; Second Amended Complaint, *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20-cv-457 (M.D.N.C. June 18, 2020), D.E. 30; Amended Complaint, *id.* (June 5, 2020), D.E. 8; Complaint, *id.* (May 22, 2020), D.E. 1.

6. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 590 F. Supp. 3d 850, 863 n.3 (M.D.N.C. 2022).

7. Notice of Related Case, *Moore*, No. 4:20-cv-182 (E.D.N.C. Sept. 28, 2020), D.E. 16.

8. Complaint at 2, *Wise v. N.C. State Bd. of Elections*, No. 5:20-cv-505 (E.D.N.C. Sept. 26, 2020), D.E. 1; *Moore v. Circosta*, 494 F. Supp. 3d 289, 304 (M.D.N.C. 2020); see Notice of Related Case, *Wise*, No. 5:20-cv-505 (E.D.N.C. Sept. 28, 2020), D.E. 8.

9. Temporary-Restraining-Order Motion, *Wise*, No. 5:20-cv-505 (E.D.N.C. Sept. 26, 2020), D.E. 3.

10. Order, *id.* (Sept. 28, 2020), D.E. 11; see Motion, *id.* (Sept. 28, 2020), D.E. 6.

11. Docket Sheet, *id.* (Sept. 26, 2020).

12. Transcript, *id.* (Oct. 2, 2020, filed Oct. 3, 2020), D.E. 26.

13. Opinion, *Moore v. Circosta*, No. 5:20-cv-507 (E.D.N.C. Oct. 3, 2020), D.E. 47 [hereinafter E.D.N.C. Temporary-Restraining-Order Opinion], 2020 WL 5880129; *Wise v. Circosta*, 978 F.3d 93, 97 (4th Cir. 2020); *Moore*, 494 F. Supp. 3d at 304; see *Judge Halts New N.C. Absentee Witness Rule*, Winston-Salem J., Oct. 4, 2020, at A12.

14. E.D.N.C. Temporary-Restraining-Order Opinion, *supra* note 13, at 16–19; *Wise*, 978 F.3d at 97 n.4; *Moore*, 494 F. Supp. 3d at 304; see Docket Sheet, *Wise v. N.C. State Bd. of*

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Judge Osteen

On October 5, Judge Osteen held a telephonic conference and ordered briefing in the two cases completed by the following afternoon.¹⁵ On October 8, Judge Osteen heard oral arguments¹⁶ and granted motions to intervene as defendants to the North Carolina Alliance for Retired Americans and seven persons.¹⁷ But on October 13, Judge Osteen denied motions to intervene by organizations and persons whose “interests in upholding North Carolina’s voting laws will be adequately represented by Defendants.”¹⁸

Judge Osteen denied the plaintiffs preliminary injunctive relief on October 14; although the complaints had merit, the balance of equities weighed heavily against a preliminary injunction.¹⁹

[T]his court finds Plaintiffs have established a likelihood of success on their Equal Protection challenges with respect to the State Board of Elections’ procedures for curing ballots without a witness signature and for the deadline extension for receipt of ballots. . . . [B]ut injunctive relief should be denied at this late date, even in the face of what appear to be clear violations.²⁰

On October 15, Judge Osteen decided that pending appeal, Judge Dever’s temporary restraining order would remain in effect until the end of the following day, and Judge Osteen’s October 14 decision would be stayed until then.²¹

The court of appeals decided on October 19 to hear motions to enjoin Judge Osteen’s decision en banc.²² On the following day, the court denied the plaintiffs an injunction by a vote of twelve to three:²³

Our prudent decision today declines to enjoin the North Carolina State Board of Elections’s extension of its deadline for the receipt of absentee ballots for the ongoing general election.

Elections, No. 1:20-cv-912 (M.D.N.C. Oct. 5, 2020); Docket Sheet, *Moore v. Circosta*, No. 1:20-cv-911 (M.D.N.C. Oct. 5, 2020).

15. Order, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 5, 2020), D.E. 51; *Moore*, 494 F. Supp. 3d at 304–05.

16. Transcript, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 8, 2020, filed Oct. 12, 2020), D.E. 70; *Moore*, 494 F. Supp. 3d at 305.

17. Opinion, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 8, 2020), D.E. 67, 2020 WL 6597291; *Moore*, 494 F. Supp. 3d at 298, 304; see Motion, *Wise*, No. 5:20-cv-505 (E.D.N.C. Oct. 2, 2020), D.E. 21; Motion, *Moore*, No. 5:20-cv-507 (E.D.N.C. Sept. 30, 2020), D.E. 27.

18. Opinion at 7, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 13, 2020), D.E. 72, 2020 WL 6165353; see Motion, *id.* (Oct. 5, 2020), D.E. 38; Motion, *Moore*, No. 5:20-cv-507 (E.D.N.C. Oct. 1, 2020), D.E. 35.

19. *Moore*, 494 F. Supp. 3d 289.

20. *Id.* at 297–98.

21. Order, *Moore*, No. 1:20-cv-911 (M.D.N.C. Oct. 15, 2020), D.E. 78.

22. Order, *Wise v. Circosta*, No. 20-2104 (4th Cir. Oct. 19, 2020), D.E. 17.

23. *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020); see Ann E. Marimow, *North Carolina’s Mail-In Ballot Deadline Extension Upheld in Federal Court*, Wash. Post, Oct. 22, 2020, at A13.

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... *All ballots must still be mailed on or before Election Day.* The change is simply an extension from three to nine days after Election Day for a timely ballot to be received and counted. That is all.

...
... [E]veryone must cast their ballot on or before Election Day, and the ballot will be counted for *everyone* as long as it is received within nine days after Election Day. . . .

...
... The extension simply makes it easier for more people to vote absentee in the middle of a global pandemic that has killed over 200,000 Americans. How this implicates the Equal Protection Clause—a key provision of the Reconstruction Amendments that protects individuals’ right to *equal protection* under the law—is beyond our understanding.²⁴

The Supreme Court denied injunctive relief on October 28.²⁵

The plaintiffs voluntarily dismissed their district-court cases on January 7, 2021.²⁶

24. *Wise*, 978 F.3d at 96, 100.

25. *Wise v. Circosta*, 592 U.S. ___, 141 S. Ct. 46 (2020); see Robert Barnes, *Democrats Gain Two Supreme Court Victories on Ballot Deadline Extensions*, Wash. Post, Oct. 29, 2020, at A9; Jess Bravin & Brent Kendall, *Court Won’t Block Ballots in North Carolina*, *Pennsylvania*, Wall St. J., Oct. 29, 2020, at A6; Adam Liptak, *Supreme Court Lets 2 Key States Extend Deadlines on Mail Ballots*, N.Y. Times, Oct. 29, 2020, at A1; Mark Sherman & Jonathan Drew, *Supreme Court Leaves N.C. Absentee Ballot Deadline As Is*, *Winston-Salem J.*, Oct. 29, 2020, at A5.

26. Notice, *Wise v. N.C. State Bd. of Elections*, No. 1:20-cv-912 (M.D.N.C. Jan. 7, 2021), D.E. 73; Notice, *Moore*, No. 1:20-cv-911 (M.D.N.C. Jan. 7, 2021), D.E. 90.