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

REPLY BRIEF IN SUPPORT OF LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

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.

INTRODUCTION

In this lawsuit, two Organizational Plaintiffs and eight Individual Plaintiffs have sued to enjoin various North Carolina election laws and require the State to institute several new procedures allegedly necessary to protect North Carolinians' voting rights because of the Covid-19 pandemic. Legislative Defendants have moved to dismiss the constitutional claims in Plaintiffs' Second Amended Complaint ("SAC") 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. Plaintiffs filed their response in opposition to the motion ("Response") on August 6, 2020. Doc. 126. Notwithstanding the assertions in Plaintiffs' Response, Plaintiffs fail to plausibly allege standing or to state plausible claims for relief.[1] Legislative Defendants' motion to dismiss should be granted.

ARGUMENT

I. Plaintiffs Lack Article III Standing to Assert Many of Their Vote-Burdening Claims.

Plaintiffs' Response entirely fails to defend Plaintiffs' standing with respect to some claims in their SAC. And Plaintiffs' contentions concerning the home-county and uniform-hours

[1] In light of this Court's preliminary injunction ruling, this reply will not address standing, political question, and procedural due process arguments that this Court has already rejected. Legislative Defendants maintain their arguments on those claims, however.

requirements merely confirm their lack of Article III standing to challenge those requirements. Several of Plaintiffs' claims should therefore be dismissed for lack of standing under Rule 12(b)(1).

A. Absentee Ballot Form Requirement and Drop Boxes

Plaintiffs' SAC argues that voters' inability to request an absentee ballot by phone is unconstitutional, notwithstanding HB1169's allowance of requests by mail, fax, email, or online submission. SAC ¶103. Plaintiffs' Response declines to defend Individual Plaintiffs' standing to bring this claim, presumably because Plaintiff Hutchins withdrew his allegation that he needs a request-by-phone option. *See* Doc. 87. And Organizational Plaintiffs merely parrot the same bare allegation of resource diversion found in their SAC. Response 7. This is insufficient to create standing to bring this claim. *See* Doc. 72 ("Br. in Support") 7; Memorandum Opinion and Order, Doc. 124 ("PI Order") 42.

While Plaintiffs' Response argues for the constitutional necessity of drop boxes on the merits, Response 24–25, Plaintiffs nowhere discuss or defend their standing to bring this claim. No Individual Plaintiff has alleged the need for a drop box, and no Organizational Plaintiff has alleged impairment of organizational mission or diversion of resources resulting from the lack of drop boxes. *See, e.g.*, SAC ¶103. Moreover, as this Court already found, even if Organizational Plaintiffs' expenditures are affected by a lack of drop boxes, such a diversion of funds cannot be attributed

to Defendants. PI Order 43. Plaintiffs lack standing to bring this claim.

B. The Home County and Uniform Hours Requirements

One Individual Plaintiff, Plaintiff Permar, has asserted that she plans to vote in person and thus may challenge the home-county and uniform-hours requirements. But Ms. Permar's alleged injury, that she may be unable to reach a polling place via public transportation or forced to wait in a long line, is too speculative and hypothetical to create standing. She has still not explained why Durham County—should it even need to engage in precinct consolidation at all—would locate no polling places near public transportation. She merely alleges "hypothetical future harm" which cannot generate standing. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 402 (2013).

Plaintiffs cite a single Illinois district court case to try to establish standing for Plaintiff Permar. Response 13. But that challenge to election procedures was brought *after* the relevant election took place, allowing plaintiffs to concretely allege why voting facilities had been inadequate. *See Ury v. Santee*, 303 F. Supp. 119, 124 (N.D. Ill. 1969). *Ury* provides no support for Plaintiffs' standing to allege hypothetical harm based on potential precinct consolidations that have not yet happened.

Organizational Plaintiffs' standing fares no better. Plaintiffs simply repeat the conclusory assertion that these

requirements "force" Organizational Plaintiffs to expend resources on "poll worker recruitment and voter education." Response 8. But operating the polls is Defendants' responsibility, not Plaintiffs', and Plaintiffs fail to explain how they are "force[d]" into poll worker recruitment rather than voluntarily undertaking it. As this Court has explained, any diversion of resources "has not stemmed from Defendants' frustrating Organizational Plaintiffs' mission," but rather from Plaintiffs' budgetary choices. PI Order 51. Organizational Plaintiffs also lack standing to challenge the home-county and uniform-hours requirements.

II. Plaintiffs' Constitutional Challenges Fail to State a Plausible Claim for Relief

A. Plaintiffs' Vote-Burdening Claims Are Legally Insufficient

Plaintiffs misconstrue the applicable legal standard, repeat their complaint's speculative and conclusory allegations, and invoke inapposite cases to try to save their vote-burdening claims. Each of these claims should be dismissed.

1. Plaintiffs Distort the Applicable Legal Standard

"To require that every voting regulation be narrowly tailored would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Wood v. Meadows*, 207 F.3d 708, 716–17 (4th Cir. 2000) (cleaned up). Accordingly, "[i]n the ballot access context, requirements constituting an unreasonable, discriminatory burden are the only requirements subject to strict

scrutiny review." *Id.* at 716. For all other restrictions, a Court "ask[s] only that the state 'articulate' its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (cleaned up). "This is not a high bar," requiring only "[r]easoned, credible argument"—*not* "elaborate, empirical verification." *Id.*

Plaintiffs attempt to salvage their vote-burdening claims mainly by flipping this well-established legal framework on its head. First, they argue that the "context of the Covid-19 pandemic" renders all of the challenged regulations "severe burden[s]" which must be justified by "compelling interests." Response 16. Plaintiffs essentially assert, though not in terms, that the pandemic should render all of North Carolina's election laws subject to strict scrutiny. Plaintiffs cite no authority for this approach, and the Court should reject it. Strict scrutiny only applies when election regulations are discriminatory or wholly disenfranchise a class of voters—neither of which is the case here. *See, e.g.*, *Mays v. LaRose*, 951 F.3d 775, 786 (6th Cir. 2020) ("Strict scrutiny is the standard for cases where 'the State totally denied the electoral franchise to a particular class of residents.'").

Second, even where strict scrutiny does not apply, Plaintiffs argue that "evidence at a later stage" is necessary to determine "the weight of the state interests" and balance them against

burdens on voters. Response 27. A nearly identical claim was squarely rejected in *Libertarian Party*, where the plaintiff insisted that dismissal was improper because the Court "may not weigh [State] interests without discovery." 826 F.3d at 719. The court held that "elaborate, empirical verification of weightiness is not required," noting that a contrary approach would generate "endless court battles over the quality of the state's evidence." *Id.* (cleaned up). Instead, dismissal was proper when the state merely "articulate[d] its asserted interests" with "[r]easoned, credible argument." *Id.* So too here.

Finally, Plaintiffs ask this Court to "assess the challenged restrictions' cumulative impact" instead of considering each challenge on its own merits. Response 17. But Plaintiffs' only authority for this novel approach is dicta signed onto by just one Justice. *See Clingman v. Beaver*, 544 U.S. 581, 607–08 (2005) (O'Connor, J., concurring). Moreover, in *Clingman* the challenged deadlines, working together, forced voters to potentially forego their right to vote in a primary at all in order to ensure they could vote in a third party's primary if the party qualified. *Id.* at 606–07. Here, Plaintiffs challenge a disparate array of laws that do not similarly interlock. The *Clingman* dicta they cite is inapposite to this case.

2. Voter Registration

Plaintiffs' Response does not contend that the 25-day registration deadline or the single online registration portal severely burden North Carolinians' right to vote; instead they merely argue that these restrictions "present a burden" and that the burden "is heightened in the context of Covid-19." Response 18–19. Nor could Plaintiffs plausibly allege a severe burden, given the "ample time and opportunity" North Carolinians have had—and still have—to register to vote before October 6. *Pisano v. Strach*, 743 F.3d 927, 936 (4th Cir. 2014). Indeed, "when a plaintiff can avoid the restriction imposed by an election regulation," as here, "the plaintiff's right has not been burdened"—let alone severely burdened. *Fusaro v. Cogan*, 930 F.3d 241, 260 (4th Cir. 2019).

Because these laws do not severely burden voting rights, the State need only "articulate[] legitimate interests justifying its reasonable, nondiscriminatory" regulations. *Wood*, 207 F.3d at 717. It has done so here, articulating how maintaining orderly, fair, and efficient election procedures requires imposing a uniform cutoff period to verify the validity of applications. Br. in Support 13. It has also explained how a DMV-centered online registration system streamlines verification of applications. *Id.* at 14. Plaintiffs do not contend that these state interests are illegitimate, nor could they. *See* Response 18–19; *see also Wood*, 207 U.S. at 715 ("Administrative convenience readily falls under

the rubric of a state's 'regulatory interests,' the importance of which the Supreme Court has repeatedly recognized."). Because Plaintiffs allege neither a severe burden nor the absence of a legitimate State regulatory interest, their voter registration challenges fail to state a claim.

3. Ballot Harvesting Ban

Plaintiffs make three critical legal errors while attempting to save their challenge to North Carolina's Ballot Harvesting Ban. First, they argue that this Court should dispense with the lenient standard typically applicable to absentee ballot regulations, *see McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807–08 (1969), because of the pandemic. Response 19–20. But Plaintiffs improperly hold the pandemic against the State. *See Texas Democratic Party v. Abbott*, 961 F.3d 389, 404 (5th Cir. 2020) ("[T]here is no indication that [plaintiffs] are in fact absolutely prohibited from voting *by the State*. So the right to vote is not at stake, and rational-basis review follows.") (citations and internal quotation marks omitted); *Thompson v. Dewine*, 959 F.3d 804, 810 (6th Cir. 2020) ("[W]e cannot hold private citizens' decisions to stay home for their own safety against the State.").

Plaintiffs attempt to distinguish *Texas Democratic Party* by noting that it considered claims of age-based disparate treatment. Response 20. But the plaintiffs there expressly asserted that "because the statute doesn't permit them to vote by mail during

this pandemic, it unlawfully burdens their fundamental right to exercise the franchise." *Texas Democratic Party*, 961 F.3d at 402. Texas did expressly discriminate on the basis of age in access to absentee ballots—but it would be nonsensical to treat North Carolina *worse* because of its broader extension of absentee ballot eligibility. *See McDonald*, 394 U.S. at 810–11. *McDonald* remains the controlling precedent here, such that the challenged absentee ballot restrictions are reviewed for rational basis.

Second, even if *Anderson-Burdick* balancing applies, Plaintiffs misconceive what constitutes a "severe burden" under that framework. Plaintiffs allege that the "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." Response 21. But the class of laws imposing severe burdens is limited, generally excluding "facially neutral and nondiscriminatory" laws which do not absolutely disenfranchise any class of voters. *Libertarian Party*, 826 F.3d at 717; *see Rosario v. Rockefeller*, 410 U.S. 752, 757 (1973). Plaintiffs' allegation that the pandemic might create an influx of absentee voters, including first-time absentee voters, falls far short of alleging a severe burden under *Anderson-Burdick*. And the State's legitimate interest in deterring voter fraud justifies any non-severe burden the law creates. Plaintiffs thus fail to state a claim even under *Anderson-Burdick*.

Third, Plaintiffs continue to exaggerate what the Ballot Harvesting Ban requires. For example, Plaintiffs contend that they are unable to help "individuals who, because of age or disability, cannot complete the form without more than verbal assistance." Response 21. Yet the law expressly permits them to assist in such circumstances: "If a voter is in need of assistance completing the written request form due to blindness, disability, or inability to read or write and there is not a near relative or legal guardian available to assist that voter, the voter may request some other person to give assistance, notwithstanding any other provision of this section." N.C.G.S. § 163-230.2(e1). Plaintiffs also continue to protest alleged ambiguity in the law's prohibition on completing and delivering absentee ballot request forms. But as this Court noted, the law is narrow and precise, simply prohibiting helpers from "mark[ing] the voter's request form themselves." PI Order 147. Plaintiffs make no plausible allegation that the Ballot Harvesting Ban burdens the right to vote.

4. Witness Requirement

The State's Witness Requirement satisfies *Anderson-Burdick* as it advances a vital state interest while putting a minimal burden on voters. This is because it can be easily satisfied while following all CDC social-distancing and sanitation guidelines. *See* Br. in Support 18. Plaintiffs disparage this process as "rigmarole" which "acknowledges the high risk that obtaining a witness

signature presents." Response 22. Precisely the opposite: this "rigmarole"—which consists of merely following CDC guidelines—*eliminates* (or nearly so) the risk of infection resulting from obtaining a witness signature. Even a self-isolating voter like Plaintiff Bentley can satisfy the witness requirement by following CDC guidelines with an exceedingly minimal chance of contracting the virus. And following CDC guidelines cannot plausibly be considered anything more than a "modest" burden under *Anderson-Burdick*.

Meanwhile, the Witness Requirement furthers the State's compelling interest in preventing voter fraud. Plaintiffs stress that Director Bell recommended elimination of the Witness Requirement. Response 22. But the General Assembly is charged by the State's constitution with prescribing the manner of elections, and it overwhelmingly rejected Director Bell's recommendation. There is no basis for the Court to second-guess the General Assembly's determination.

5. Drop Boxes

The State's decision to abstain from providing drop boxes is a reasonable, nondiscriminatory rule which imposes no significant burden on voters. Plaintiffs' argument to the contrary is self-refuting: they claim that voters without drop boxes face a "real and concrete" burden because USPS infrastructure "may be overwhelmed" due to increased numbers of absentee ballots.

Response 24. Plaintiffs' own language acknowledges that USPS's alleged inability to timely deliver absentee ballots is a speculative possibility rather than a concrete burden. This hypothetical burden cannot outweigh the State's legitimate interests, including administrative convenience. *See Wood*, 207 F.3d at 715.

6. Home County and Uniform Hours Requirements

Plaintiffs have failed to plausibly allege that the State's home-county requirement burdens the right to vote at all, let alone severely. Plaintiffs allege that during primaries months ago, certain county boards requested to consolidate precincts partly due to poll worker shortages. Response 25. Of course, at that time poll workers had to reside within the *precinct*, not just the county, of the polling place, and HB1169 relaxed that requirement for the general election. *See* N.C. Sess. Laws 2020-17, §1(b). At any rate, Plaintiffs make no factual allegation that the in-precinct requirement actually burdened voters, for example by creating long lines or closing the only polling places available via public transportation. The closest they come is their vague allegation that primary-season precinct consolidation "impact[ed]" voters. SAC ¶79. Moreover, Plaintiffs ignore that the intervening months have given the State more time to adapt and prepare for election administration during the pandemic; come November, the

State will not be "caught off guard by the COVID-19 pandemic." PI Order 113.

Plaintiffs do not dispute that the uniform hours requirement serves the State's vital interests in avoiding discriminatory poll hours and avoiding voter confusion. Instead, they merely repeat their speculative assertions that requiring uniform hours will reduce polling places and cause long lines. Response 26. Plaintiffs also repeat their implausible allegation that Durham County might close all voting locations available via public transportation, inconveniencing Plaintiff Permar. *Id.* Plaintiffs have not plausibly alleged that North Carolina's in-person voting regulations unconstitutionally burden voting rights.

B. Plaintiffs' Unconstitutional Conditions Claim Fails

Plaintiffs' unconstitutional conditions claim fails because the Witness Requirement does not offend the constitutional right to bodily integrity. Plaintiffs cite two cases purportedly demonstrating otherwise. Response 30. The first affirmed a liberty interest in "freedom from bodily restraint and punishment" in the context of involuntary administration of corporal punishment. *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). And the second involved using a city's public works system to expose residents to toxic water while "engag[ing] in conduct designed to deceive the scope of the bodily invasion." *Guertin v. State*, 912 F.3d 907, 921 (6th Cir. 2019); *see also id.* ("The involuntary and misleading

nature of the intrusions was key."). These overt and misleading interferences with bodily integrity are plainly unlike the Witness Requirement, which involves neither bodily restraint nor "false pretenses and … deceptive practices hiding the nature of the interference." *Id.* Given Plaintiffs' contention that the right to bodily integrity is "well-established," their failure to identify any remotely analogous cases is telling. Their unconstitutional conditions claim should be dismissed.

C. Plaintiffs Fail to State a First Amendment Claim

The Ballot Harvesting Ban's specific prohibitions on "complet[ing]" and "deliver[ing]" request forms do not infringe on constitutionally protected speech. Plaintiffs contend that HB 1169, by allowing online requests, makes the law's requirements ambiguous. Response 21. But the conduct Plaintiffs argue might be chilled——for example, submitting an online request form for another person——is not protected speech either. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (First Amendment only protects conduct that a viewer would reasonably consider communicative); *Knox v. Brnovich*, 907 F.3d 1167, 1181 (9th Cir. 2018) (collecting and delivering ballots is not expressive conduct).

Plaintiffs also cite inapposite cases to argue that completing and delivering absentee ballot request forms constitutes "political expression manifested through conduct."

Response 32. *American Association of People with Disabilities v. Herrera* concerned voter registration, not absentee voting, and required a "pre-registration process," among other things, before individuals could help others register. 580 F. Supp. 2d 1195, 1203 (D.N.M. 2008). And *Priorities USA v. Nessel* involved a law that explicitly restricted speech, banning "solicit[ing]" or "request[ing]" to return an absentee ballot application. 2020 WL 2615766, at *11 (E.D. Mich. May 22, 2020). Plaintiffs argue that *Voting for America, Inc. v. Steen*, 732 F.3d 382, 389 (5th Cir. 2013) is inapplicable because the law at issue there permitted "urging" citizens to register, "distributing" forms, "helping" voters, and "asking" for information. Response 34. Plaintiffs ignore that this Court has already found the Ballot Harvesting Ban to permit those same activities, as long as "helping" does not include marking the applicant's form. *See* PI Order 147. *Voting for America, Inc.* remains the most applicable case, and its analysis persuasively demonstrates that Plaintiffs' claim lacks merit.

CONCLUSION

For the foregoing reasons, Plaintiffs' Second Amended Complaint should be dismissed in part.

Dated: August 20, 2020

Respectfully submitted,

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**Notice of Appearance Forthcoming*

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Reply Brief in Support of Legislative Defendants' Motion to Dismiss, including body, headings, and footnotes, contains 3,123 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 20th day of August, 2020, she electronically filed the foregoing Reply Brief in Support of Legislative Defendants' Motion to Dismiss 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.

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