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,* *vs.* 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,*	Civil Action No. 20-cv-457 **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO DISMISS**

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

Defendant-Intervenors.

INTRODUCTION AND STATEMENT OF FACTS

In the Second Amended Complaint, Doc. 30 ("Compl." or "Complaint"), eight Individual Plaintiffs together with two Organizational Plaintiffs, League of Women Voters of North Carolina ("LWVNC") and Democracy North Carolina ("DemNC"), allege that the State Defendants' enforcement of several of North Carolina's restrictions on voter registration, mail-in absentee ballots, and in-person voting violate the First and Fourteenth Amendments as well as various federal statutes when enforced during the ongoing Covid-19 pandemic. Defendant-Intervenors have moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim. Doc. 71.

LEGAL STANDARD

When reviewing a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), a court may consider

evidence outside the pleadings and should grant the motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (citations omitted).

Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Plaintiffs Have Standing To Assert Their Claims

Defendant-Intervenors contend that Plaintiffs lack standing to challenge certain burdens to the right to vote under Counts I and IV of the Complaint.[1] Defendant-

[1] Defendant-Intervenors do not challenge standing for the remaining seven claims, and have not challenged Plaintiffs' standing with respect to (1) the organizational assistance ban; (2) HAVA alternative identification for absentee ballot request forms; (3) Federal Write-in Absentee Ballots;

Intervenors, however, urge the Court to apply legal standards that contradict longstanding precedent on Article III standing. Under the proper standards, Plaintiffs have plausibly alleged standing for the challenged claims.

A. Organizational Plaintiffs

When standing is challenged on the pleadings, a court must accept as true all material allegations of the Complaint and construe the complaint in favor of the complaining party. *See Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). Furthermore, "'general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presume that general allegations embrace those specific facts that are necessary to support the claim.'" *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 89-90 (4th Cir. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal alterations omitted)). Finally, an organization need not "prove" that challenged regulations will cause injury, it need only plausibly allege that it will. *Id.* (emphasis original).

(4) centralized information on precinct consolidation; or (5) personal protective equipment.

In *Havens Realty Corp. v. Coleman*, the Supreme Court held that organizational plaintiff HOME had standing based on allegations that the defendants' racial steering practices had frustrated its efforts to assist equal access to housing, causing it to "devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." 455 U.S. 363, 379 (1982). The Supreme Court held that,

> [i]f, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities – with the consequent drain on the organization's resources – constitutes far more than simply a setback to the organization's abstract social interests.

Id. In the election context, "[i]t is well-established that an organization has standing in its own right to challenge an election law when it expends or diverts resources to educate voters about the new law or assist them in complying with the new law." *Spirit Lake Tribe v. Jaeger*, 2020 WL 625279, at *4 (D.N.D. Feb. 10, 2020) (collecting cases and denying motion to dismiss); *see also Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019)

(collecting cases and holding that "[i]n election law cases, an organization can establish standing by showing that it will need to divert resources from general voting initiatives or other missions of the organization to address the impacts of election laws or policies").

Here, the Organizational Plaintiffs have plausibly alleged injuries that establish their standing. DemNC works to increase voter access and participation by spending substantial time and effort to produce voter education guides, in-person voter education forums, serving as a central hub for voter information, and providing direct voter assistance. Compl. ¶¶ 14, 57, 113. Similarly, LWVNC invests substantial time and effort into voter training and education, voter registration and ballot assistance, and get-out-the-vote efforts to further its missions of encouraging voting and removing unnecessary barriers to full participation in the electoral process. *Id.* ¶¶ 15, 96.

Throughout the Complaint, Plaintiffs extensively describe how the challenged restrictions will directly inhibit the ability of voters to register, vote by mail, or vote in-person safely. Plaintiffs have thus plausibly alleged that these restrictions have "perceptively impaired" the

Organizational Plaintiffs' core missions of getting people to vote and reducing the burdens to voting in North Carolina, especially through allegations asserting these restrictions have also burdened the Organizational Plaintiffs, *see, e.g.*, Compl. ¶¶ 91, 103, 115, 116, as construed to "'embrace those specific facts that are necessary to support the claim.'" *Liberty Univ.*, 733 F.3d at 89-90 (citation omitted).[2]

Furthermore, as to voter registration, Plaintiffs allege that the 25-day deadline and lack of more online voter registration options will hinder and impede LWVNC's efforts to promote voter registration, educate voters, and engage in voter registration efforts, frustrating its mission to ensure that all eligible voters can register safely during the pandemic. Compl. ¶ 94. The inability of voters to request absentee ballots by phone will require LWVNC to redirect a significant amount of its limited resources toward helping eligible voters submit absentee ballot request forms by other means, *id.* ¶ 103, thus limiting its ability to engage in other voter assistance. The failure to provide a uniform mechanism

[2] Plaintiffs' allegation that the challenged restrictions will present an undue burden to LWVNC's members confers membership standing in the alternative. *See* Complaint ¶ 91; *Veasey v. Perry*, 29 F. Supp. 3d 896, 904 (S.D. Tex. 2014).

for voters to cure their absentee ballots, in light of historical and anticipated high rejection rates, will require Organizational Plaintiffs to research various rules to help ensure the voters they assist are following all procedures for requesting and filling out absentee ballots precisely. *Id.* ¶¶ 76, 104. Accordingly, the harm to the Organizational Plaintiffs of expending additional resources to combat these restrictions both directly impedes their core missions of providing direct voter assistance and detracts from the Organizational Plaintiffs' other efforts to serve these missions. The home county and uniform hours requirements will similarly force the Organizational Plaintiffs to divert resources toward poll worker recruitment and voter education to directly combat the harmful effects of these restrictions, including a shortage of poll workers and resulting reduction in polling locations. Compl. ¶¶ 108, 111.[3]

[3] In addition to the allegations in the Complaint, Plaintiffs have provided on the record ample evidence of injury from the challenged restrictions in the declarations provided in support of Plaintiffs' Amended Motion for Preliminary Injunction. *See* Docs. 12-1, 12-2, 73-1, 73-2. Plaintiffs have further requested leave to file a Third Amended Complaint in order to, *inter alia*, include allegations that reflect this more specific evidence among the allegations in the operative complaint. *See* Doc. 120.

Courts have routinely found standing exists based on the nearly identical allegations of diversion of resources that the Organizational Plaintiffs assert here. *See, e.g., OCA-Greater Houston v.* Texas, 867 F.3d 604, 610 (5th Cir. 2017) (finding organizational standing based on diversion of resources); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (same); *Lewis v. Hughs*, 2020 WL 4344432, at *9-10 (W.D. Tex. July 28, 2020) (same); *Fair Fight Action*, 413 F. Supp. 3d at 1267 (same); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 909-10 (W.D. Wis. 2016) (same), *aff'd in part, rev'd in part sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1335-36 (N.D. Ga. 2018) (finding organizational standing for procedural due process claim challenging signature mismatch risks).

Lane v. Holder does not require dismissal as Defendant-Intervenors contend. 730 F.3d 668 (4th Cir. 2012). There, Plaintiff SAF, a gun rights organization, alleged that its "resources are taxed by inquiries into the operation and consequences of interstate handgun transfer provisions." *Id.* at 675. But, unlike here, SAF failed to allege any efforts to assist individuals burdened by the challenged restrictions in

exercising their constitutional rights, or that it engaged in individualized assistance at all. The Fourth Circuit thus found that SAF failed to show that the "defendant's alleged practices 'perceptibly impaired [the organization's] ability to" engage in "a key component of [its] mission." *Id.* at 674-75 (quoting *Havens Realty*, 455 U.S. at 379). By contrast, the Organizational Plaintiffs here engage in educational efforts and direct voter assistance to encourage individual voters to vote and reduce barriers to voting. This is much more than just the handling of "inquiries" by SAF, and courts have rejected similar arguments relying on *Lane*. *See, e.g.*, *Harrison v. Spencer*, 2020 WL 1493557, at *7 (E.D. Va. Mar. 27, 2020) (where defendants' actions have "perceptibly impaired" organization's ability to carry out its mission and drained its resources, standing exists, and *Lane* "does not compel a contrary conclusion").

B. Individual Plaintiffs

Defendant-Intervenors' arguments challenging the standing of certain individuals are likewise unavailing. "[A] voter always has standing to challenge a statute that places a requirement on the exercise of his or her right to vote." *People First of Ala. v. Merrill*, 2020 WL 3207824, at *6 (N.D.

Ala. June 15, 2020) ("People First I"), *stay granted*, 591 U.S. -- (July 2, 2020) ("People First II"). A voter need not show they are categorically unable to surmount a challenged restriction, especially where they have plausibly alleged this restriction presents a burden to the right to vote. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) ("The inability of a voter to pay a poll tax … is not required to challenge a statute that imposes a tax on voting."); *OCA-Greater Houston*, 867 F.3d at 612 (injury requirement can be met by an "identifiable trifle").

Defendant-Intervenors therefore misconstrue the appropriate standard when they contend that Plaintiff Bentley's injury is too "speculative" or not "certainly impending" enough to challenge the witness requirement. Doc. 72, at 6. Ms. Bentley is at risk of severe illness from Covid-19 and cannot vote in person because of the risk to her health. Compl. ¶ 19. However, because she lives on her own, she does not know how she will safely satisfy the Witness Requirement to successfully vote by mail while self-isolating to protect her health. Doing so would require her to risk contact with another individual (assuming she identifies a witness at all while self-isolating) who may not be taking

appropriate precautions and may lead her to contract Covid-19. *Id.* Ms. Bentley has therefore plausibly alleged that the witness requirement places a burden on her right to vote; she "need not show that [her] right to vote *will* be denied" to bring this claim. *Lewis*, 2020 WL 4344432, at *9 (high-risk individuals have standing where they were self-isolating during the Covid-19 pandemic and had concerns compliance would present a risk to their health); *see also One Wis. Inst., Inc.*, 198 F. Supp. 3d at 909 (individuals had standing to challenge voter ID law even where they had a qualifying ID). Furthermore, there is a direct link between the challenged restriction – the witness requirement – and the risk to her health, unlike the "highly attenuated chain of possibilities" in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410-11 (2013), on which Defendant-Intervenors rely.[4]

Plaintiff Permar likewise need not prove she will be disenfranchised or infected to challenge the precinct consolidation and reduction in polling sites that will result

[4] Defendant-Intervenors' reliance on *Matherly v. Andres*, 859 F.3d 264 (4th Cir. 2017), and *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017), are similarly misplaced as neither involved an alleged burden on the right to vote.

from the uniform hours and home county requirements, as she has plausibly alleged she will be severely burdened by excessive precinct consolidation that threatens her ability to access polling by publicly-available transit and/or forces her to stand in long lines and risk her health. *See Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969) (defendant's failure to provide adequate voting facilities, despite their foreknowledge of precinct consolidations, deprived voters of their constitutional rights).[5]

Similarly, Plaintiffs Clark, Cates, Edwards, Priddy, Bentley, and Hutchins all intend to vote by mail, and they need not prove that their absentee ballots will be rejected to challenge the lack of any uniform method to cure absentee ballots. Defendant-Intervenors cite no case law to contend otherwise, and ignore that the undisputed risk of disenfranchisement is injury enough to challenge this burden on the right to vote. *Cf. Democratic Exec. Comm. of Fla. v.*

[5] The Court's finding in its August 4, 2020, memorandum and order that Ms. Permar does not have standing to challenge the uniform hours and home county requirements for the purposes of the preliminary injunction is not dispositive here. Plaintiffs have plausibly alleged that Ms. Permar will be burdened by these requirements, which is all that is required to survive a motion to dismiss.

Lee, 915 F.3d 1312, 1319-20 (11th Cir. 2019) ("Florida's signature-match scheme subjects vote-by-mail and provisional electors to the risk of disenfranchisement" and that "[c]onsequently, legitimate vote-by-mail and provisional voters, through factors out of their control, are burdened with the risk that their ballots will incorrectly be rejected for signature mismatch"). Furthermore, the standard for Plaintiffs' due process claim in Count IV requires showing only a *risk* of deprivation, not actual deprivation. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Even if required, Plaintiffs have plausibly alleged a substantial risk of disenfranchisement due to a lack of cure method based on prior rejection rates in North Carolina and the anticipated dramatic increase in use of vote-by-mail during the pandemic. Compl. ¶ 76.

In sum, Plaintiffs have adequately shown standing with respect to each challenged restriction, and thus the motion to dismiss Counts I and IV for lack of standing should be denied. *See Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

II. Plaintiffs' Claims Are Not Precluded By The Political Question Doctrine

Defendant-Intervenors contend that the political question doctrine bars the Court's resolution of Plaintiffs' claims, relying on *Coalition for Good Governance v. Raffensperger*, 2020 WL 2509092, at *3 (N.D. Ga. May 14, 2020). But it is beyond cavil that the Constitution vests federal courts with the duty and the power "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). This is especially true in the election law context, "an area so closely touching our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). That is precisely what Plaintiffs ask of this Court: to exercise its Article III authority to determine whether Defendants have violated Plaintiffs' rights under the U.S. Constitution and federal statutes. *See People First I*, 2020 WL 3207824, at *12 ("[T]he 'standards for resolving such claims are familiar and manageable, and federal courts routinely entertain suits to vindicate voting rights.'" (citation omitted)); *see also Texas Democratic Party v. Abbott*, 961 F.3d 389, 398 (5th Cir. 2020) (declining to follow *Raffensperger*, 2020 WL 2509092).

III. Plaintiffs Have Stated Plausible Claims for Relief

A. Undue Burden on the Right to Vote

Defendant-Intervenors' arguments as to Count I suffer from four global defects. First, the effects of the challenged restrictions must all be analyzed *in the context of the Covid-19 pandemic*, where Plaintiffs have plausibly alleged that voters in North Carolina are at severe risk to exposure and that the enforcement of these restrictions during the pandemic will present a severe burden to voters in North Carolina as similar restrictions have burdened voters in other states. Because these restrictions are severe, they must be justified by compelling interests, substantiated with concrete evidence. Defendant-Intervenors have failed to offer such compelling interests.

Second, even if the burdens are not severe, Plaintiffs have otherwise plausibly alleged that the challenged restrictions burden voters and do not serve any interests with sufficient "legitimacy and strength" to justify "the extent to which those interests make it necessary to burden the plaintiff's rights," especially during Covid-19. *Anderson*, 460 U.S. at 789. Defendant-Intervenors' arguments otherwise are conclusory, ignore that all inferences are

drawn in favor of Plaintiffs, and require the Court to consider underlying evidence of these burdens that would be inappropriate on a motion to dismiss.

Third, Defendant-Intervenors fail to acknowledge that a "panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition." *Clingman v. Beaver*, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring). While Defendant-Intervenors would like the Court to weigh each restriction in a vacuum, applicable precedent requires the Court to assess the challenged restrictions' cumulative impact in the context of the pandemic. Analyzed accordingly, the challenged provisions taken together undeniably present an undue burden on the right to vote in North Carolina.

Fourth, Defendant-Intervenors repeatedly and impermissibly urge the Court to look beyond the four-corners of the Complaint and improperly weigh evidence instead of assessing the sufficiency of Plaintiffs' allegations. *See, e.g.*, Doc. 72, at 13 (asserting that "91.9% of registered voters in the State have DMV-issued ID"). On a motion to dismiss, however, a plaintiff's allegations must be accepted

as true, and "courts must be careful not to import the summary-judgment standard into the motion-to-dismiss stage." *SD3, LLC v. Black & Deck (U.S.) Inc.*, 801 F.3d 412 (2015).

i. Plaintiffs Have Plausibly Alleged that the Challenged Actions Burden Plaintiffs' Right to Vote

Voter Registration

Defendant-Intervenors contend that voters have ample time and opportunity to register to vote, and thus the 25-day registration deadline is, at most, a "modest" burden on voters. Doc. 72 at 13. But Defendant-Intervenors provide no support for this conclusory assertion and otherwise do not dispute that Plaintiffs have plausibly alleged the burden on voters of enforcing this deadline is heightened in the context of Covid-19, as shown by the decrease in voter registration rates and in-person registration opportunities. Compl. ¶¶ 57, 92; *see also Democratic Nat'l Comm. v. Bostelmann*, 2020 WL 1320819, at *5-7 (W.D. Wis. Mar. 20, 2020) (extending registration deadline would "impose only a minimal burden while potentially affording a great number of as yet unregistered voters the opportunity to exercise their franchise by safely voting absentee").

Similarly, instead of challenging the plausibility of Plaintiffs' allegations as to the lack of expanded online-registration opportunities, Defendant-Intervenors present a countervailing factual argument that 91.9% of registered voters have DMV-issued ID. *See* Doc. 72, at 13. Putting aside that this says nothing about *unregistered* eligible voters, the consideration of any such evidence is a matter for resolution at summary judgment or trial.

Plaintiffs have otherwise plausibly alleged that, during the pandemic, the lack of additional online options for registering presents a burden to voters without access to the DMV online option because voters' ability to access the resources they need to vote, such as printers, postage, and access to a place where they can drop off their voter registration, is significantly hindered. Compl. ¶ 57. Accordingly, Plaintiffs have plausibly alleged that for these voters there is no such "ample time and opportunity" before the election to register during Covid-19, as Defendants contend.

Absentee Ballots

Defendant-Intervenors improperly rely on *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802

(1969) to contend that the default standard for reviewing restrictions on absentee ballots is "rationality." Where "'other means of exercising the right' to vote are not easily available," restrictions on absentee voting impede the right to vote and must be analyzed under *Anderson-Burdick*'s balancing analysis. *Thomas v. Andino*, 2020 WL 2617329, at *17 n.20 (D.S.C. May 25, 2020)("[D]uring this pandemic … 'denial of the absentee ballot is effectively an absolute denial of the franchise [and fundamental right to vote.]'" (citations omitted)).

Defendant-Intervenors' reliance on *Texas Democratic Party*, 961 F.3d 389, is similarly inapposite as it considered claims of age-related disparate treatment, not claims of undue burden based on the interaction of specific voting restrictions and pandemic conditions, as alleged here.

In any event, even if rational basis review applied, Plaintiffs have plausibly alleged that there is no legitimate state interest for any of the myriad of burdens the challenged restrictions place on absentee vote-by-mail.

a. Assistance Ban

As to the assistance ban for absentee ballot requests, Defendant-Intervenors argue that Plaintiffs are "over-

reading" the statute, contending that Organizational Plaintiffs and Plaintiff Schaffer can verbally assist voters. However, Defendant-Intervenors do not explain how Organizational Plaintiffs and Plaintiff Schaffer may help individuals who, because of age or disability, cannot complete the form without more than verbal assistance. They further ignore the ambiguity in whether someone has assisted with "completing" or "delivering" a ballot request form if, at the voter's request, they fill in certain fields or email the form from their own email address, or if they assist voters who lack internet access with navigating the online option for requesting absentee ballots. These are nuances that cannot be overlooked based on conclusory assertions alone.

Moreover, Defendant-Intervenors ignore LWVNC's plausible allegations that the assistance ban's burden is severe because it impairs LWVNC's efforts to help voters at a time when an unprecedented number of voters are expected to vote by mail and to do so for the first time. Compl. ¶¶ 66, 96. Intervenor-Defendants have failed to show dismissal is required, especially where all reasonable inferences as to the stated burdens are drawn in favor of Plaintiffs.

b. Witness Requirement

Plaintiffs have sufficiently alleged that the Witness Requirement presents an undue burden as applied during the pandemic. Defendant-Intervenors' purported solution shows why: elderly people with multiple Covid-19 risk factors who live alone would need to identify a neighbor, postal worker, or a *complete stranger* to observe them voting through a window or glass door and then pass the ballot under a closed door or through an open window "to be marked, signed, and returned (after handwashing or sanitizing)." Doc. 72, at 18. Such rigmarole acknowledges the high risk that obtaining a witness signature presents to voters during the pandemic; it could only be justified by a requirement that held unmistakable and compelling benefits for law enforcement, which Plaintiffs have plausibly alleged the witness requirement does not. Defendant Bell's recommendation that the Witness Requirement be eliminated, Doc. 1-1 at 4, undercuts that this is a truly effective or necessary election regulation.

Moreover, Plaintiffs have plausibly alleged that the Witness Requirement's burden on voters like Plaintiff Bentley is severe. Ms. Bentley lives alone and has been self-isolating because of the pandemic and her comorbidities. Compl. ¶ 71.

She does not feel safe asking a neighbor to witness her ballot, *id.*, and her concerns about this risk are further justified and plausible in light of the highly contagious nature of Covid-19 and the severe harm from infection.

Accordingly, Defendant-Intervenors fail to demonstrate that Plaintiffs' allegations that the Witness Requirement imposes severe unjustified burdens during this pandemic are insufficient under *Anderson-Burdick*. *Cf. Thomas*, 2020 WL 2617329, at *21 (finding plaintiffs likely to prevail on their constitutional challenge to the Witness Requirement under *Anderson-Burdick* because "the character and magnitude of the burdens imposed … during the Covid-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state's interests of voter fraud and integrity").

c. Opportunity to Cure Absentee Ballots

Plaintiffs have adequately supported their claim that the State's failure to provide voters a uniform opportunity to cure deficient absentee ballots presents an undue burden on voters if enforced during the pandemic. Plaintiffs have specifically alleged that the lack of an opportunity to cure presents a severe burden in light of the historical rejection rates for absentee ballots in North Carolina during non-

pandemic times, compounded by the anticipated influx of voters submitting mail-in ballots, likelihood many voters will be so for the first time, and the severe restrictions on the assistance available to them to navigate this process. Compl. ¶¶ 76, 103.

In arguing for dismissal, Defendant-Intervenors again rely on a purported lack of *evidence* instead of arguing against the plausibility of these allegations on their face. While such arguments may properly be considered at summary judgment or trial, they cannot compel dismissal of the complaint at this stage. Moreover, Defendant-Intervenors' claim that this relief would cause severe administrative burdens, Doc. 72, at 20-21, essentially concedes the likelihood that there will be a high incidence of problems with absentee ballot rejections.

d. Drop Boxes

The burden placed on voters by a failure to provide secure drop boxes is real and concrete; as alleged in the Complaint, the local U.S. Postal Service ("USPS") infrastructure in North Carolina may be overwhelmed with the increase in voting by mail. *See* Compl. ¶ 5. This allegation is plausible in light of the absentee ballot delivery issues

that have occurred in recent elections in other states. *Id.* ¶ 103. It is undisputable that the USPS is federal agency operating throughout the country; whether North Carolina will fare better or worse than other states is a factual matter properly evaluated on the evidence, and Defendant-Intervenors' request that the Court determine now that North Carolina will not experience similar issues, based on Defendant-Intervenors' conclusory assertions alone, is inappropriate on a motion to dismiss.

Restrictions on In-Person Voting

Plaintiffs have plausibly alleged that enforcing the Home County requirement has and will continue to cause a shortage of poll-workers, leading to precinct consolidation and lack of accessible early voting that will burden voters.

Defendant-Intervenors contend the Complaint includes "zero" factual allegations as to this claim, Doc. 72, at 21, ignoring that it has already occurred: during the Congressional District 11 Second Republican Primary, several county boards cited poll worker shortages in their requests to consolidate 64 precincts. Compl. ¶ 79. Furthermore, poll worker shortages continue to be an issue, as shown in Wisconsin and Georgia's recent elections. *Id.* ¶¶ 5, 82, 106.

It is beyond dispute that *any* geographic restriction on poll workers, whether at the county level or the precinct level (as it will be for post-2020 elections during the pandemic) narrows the field of available poll workers for each given polling site, and Defendant-Intervenors fail to contend otherwise.

Plaintiffs have also sufficiently alleged that enforcing the uniform hours requirement will burden the right to vote by similarly causing a reduction in early voting sites. Defendant-Intervenors argue that the number of early voting sites is "irrelevant" and that the Court should instead weigh overall hours and sites together. However, this argument is directly rebutted by the burden on Plaintiff Permar, who is blind and must have access to a voting location by public transportation, and will be severely burdened if transit-accessible precincts are unavailable, regardless of what hours are otherwise offered in her county. Compl. ¶ 108. Defendant-Intervenors' argument also ignores that, regardless of hours available, Plaintiffs have plausibly alleged a reduction in polling places will cause long lines (and resulting risk to Covid-19 infection), *id.* ¶ 85, and the contention that more hours will alleviate this is speculative

and assumes that voters will somehow coordinate with each other to reduce crowding during certain peak hours. Accordingly, Defendant-Intervenors' discussion of "voting opportunities" ignores these aspects of the burdens on voters and cannot justify dismissal of this claim.

ii. The Purported State Interests are not Compelling as to Justify the Challenged Provisions

Plaintiffs have adequately alleged that the state interests in enforcing these restrictions are either not legitimate or not compelling enough to warrant the burdens imposed.

Defendant-Intervenors argue that the State has "important interests" in "avoiding voter confusion and securing sensitive voter information" (voter registration), preventing voter fraud (witness requirement), and "finality" and "convenience" (failure to implement a curing process). However, a 12(b)(6) motion is not the proper time for a weighing of such interests when they are stated in a conclusory and speculative manner. Instead, the weight of the state interests is more properly evaluated in light of the evidence at a later stage to determine whether the burdens on voters are in fact justified by those interests. *Thomas*, 2020

WL 2617329, at *20 ("'[w]hile states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent 'evidence that such an interest made it necessary to burden voters' rights.'" (citation omitted)). In other words, Defendants cannot simply assert a state interest in conclusory terms to evade the phase of this litigation at which the evidence is weighed, especially where Plaintiffs otherwise adequately plead these restrictions present an undue burden on the right to vote. Accordingly, the motion to dismiss this claim should be denied.

B. Unconstitutional Conditions Doctrine

Defendant-Intervenors incorrectly assert that the unconstitutional conditions doctrine is "irrelevant" here, ignoring that the Supreme Court has struck down impermissible conditions that involve voting rights. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) ("Durational residence laws *impermissibly condition* and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right." (emphasis added)).

Defendant-Intervenors' assertion that it could be unconstitutional for the government to require someone to

give up a constitutional right in order to obtain a *statutory benefit*, but not to exercise another *constitutional right*, likewise belies logic given that "[c]onstitutional rights would be of little value if they could be … indirectly denied" through any such condition. *Dunn*, 405 U.S. at 341 (citation omitted); *see also Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir. 2004) (finding an "especially malignant unconstitutional condition" between "freedom from unreasonable searches and seizures" and "two other fundamental rights—freedom of speech and assembly").

Defendant-Intervenors' assertion that this doctrine is inapposite because "[t]he spread of the coronavirus is a natural phenomenon that the State did not cause," Doc. 72 at 25, has no merit. The State is actively requiring contact by enforcing the Witness Requirement, and courts have held that when constitutionally-protected rights such as the right to vote are at stake, it is irrelevant whether the government *intended* to coerce the plaintiff into forfeiting a constitutional right. *See Bourgeois*, 387 F.3d at 1324–25 ("[T]he very purpose of the unconstitutional conditions doctrine is to prevent the Government from subtly pressuring

citizens, *whether purposely or inadvertently*, into surrendering their rights." (emphasis added)).

Finally, Defendant-Intervenors' attempt to reframe this claim as no condition at all and rather a substantive due process right in "physical safety while voting", *see* Doc. 72, at 25-26, is similarly misguided given that the State is plainly affirmatively requiring individuals to obtain a witness during the pandemic, and thereby risk infection, in order to vote absentee. The right to bodily integrity threatened by this requirement is well-established. *See, e.g., Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977); *Guertin v. Michigan*, 912 F.3d 907, 919, 921–22 (6th Cir. 2019) ("Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value … is a classic example of invading the core of the bodily integrity protection."). Furthermore, Plaintiffs have plausibly alleged the risk to bodily integrity presented by the witness signature given the highly contagious nature of Covid-19 and the severe harm caused by this illness.

C. First Amendment

Plaintiffs have plausibly alleged that the organizational assistance ban for absentee ballot requests

prevents Organizational Plaintiffs from associating with their members and both Organizational Plaintiffs and Plaintiff Schaffer from associating with other voters. Compl. ¶¶ 96, 128. As Plaintiffs' expressive association and conduct are political expression "at the core of our electoral process and of the First Amendment freedoms," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), the assistance ban is subject to strict scrutiny. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

Defendant-Intervenors assert that the assistance ban "does not touch on protected speech or association *at all*," Doc. 72, at 26 (emphasis in original), but, as noted above, they ignore the ambiguity in what constitutes "completing" or "delivering" a request form. This ambiguity will inevitably "chill" Plaintiffs' expressive conduct, as "[people] of common intelligence must necessarily guess at [the law's] meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

Defendant-Intervenors also ignore the allegations that the Organizational Plaintiffs and Plaintiff Schaffer build relationships with voters, associate with them, and convey their message of participation by assisting voters to

effectuate their desire to participate. *See* Compl. ¶¶ 15, 96, 128. This assistance includes "completing," "signing," and "delivering" request forms as they have educational, associational and communicative aspects, and is an expression of Plaintiffs' view that the act of voting and helping others to vote promotes democracy. *See id.*

Courts have recognized that such voter assistance activities are political expression manifested through conduct. In *American Association of People with Disabilities v. Herrera*, the court held that plaintiffs' "endeavors to assist people with voter registration are intended to convey a message that voting is important, that the Plaintiffs believe in civic participation," and that "ministerial conduct" that facilitates voting (such as "delivering" ballots) "acquire[s] First-Amendment protection when done in a setting or manner in which the message becomes apparent." 690 F. Supp.2d 1183, 1216 (D.N.M. 2010), *on reconsideration in part*, 2010 WL 3834049 (D.N.M. July 28, 2010). Accordingly, plaintiffs sufficiently stated a First-Amendment expressive-conduct claim. *Id.* In *Priorities USA v. Nessel*, the court held that plaintiffs' efforts to educate voters about their options to use and request absentee ballot applications,

offer to return absentee ballot applications, and return absentee ballot applications "necessarily involve[d] political communication and association," and thus strict scrutiny applied. 2020 WL 2615766, at *7-8, 13 (E.D. Mich. May 22, 2020).

As in *Herrera* and *Priorities USA*, the Organizational Plaintiffs and Plaintiff Schaffer are involved in voter registration and other activities—such as assisting with mail-in voting—that are just as expressive and "of necessity involve[] both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

The *Herrera* court also rejected contentions like those of Defendant-Intervenors that Plaintiffs can still "say anything" to registered voters notwithstanding the restriction. Doc. 72, at 27. The *Herrera* court recognized that "[t]he First Amendment protects not only the Plaintiffs' right to engage in incidental speech with prospective voters, but also their right to do so *while engaging in the act of registration*." 690 F. Supp. 2d at 1217 (emphasis added). This reasoning applies with equal force here, and the Court should

find that Plaintiffs' voter assistance is expressive conduct protected by the First Amendment.

Finally, Defendant-Intervenors' reliance on *Voting for America, Inc. v. Steen* is misplaced. In *Voting for America*, the law at issue limited voter registration volunteers by geography and thus "neither regulate[d] nor limit[ed] … constitutionally protected speech," which the court found to include "'urging' citizens to register; 'distributing' voter registration forms; 'helping' voters to fill out their forms; and 'asking' for information to verify that registrations were processed successfully," 732 F.3d 382, 389 (5th Cir. 2013), *i.e.* conduct like that at issue here.

D. Procedural Due Process

As to Plaintiffs' procedural due process claim, Defendant-Intervenors do not invoke any state interest that could outweigh the risk of erroneous disenfranchisement. *See Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (to assess a due process claim, a court "evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake"). Defendant-Intervenors' assertion that North Carolina law does not create an interest

in casting an absentee ballot is without merit as Plaintiffs have a statutory right to vote by mail, *see* N.C. Gen. Stat. § 163-226(a), and "once the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot." *Zessar v. Helaner*, 2006 WL 642646, at *5 (N.D. Ill. Mar. 13, 2006).

Furthermore, the risk of deprivation is plausibly alleged given that North Carolina has rejected absentee ballots at exceptionally high rates and given the anticipated dramatic increase in the use of absentee ballots. Compl. ¶ 76; *see, e.g.*, *Self Advocacy Sols. N.D. v. Jaeger*, 2020 WL 3068160 (D.N.D. June 5, 2020); Stip. & Order Granting Prelim. Inj., *League of Women Voters of N.J. v. Way*, No. 3:20-cv-05990 (D.N.J. June 16, 2020), ECF No. 34 (Doc. 74-1).

Finally, as to the purported governmental interest at stake – the administrative burden of implementing a cure process – Defendant-Intervenors fail to show why this would outweigh the liberty interest at stake such that Plaintiffs' claims alleged is implausible. Accordingly, the motion to dismiss this claim should be denied.

CONCLUSION

For the foregoing reasons, Defendant-Intervenors' motion to dismiss should be denied.

Dated: August 6, 2020.

Respectfully submitted,

/s/ Jon Sherman
Jon Sherman
D.C. Bar No. 998271
Michelle Kanter Cohen
D.C. Bar No. 989164
Cecilia Aguilera
D.C. Bar No. 1617884
FAIR ELECTIONS CENTER
1825 K St. NW, Ste. 450
Washington, D.C. 20006
Telephone: (202) 331-0114
Email:
jsherman@fairelectionscenter.org
mkantercohen@fairelectionscenter.org
caguilera@fairelectionscenter.org

/s/ Hilary Harris Klein
Allison J. Riggs (State Bar #40028)
Jeffrey Loperfido (State Bar #52939)
Hilary Klein (State Bar #53711)
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942
Email:
Allison@southerncoalition.org
jeff@southerncoalition.org

/s/ George P. Varghese
George P. Varghese (Pa. Bar No. 94329)
Joseph J. Yu (NY Bar No. 4765392)
Stephanie Lin (MA Bar No. 690909)
Rebecca Lee (DC Bar No. 229651)
Richard A. Ingram (DC Bar No. 1657532)
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

Telephone: (617) 526-6000
Facsimile: (617) 526-5000
Email:
george.varghese@wilmerhale.com
joseph.yu@wilmerhale.com
stephanie.lin@wilmerhale.com
rebecca.lee@wilmerhale.com
rick.ingram@wilmerhale.com

WORD CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION TO DISMISS is 6,233 words. The word count excludes the case caption, signature lines, cover page, and required certificates of counsel. In making this certification, the undersigned has relied upon the word count of Microsoft Word, which was used to prepare the brief.

/s/ Hilary Harris Klein
Hilary Harris Klein