IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRACY NORTH CAROLINA, THE LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DONNA PERMAR, JOHN P. CLARK, MARGARET B. CATES, LELIA BENTLEY, REGINA WHITNEY EDWARDS, ROBERT K. PRIDDY II, WALTER HUTCHINS, AND SUSAN SCHAFFER,

Plaintiffs,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; STELLA ANDERSON, in her official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; KEN RAYMOND, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; DAVID C. BLACK, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION; J. ERIC BOYETTE, in his official capacity as TRANSPORTATION SECRETARY; THE NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES; MANDY COHEN, in her official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendants,

and

Civil Action

No. 20-cv-00457

BRIEF IN SUPPORT OF LEGISLATIVE DEFENDANTS' MOTION TO DISMISS IN PART PLAINTIFFS' SECOND AMENDED COMPLAINT

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; and TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES,

Legislative Defendant-Intervenors.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Legislative Materials

Other Authorities

INTRODUCTION AND STATEMENT OF MATTER BEFORE THE COURT AND FACTS

Plaintiffs filed this suit nearly two months after Karen Bell, Executive Director of the North Carolina State Board of Elections ("SBOE"), wrote to Governor Cooper and the General Assembly flagging the potential impact of COVID-19 pandemic on North Carolina's upcoming elections. *See* Second Am. Compl. ("SAC") ¶51, Doc. 30 (June 18, 2020). The General Assembly responded by passing bipartisan legislation, House Bill 1169 ("HB1169") in mid-June by a total vote of 142–26.

The law makes several changes to North Carolina election procedures for the 2020 General Election, including reducing to one the number of individuals required to witness an absentee ballot; expanding the pool of authorized poll workers to include county residents beyond a particular precinct; allowing absentee ballots to be requested online, by fax, or by email; directing the SBOE to develop guidelines for assisting registered voters in nursing homes and hospitals; giving additional time for county boards to canvass absentee ballots; and providing over $27 million in funding for election administration.

Nevertheless, apparently unsatisfied with HB1169, which gives them some, but not all, of what they seek, Plaintiffs have persisted in this litigation by amending their complaint primarily to adjust the language, but not the substance, of their kitchen-sink challenge to North Carolina election law. They have

even gone so far as to seek a preliminary injunction, which the State and Legislative Defendants oppose, requiring radical changes to North Carolina election procedures, including the construction of absentee ballot drop boxes across the state, the development and implementation of an additional online voter registration system, and the elimination of the uniform hours requirement for early voting locations. *See* Pls.' Am. Mot. for Prelim. Inj., Doc. 31 (June 18, 2020).

Plaintiffs' constitutional claims are without merit. Indeed, those claims rest almost entirely on speculative allegations of harm that fail to establish standing and seek to have this Court address political questions that are not within the Court's jurisdiction. They also fail on the merits. For these reasons, the Court should dismiss Plaintiffs' constitutional claims outright.[1]

QUESTION PRESENTED

Whether Plaintiffs' constitutional claims should be dismissed.

LEGAL STANDARD

When a party challenges standing at the pleading stage, the Court must "accept as true all material allegations of the complaint and construe the complaint in favor of the complaining

[1] While this motion is addressed to Plaintiffs' constitutional claims, Legislative Defendants do not concede the validity of Plaintiffs' statutory claims.

party." *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). However, the Court need not accept factual allegations "that constitute nothing more than 'legal conclusions' or 'naked assertions.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Likewise, to survive a motion to dismiss under Rule 12(b)(6), Plaintiffs "must plead enough factual allegations 'to state a claim to relief that is plausible on its face.'" *Bing v. Brivo Sys., LLC*, 959 F.3d 605, 616 (4th Cir. 2020) (quoting *Iqbal*, 556 U.S. at 678). To do so, the complaint's factual allegations must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, and "nudge the plaintiff's claims across the line from conceivable to plausible," *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256 (4th Cir. 2009) (quotation marks omitted).

ARGUMENT

I. The Court Should Dismiss Plaintiffs' Constitutional Claims Under Rule 12(b)(1) For Lack of Subject-Matter Jurisdiction.

A. Plaintiffs Lack Article III Standing To Assert Their Vote-Burdening Claims.

At the pleading stage, a plaintiff must plausibly allege the three requirements of standing: injury in fact, causation, and redressability. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89 (4th Cir. 2013); *David v. Alphin*, 704 F.3d at 333.

In addition to suing in its own right, an organizational plaintiff may establish standing to represent its members' interests by demonstrating that "(1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1251 (4th Cir. 1991).

Both the individual and organizational Plaintiffs lack standing to challenge what they allege are unconstitutional burdens on the right to vote.

1. Voter Registration

Plaintiffs allege that the State's requirement that voters must register at least 25 days before the relevant election and its decision not to offer online registration through the Department of Health and Human Services ("DHHS") both unconstitutionally burden the right to vote. *See* SAC ¶¶3, 92–95. *Every single one* of the individual voter-plaintiffs, however, is already registered to vote in North Carolina. *See id.* ¶¶16–22. The State's registration regime therefore poses no injury to any of them, and they have no standing.

The organizational plaintiffs lack standing as well. Neither has identified any members who would independently have standing

to challenge the registration system. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *see also* SAC ¶15 (alleging that LWVNC's membership is registered). Nor do the organizational plaintiffs have standing in their own right. They generally allege that the deadline will "require [them] and [their] members to divert significant resources." *Id.* ¶94. This kind of conclusory statement does not suffice. "Although a diversion of resources might harm the organization by reducing the funds available for other purposes, it results not from any actions taken by [the defendant], but rather from the [organization's] own budgetary choices." *Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012) (quotation marks omitted) (alterations in original).

2. The Witness Requirement

Only Plaintiffs Bentley and Hutchins are potentially capable of challenging the Witness Requirement as amended. Bentley lives alone and alleges that she "do[es] not know if she can satisfy the witness requirement in order to request and cast an absentee mail-in ballot." SAC ¶19. But she lacks standing because her "theory of *future* injury is too speculative to satisfy the well-established requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (quotation marks omitted).

Bentley has until the day of the General Election in November 2020 to postmark her ballot. *See* N.C. GEN. STAT. § 163-231(b)(2)b.

And a great deal can change in the next four months with respect to the danger posed by the virus. Moreover, Bentley alleges only that she "does not leave her home unless absolutely necessary." SAC ¶19. This implies that since she began self-isolating she *has* left her house when necessary. And Bentley has not alleged facts showing that she will not need to leave her house in the months preceding the election such that she will encounter at least one person eligible to serve as her witness.

Nor has Bentley alleged facts indicating that the probability of contracting the virus is so high as to be "certainly impending." An injury that "could very likely" occur does not suffice to secure standing. *Matherly v. Andrews*, 859 F.3d 264, 277 (4th Cir. 2017). Even a 33% chance of harm "falls far short" of establishing standing. *Beck v. McDonald*, 848 F.3d 262, 275–76 (4th Cir. 2017). Bentley has offered no factual allegation showing that, should she maintain diligent social distancing and compliance with CDC recommendations and ask a neighbor who has likewise engaged in social distancing to serve as her witness outdoors and socially distanced, her contracting the virus is certainly impending.

Hutchins also lacks standing to challenge to the Witness Requirement. As with Bentley, Hutchins fails to show any certainly impending injury. First, while Hutchins's living facility is currently on lockdown, that may change by November and if so, Hutchins's wife should be able to serve as his witness. *See* SAC

¶22. Second, Hutchins proffers no allegations explaining why one of his fellow residents at the living facility could not serve as his witness. Third, HB1169 requires the DHHS and SBOE to develop guidance allowing trained multipartisan assistance team ("MAT") members to enter nursing homes "to assist registered voters" there. HB1169 § 2(b). Hutchins may therefore also have a MAT member serve as his witness.

The organizational plaintiffs also lack standing to challenge the Witness Requirement. Neither addresses whether their members would not be able to meet the one-witness requirement, much less identified any such member. *See Summers*, 555 U.S. at 498. Nor do the organizational Plaintiffs allege any facts that would suffice to secure standing in their own right.

3. Requesting Absentee Ballots

HB1169 now provides that voters or their near relatives may additionally request absentee ballots through online submissions, email, or fax. HB1169 §§ 1(b), 7(a). Plaintiffs nevertheless allege that the lack of a request-by-phone option is unconstitutional. *See* SAC ¶103. The only Plaintiff who even addresses requesting a ballot by phone, Hutchins, *see id.* ¶22, has alleged no facts indicating that neither his wife nor any other near relative would be unable to submit the online form, or send a fax or email on his behalf, or that he even has any preference between those options and requesting his ballot over the phone. He lacks standing.

4. Drop Boxes

None of the individual plaintiffs has declared a need for using a drop box to submit their absentee ballots. Therefore, none has standing to raise this claim. Nor have the organizational plaintiffs because they do not specifically identify any members who need or plan to use such drop boxes, nor do they proffer allegations establishing standing in their own right.

5. Opportunity To Cure

The individual plaintiffs who plan to vote by mail do not allege facts showing that it is "certainly impending" that they will need an opportunity to cure any deficiencies in submitting their absentee ballots, nor that their county board of elections will deny them such an opportunity if needed. Millions of citizens every year successfully cast absentee ballots across the country. And these plaintiffs are sophisticated enough to initiate this very suit. It is therefore implausible to conclude that Plaintiffs will imminently err in filling out their absentee ballots. Thus, Plaintiffs lack standing to bring both their vote-burdening and due-process claims against this feature of State law.

And for the same reasons outlined in the above sections, the organizational plaintiffs likewise lack standing to raise this challenge.

6. The Home County and Uniform Hours Requirements

Permar asserts that because she is blind, she uses public transportation and that her right to vote would be burdened "if precincts are consolidated in such a way as to force her . . . to travel to a polling place that is not accessible by public transportation" or wait in a long line once there. SAC ¶108.

These concerns are entirely speculative. Permar makes no allegations supporting the highly unlikely proposition that Durham County—should it even need to engage in precinct consolidation—would not locate any polling places near public transportation. Indeed, in the 2020 Primary Election, one early voting location in Durham County was the Broadhead Center at Duke University, *see 2020 Primary Election Early Voting Schedule*, DURHAM CTY. BD. OF ELECTIONS (2020), https://bit.ly/3hxxhzH, the same campus on which Permar works, *see* SAC ¶111. Likewise, Permar's speculative concern about long lines lacks sufficient factual support to secure her standing.

Finally, the organizational plaintiffs lack standing because they have not identified any individual members who would have standing to challenge these laws, nor are their bare assertions of resource diversion sufficient, *see id.* ¶108, enough. *See Lane*, 703 F.3d at 675.

B. Plaintiffs' Constitutional Voting Rights Claims Must Be Dismissed Under the Political Question Doctrine.

When recently presented with claims that Georgia election officials had not adequately responded to COVID-19 in violation of the constitutional right to vote, a federal court dismissed the claims under the political question doctrine. *See Coal. for Good Governance v. Raffensperger*, No. 20-1677, 2020 WL 2509092 (N.D. Ga. May 14, 2020). First, the court pointed to the Elections Clause's textually demonstrable commitment of "the administration of elections to Congress and state legislatures—not courts," which is "especially important during crises such as the present one involving a medical pandemic." *Coal. for Good Governance*, 2020 WL 2509092, at *3. Second, the court explained that the plaintiffs' claims ultimately turned on "whether the executive branch has done enough," and resolving that issue "with any degree of certainty would be impossible, as there are no judicially discoverable and manageable standards." *Id.*

Coalition for Good Governance is on all fours with this case, its reasoning is persuasive, and this Court should follow it. Any standard for resolving claims in the sensitive area of election regulation "must be grounded in a limited and precise rationale and be clear, manageable, and politically neutral." *Common Cause v. Rucho*, 139 S. Ct. 2484, 2498 (2019) (quotation marks omitted). Here, the General Assembly balanced many incommensurables when

deciding upon procedures for elections during a pandemic. The Court cannot second-guess this judgment without making "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

II. The Court Should Dismiss Plaintiffs' Constitutional Claims for Failure To State a Claim Under Rule 12(b)(6).

Even if Plaintiffs' constitutional claims survive under Rule 12(b)(1), they cannot surmount Rule 12(b)(6).

A. The Organizational Plaintiffs Lack Prudential Standing to Assert Their Vote-Burdening and Due-Process Claims.

The organizational Plaintiffs' vote-burdening and due-process claims additionally must be dismissed under Rule 12(b)(6) for a lack of prudential standing. To overcome the limits on third-party standing, the organizational plaintiffs must show that: (1) they have a " 'close' relationship" with those whose constitutional rights they seek to assert; and (2) the individuals whose rights are at issue face a "hindrance" to their "ability to protect [their] own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Neither is satisfied. First, the relationship between the organizational plaintiffs and third-party voters is nothing like the special relationships of intimacy and confidence justifying third-party standing. *See, e.g.*, *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689 (2017) (parent-child); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 (1989) (attorney-client). Second, parties whose rights are directly affected are

their own best representatives, to the exclusion of others, unless third-party plaintiffs make an affirmative showing otherwise. *See Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002). The organizational plaintiffs cannot make such a showing. The claims of the individual plaintiffs here demonstrate that voters can readily bring their own suits.

B. Plaintiffs' Vote-Burdening Claims Are Legally Insufficient.

Under the well-established *Anderson-Burdick* framework, a court assessing a vote-burdening claim must "consider the character and magnitude of the asserted injury" to the right vote. *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605 (4th Cir. 2016) (quotation marks omitted). If the restriction is "severe," it "must be narrowly drawn to advance a state interest of compelling importance." *Id.* at 606. But this scrutiny is applicable only when "the State totally denied the electoral franchise to a particular class of residents." *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020) (quotation marks omitted). Meanwhile, "a reasonable, nondiscriminatory restriction on voting rights" is "justified by a State's important regulatory interests." *Lee*, 843 F.3d at 606 (quotation marks omitted).

Even accepting Plaintiffs' factual allegations as true, they cannot state a claim for relief under *Anderson-Burdick*.

1. Voter Registration

Plaintiffs cannot plausibly claim that the 25-day registration deadline somehow "totally denie[s]" the right to vote, *see Mays*, 951 F.3d at 786, because the State provides ample registration opportunities, *see* SAC ¶53. Because voters "have ample time and opportunity" to register, the 25-day requirement's burden on voters is, at most, "modest." *Pisano v. Strach*, 743 F.3d 927, 936 (4th Cir. 2014).

The State's "interest in ensuring orderly, fair, and efficient procedures for the election of public officials" justifies the deadline. *Id.* at 937 (quotation marks omitted). "This interest necessarily requires the imposition of some cutoff period to verify the validity of" the applications. *Id.* (quotation marks omitted). Plaintiffs give no reason to think that the 25-day requirement is incongruent with that interest.

For similar reasons, the State's decision to offer online registration only through the DMV's website is perfectly constitutional. They offer no allegation supporting why the current DMV-based portal is constitutionally deficient, especially given that at least 91.9% of registered voters in the State have DMV-issued ID. *See N.C. State Conference of NAACP v. Cooper*, 430 F. Supp. 3d 15, 38 (M.D.N.C. 2019). And Plaintiffs further do not explain how even a single voter has ever been hindered from

registering to vote because DHHS has not operated a registration website apart from the DMV's.

Meanwhile, the State has important interests in avoiding voter confusion and securing sensitive voter information. Were there a proliferation of State agency websites available for registration, the State would need to expend significant resources to securely maintain the information deposited through the websites and would need to make efforts to allow voters to differentiate those agencies whose websites permit voter registration from those that do not. Moreover, because the State must ultimately verify each voter registration application, *see* N.C. GEN. STAT. § 163-82.7, a DMV-centered online registration system connects any applicant to an existing DMV account and therefore streamlines the verification process.

2. The Ballot Harvesting Ban

North Carolina law allows only a "voter's near relative or verifiable legal guardian" or MAT members to "complete[], partially or in whole" or to "sign[]" absentee ballot request form, *see* N.C. GEN. STAT. § 163-230.2(e)(2), and allows only those individuals, the Postal Service, or a statutorily authorized delivery service to deliver a completed request form, *see id.* § 163-230.2(c), (e)(4) ("Ballot Harvesting Ban").

Of course, "there is no constitutional right to an absentee ballot." *Mays*, 951 F.3d at 792. Therefore, restrictions on absentee

ballots are reviewed only for rationality unless the putative voter is "in fact *absolutely prohibited* from voting by the State" when looking at the state's election code "as a whole." *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 & 808 n.7 (1969) (emphasis added). Because North Carolina "permits the plaintiffs to vote in person" "*McDonald* directs [this Court] to review [the absentee-ballot laws] only for a rational basis." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 404, 406 (5th Cir. 2020). That said, as shown below, each challenged absentee-voting provision satisfies even the *Anderson-Burdick* framework.

To begin, with the passage of HB1169, the State now allows absentee ballot requests online and by email and fax for all further 2020 elections. HB1169 §2(a). While Plaintiffs claim that the Constitution also requires State to allow absentee ballot requests over the phone, *see* SAC ¶103, the lack of such an option when voters can request absentee ballots many other ways is not a "severe" burden on the right to vote. Whatever burden exists is minute, and the State's interest in maintaining written and electronic records, complete with wet signatures or e-signatures for verification, is plainly legitimate.

HB1169 likewise neuters Plaintiffs' challenge to the Ballot Harvesting Ban. The suspension of the requirement that absentee ballot requests be sent on paper for the 2020 elections undercuts Plaintiffs' claim of undue burden from the Ballot Harvesting Ban.

For example, Plaintiff Cates can now submit an online request, and Hutchins's wife or another near relative may do the same for him without the assistance of outside organizations.

Plaintiffs' remaining gripes with the Ballot Harvesting Ban stem from a substantial over-reading of the statute's restrictions. Section 163-230.2 prohibits three discrete acts: (1) "complet[ing]" the applicant's request form; (2) "sign[ing]" the form; and (3) "deliver[ing]" the form to the county board of elections. A LWVNC volunteer could, consistent with Section 163-230.2, discuss filling out an absentee ballot request line-by-line with any of the individual Plaintiffs or any other voter, answering whatever questions the voter has along the way, so long as the volunteer does not engage in any of three discrete acts listed above. The law therefore poses only a minimal burden on the right to vote, especially now that voters in 2020 are not physically required to deliver paper requests to the county boards.

Meanwhile, the government's interests here are weighty. Plaintiffs fault the restriction as not "narrowly drawn" to advance its anti-fraud interest, SAC ¶98, but "'narrow tailoring' . . . analysis has always been reserved for a court's strict scrutiny of a statute." *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000). Under *Anderson-Burdick*, "requirements constituting an unreasonable, discriminatory burden are the only requirements subject to strict scrutiny review." *Id.* For "reasonable and

nondiscriminatory rules"——like the Ballot Harvesting Ban——the court must "ask only that the state articulate its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (quotation marks and alterations omitted). This is "not a high bar" and can be cleared with "[r]easoned, credible argument," rather than "elaborate, empirical verification." *Id.* (quotation marks omitted).

The State has met its burden. In the aftermath of the Dowless scandal, *see generally* Order, *In re Investigation of Election Irregularities Affecting Counties Within the 9th Congressional District*, STATE BD. OF ELECTIONS (Mar. 13, 2019), https://bit.ly/38ejmtY, the State reasonably and credibly decided that preventing abuse of the ballot collection process required targeted restrictions on handling absentee ballot requests by individuals outside of the voter's family and the MAT. Plaintiffs cannot plausibly contend that the 160 state legislators who voted in favor of the Ban (against only one opposing vote) lacked any "reasoned" or "credible" arguments for enacting this limited regulation on ballot harvesting.

3. The Witness Requirement

North Carolina requires that for the 2020 elections an absentee-by-mail voter need only "mark[] the ballot in the presence of at least one" qualified adult, "provided that the person signed the application and certificate as a witness and printed that

person's name and address on the container-return envelope." HB1169 § 1(a).

The State's relaxed Witness Requirement satisfies the *Anderson-Burdick* test. Voters can satisfy the Witness Requirement while abiding by all relevant social-distancing and sanitization guidelines. For example, any family member, friend, neighbor, mail-delivery person, food-delivery person, or MAT member can watch the voter mark their ballot through a window, glass door, or other barrier. At that point, the voter can pass the ballot under a closed door or through an open window to be marked, signed, and returned (after handwashing or sanitizing) without direct interaction between the two persons. These options are available to practically all voters living alone and would not require the voter or the witness to come within six feet of each other or break other social-distancing guidelines.

Because the Witness Requirement is a "reasonable and nondiscriminatory rule[]," the State's burden is merely to "articulate its asserted interests", with "[r]easoned, credible argument," rather than "elaborate, empirical verification." *Libertarian Party of Va.*, 826 F.3d at 708 (quotation marks and alterations omitted). The Witness Requirement is a rational means of promoting the State's interest in deterring, detecting, and punishing voter fraud. And that interest is compelling. *See*

Citizens for Tax Reform v. Deters, 518 F.3d 375, 387 (6th Cir. 2008).

4. Drop Boxes

Plaintiffs allege that North Carolina has violated the Constitution by not providing drop boxes for voters to deliver absentee ballots despite the fact that "there is no constitutional right to an absentee ballot," *Mays*, 951 F.3d at 792, let alone a right to deliver that ballot however one wants. Moreover, Plaintiffs offer no support for this claim aside from the speculation that voters should be able to "avoid severe delays with the U.S. Postal Service." SAC ¶75. Plaintiffs invoke the anecdotal experiences of three states during their spring primary elections, but they offer no factual allegations from which one would reasonably infer that USPS will not timely deliver absentee ballots in North Carolina in November, especially given that the very source Plaintiffs cite noted that post offices were agreeing "to a series of measures designed to speed up election mail." Carrie Levine, *Ohio's Mail in Ballot Brouhaha: A Sign of Coming Trouble?*, CTR. FOR PUB. INTEGRITY (Apr. 28, 2020), https://bit.ly/3ihNMQD.

Because the State's decision to abstain from providing drop boxes is nothing more than a "reasonable and nondiscriminatory rule[]," the State's burden is merely to "articulate[] its asserted interests" with "[r]easoned, credible argument." *Libertarian Party*

of Va., 826 F.3d at 719 (quotation marks omitted) (first and third alterations added). Its interests in administrative convenience and the allocation of limited resources in the remaining time before the election "readily falls under the rubric of a state's regulatory interests, the importance of which the Supreme Court has repeatedly recognized." *Wood*, 207 F.3d at 715 (quotation marks omitted). And the State's decision to abstain from wading into the practice of drop boxes clearly "furthers these interests." *Id.*

5. Opportunity To Cure

Plaintiffs argue that the State unduly burdens the right to vote by not guaranteeing to voters statewide an opportunity to cure deficient absentee ballot requests or ballots. But those concerns derive from mistaken premises already addressed. For example, because the Ballot Harvesting Ban does not prevent any person from helping an individual understand the procedures surrounding mail-in absentee voting, there is no "heightened risk that voters new to mail-in absentee voting will fail to follow the proper procedures" because of it. SAC ¶76. More fundamentally, Plaintiffs cannot identify a single instance where election officials rejected an absentee ballot based on some mistake that could have been cured. This alone indicates that the purported burden here is, at most, minimal.

Plaintiffs also ignore the State's substantial interests in finality and administrative convenience. A formal administrative

apparatus designed to cure potentially thousands of absentee ballot requests and ballots could upend the finality of North Carolina's elections and perhaps their legitimacy. Requiring election officials to dedicate potentially thousands of hours to assessing the curative potential for each rejected absentee ballot could easily delay election results—particularly in close contests—by weeks. Because the State's decision to abstain from providing a mandatory curative process for absentee ballots is a "reasonable and nondiscriminatory rule[],"and because the State has articulated its asserted interest with "[r]easoned, credible argument," *Libertarian Party of Va.*, 826 F.3d at 719, its practice is constitutional.

6. The Home County Requirement

For 2020, North Carolina requires that at least one poll worker to be a resident of the precinct, and that all poll workers in the precinct at least be residents of the county. *See* HB1169 § 1(b).

Plaintiffs' allege that Home County Requirement will "force precinct consolidation and relocation and create long lines and crowds on Election Day." SAC ¶106. But Plaintiffs' complaint offers *zero* factual allegations plausibly showing that the Home County Requirement causes precinct consolidation. The most that Plaintiffs can say about the Home County Requirement is that a June primary election in Georgia shows that "even county-wide

recruitment of poll workers proved insufficient to properly staff polling locations." *Id.* ¶82. This conclusory allegation, based on an anecdotal news account of a handful of polling locations in another state, cannot plausibly support such an inference.

Plaintiffs cannot show that the law burdens their rights to vote *at all*, and it therefore necessarily satisfies *Anderson-Burdick*. *See McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995). At any rate, the State's interest in election administration and integrity supports the requirement.

7. The Uniform Hours Requirement

Finally, Plaintiffs argue that the State's Uniform Hours Requirement——that all early voting sites remain open during uniform hours and that all sites aside from the county board office must be open from 8:00 AM to 7:30 PM——unconstitutionally burdens the right to vote. This claim rests upon speculation and a disregard for the State's important interests in election integrity.

Plaintiffs claim that the Uniform Hours Requirement "caused 43 counties to reduce the number of early voting sites in the 2018 general election compared to 2014 and over two thirds of counties to reduce weekend hours." SAC ¶84. But even if true, this allegation about the number of early voting *sites* is irrelevant to the more basic question of the law's effect on total early voting *hours* across the sites. Plaintiffs therefore have no factual

allegations from which to infer that the Uniform Hours Requirement restricts voting opportunities.

Plaintiffs also proffer no factual allegations from which one can plausibly infer that the Uniform Hours Requirement would lead to unavoidable lines and crowds at early voting locations. Indeed, one should suspect the law to have the opposite effect: even if fewer early voting locations are established for the 2020 General Election, the locations that remain open will operate at least every weekday from 8:00 AM to 7:30 PM.

Plaintiffs' speculation about precinct consolidation additionally lacks foundation HB1169's allocation of an additional $6 million "for early one-stop voting-related expenses" in counties "that adopt uniform early one-stop voting plans." HB1169 § 11.1(b)(5). This substantial funding significantly decreases the likelihood that the Uniform Hours Requirement will cause precinct consolidation on the scale that Plaintiffs' imply.

To the extent that the Uniform Hours Requirement burdens the right to vote at all, that burden is modest. Moreover, the State's interests in avoiding voter confusion by promoting uniformity and promoting administrative convenience by making it easier for counties to publicize early voting hours, as well as its interest in avoiding even an appearance of partisanship in the setting of early voting hours, clearly justify such a reasonable, nondiscriminatory election regulation.

C. Plaintiffs' "Unconstitutional Conditions" Claim Fails.

1. The unconstitutional-conditions doctrine is irrelevant to this case because that doctrine only "forbids burdening the Constitution's enumerated rights by *coercively withholding benefits* from those who exercise them." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (emphasis added). Plaintiffs are not challenging the withholding of government benefits, and Legislative Defendants are not arguing that Plaintiffs voluntarily agreed to give up a constitutional right in exchange for such benefits.

Plaintiffs contend that the unconstitutional-conditions doctrine is implicated because North Carolina election law allegedly forces them to choose between their constitutional voting rights and their substantive due process right to bodily integrity. But the correct way to analyze cases in which more than one constitutional right is at stake is to apply the ordinary legal standards that govern claims under each of the constitutional rights in question. *See Miller v. Smith*, 115 F.3d 1136, 1139-44 (4th Cir. 1997) (en banc). Plaintiffs' legally deficient vote-burdening claims cannot succeed when repackaged under the inapplicable unconstitutional-conditions doctrine.

2. Plaintiffs are actually complaining about an alleged violation of their substantive due process right to bodily integrity. This argument is meritless.

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the Supreme Court held that the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.* at 194–95 (quotation marks omitted). Therefore, the baseline rule is that "[l]iability does not arise when the state stands by and does nothing in the face of danger." *Stevenson ex rel. Stevenson v. Martin Cty. Bd. Of Educ.*, 3 Fed. App'x 25, 31 (4th Cir. 2001).

Outside the custodial context, the only exception to this rule applies when "*affirmative* misconduct by the state . . . creat[es] or enhanc[es] the danger" that someone confronts. *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) (quotation marks omitted). Plaintiffs cannot establish such affirmative conduct by the State. The spread of the coronavirus is a natural phenomenon that the State did not cause, much less cause through any "affirmative" act. *Cf. Coal. for Good Governance*, 2020 WL 2509092, at *3 n.2.

Even if Plaintiffs' feared injuries were attributable to an affirmative act by the State, their substantive due process argument would still fail because the right that Plaintiffs assert falls far outside the ambit of any right the Supreme Court has ever recognized. Supreme Court precedent requires a "careful description of the asserted fundamental liberty interest,"

Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quotation marks omitted), and Plaintiffs claim a substantive due process right to physical safety while voting. Plaintiffs are unable to cite *any* case that has recognized such a right——much less the sort of weighty authority that would be necessary to show that this right is "deeply rooted in this Nation's history and tradition." *Id.* (quotation marks omitted).

D. The Ballot Harvesting Ban Does Not Violate the First Amendment.

Plaintiff Schaffer and the organizational Plaintiffs claim that the Ballot Harvesting Ban violates their rights to free speech and free association under the First Amendment. But the Ballot Harvesting Ban does not touch on protected speech or association *at all*.

First, to implicate the First Amendment, the ballot harvesting that North Carolina regulates must be expressive conduct. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). First Amendment protection extends only to conduct that "is intended to be communicative and . . . in context, would reasonably be understood by the viewer to be communicative." *Id.* at 294.

Plaintiffs fail to make this showing. The Ballot Harvesting Ban regulates three discrete forms of "assistance": (1) "complet[ing]" the applicant's absentee ballot request form; (2)

"sign[ing]" it; and (3) "deliver[ing]" it to the county board of elections. None of these actions are inherently expressive. And Plaintiffs offer no explanation for how this limited regulation of conduct infringes on their First Amendment rights. Plaintiffs can say *anything* they want to *any* registered voter regarding absentee ballot requests.

Courts assessing the constitutionality of ballot-collection measures like SB 683 regularly hold that they do not implicate the First Amendment precisely because they regulate non-expressive activities. *See Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018); *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 391 (5th Cir. 2013). And even if "complet[ing]" or "sign[ing]" a ballot request form constitutes protected speech, it is the speech of *the voter*, not the organization or individual assisting the voter. *See Knox*, 907 F.3d at 1182; *Voting for Am., Inc.*, 732 F.3d at 390.

Because the Ballot Harvesting Ban "do[es] not implicate the First Amendment, rational basis scrutiny is appropriate." *Voting for Am. Inc.*, 732 F.3d at 392. Under that standard the Ballot Harvesting Ban comes to this Court bearing a "strong presumption of validity" and will pass constitutional muster so long as it is "rationally related to legitimate governmental goals," which can be based on "rational speculation unsupported by evidence or empirical data." *Wilkins v. Gaddy*, 734 F.3d 344, 347, 348 (2013) (quotation marks omitted). The Ballot Harvesting Ban clearly

survives under such a deferential standard: It is a rational means of promoting the government's legitimate interest in combating election fraud.

E. The Due Process Clause Does Not Require the Procedures Plaintiffs Demand.

Plaintiffs allege that North Carolina violates the due process rights of its absentee voters because election officials do not provide a uniform, mandatory process through which voters who submit error-ridden absentee ballots are given a second chance at filling them out. The Fourth Circuit uses a two-pronged test to determine procedural due process violations: "a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). Plaintiffs cannot satisfy either prong.

First, the absentee vote is not a protected interest. Under *Wilkinson v. Austin*, protected interests may derive from the U.S. Constitution or from "an expectation or interest created by state laws or policies." 545 U.S. 209, 221 (2005). But the option of an absentee ballot is not a right itself. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

Second, even if absentee voting were a protected interest, courts weigh three factors when considering procedural safeguards: the protected interest; the risk that the interest will be

erroneously deprived and the probable value of additional safeguards; and the public interest, including "the fiscal and administrative burdens" that the safeguards would impose. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). If the burdens of added safeguards would overwhelm their expected value, states may constitutionally reject them. *See id.* at 349. So it is here.

Plaintiffs insist that North Carolina does not afford mail-in absentee voters "any notice of or opportunities to cure material defects in their absentee ballot request forms or absentee ballots." SAC ¶137. But they offer no factual allegations supporting that assertion, and the SBOE has a uniform policy encouraging county officials to contact voters to help them correct mistakes on absentee ballot request forms, Numbered Memorandum 2020-03 from Karen Brinson Bell, Exec. Dir., N.C. State Bd. of Elections, to County Bds. Of Elections 2-4 (Jan. 15, 2020), https://bit.ly/3eASDdj. Plaintiffs say nothing about these existing safeguards and do not even attempt to establish that additional safeguards would have value.

Meanwhile, the financial and administrative costs of what Plaintiffs appear to contemplate are overly burdensome. For example, when a county election board rejected 2,603 referendum petition signatures without giving an opportunity for cure, the Fourth Circuit found that there was no procedural due process violation because "the costs of allowing thousands of people to

demand a hearing on the validity of their signatures would be disproportionate to the benefits." *See Kendall v. Balcerzak*, 750 F.3d 515, 530 (4th Cir. 2011). Plaintiffs give this Court no reason to infer that the costs in this case would be any less disproportionate.

CONCLUSION

Plaintiffs' second amended complaint should be dismissed in part.

Dated: July 2, 2020

Respectfully submitted,

/s/ Nicole J. Moss
Nicole J. Moss (State Bar No. 31958)
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
nmoss@cooperkirk.com

Local Civil Rule 83.1 Counsel for Legislative Defendant-Intervenors

/s/ David H. Thompson
David H. Thompson
Peter A. Patterson
Steven J. Lindsay*
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Legislative Defendant-Intervenors

**Notice of Appearance Forthcoming*

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Brief in Support of Legislative Defendants' Motion To Dismiss in Part Plaintiffs' Second Amended Complaint, including body, headings, and footnotes, contains 6,243 words as measured by Microsoft Word.

/s/Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 2nd day of July, 2020, she electronically filed the foregoing Brief in Support of Legislative Defendants' Motion To Dismiss in Part Plaintiffs' Second Amended Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
Nicole J. Moss