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

LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A THIRD 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.

INTRODUCTION

The scattered amendments Plaintiffs seek to make to their Second Amended Complaint would elaborate on moot claims, add unripe claims, and backfill information into the complaint that is already in the record. Plaintiffs' motion to make these futile and prejudicial amendments should be denied. Moreover, Plaintiffs' proposed amendments are also prejudicial insofar as they attempt to transform this litigation from a lawsuit about the upcoming general election to a lawsuit seeking to control North Carolina's election administration for the indeterminate "duration of the pandemic." *E.g.*, Proposed Third Amended Complaint ("PTAC") ¶ 155.

Plaintiffs' proposed amendments are futile for several reasons. First, this Court issued its ruling on Plaintiffs' motion for a preliminary injunction on August 4, 2020. There is insufficient time to hold a trial and reach a final ruling on Plaintiffs' claims before the 2020 general election, which is now less than three months away. Thus, to the extent Plaintiffs' proposed amendments supplement claims challenging North Carolina's plan for conducting the upcoming November election, those claims will be mooted before they can be further resolved by this Court. This renders most of Plaintiffs' amendments futile.

Second, other of Plaintiffs' amendments are futile because they attempt to introduce and supplement speculative claims that are unripe for adjudication by this Court. The COVID-19 pandemic

is rapidly evolving, and as the July 17 Emergency Order——which governs only elections through November——illustrates, North Carolina has responded on an election-by-election basis. Because of the unpredictable nature of the pandemic, North Carolina's election-by-election response, and Plaintiffs' failure to allege imminent hardship resulting from post-2020 election administration, Plaintiffs' proposed amendments relating to subsequent elections are too speculative and remote to present a live controversy ripe for adjudication. Because these claims are unripe and would consume unnecessary judicial resources, Plaintiffs' proposal to expand the scope of their claims to cover "all elections during the pandemic," Motion for Leave to File a Third Amended Complaint, Doc. 120 ("MFL") ¶ 15(e), rather than the upcoming November general election——which their Second Amended Complaint focused on——should be denied as futile.

Third, Plaintiffs' standing-related amendments, which merely backfill allegations from their declarations into their complaint, are also futile. Some of these amendments concern claims where standing is uncontested. Others concern claims where additional allegations are unnecessary to establish standing for purposes of a motion to dismiss under this Court's framework. And the rest are futile because they supplement claims where this Court, in its August 4 order, already found a lack of standing——even while considering the information in the declarations. These amendments

would thus do nothing to help this Court adjudicate standing on the merits.

One category of Plaintiffs' proposed amendments——those which seek to broaden the scope of this litigation to include post-2020 elections——are also prejudicial. Plaintiffs initially styled this lawsuit as a challenge to North Carolina's administration of the November 2020 general election. But now that this Court's preliminary injunction ruling has effectively ended that controversy, Plaintiffs seek to transform this litigation into a way to control North Carolina's election administration for the indeterminate "duration of the pandemic." Such an amendment would fundamentally alter the character of this litigation and prejudice Defendants.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, two organizations and eight individuals, filed their first Complaint on May 22, 2020, suing to enjoin various North Carolina election laws and require the State to institute a variety of new election-related procedures. Plaintiffs filed an Amended Complaint, along with a Motion for Preliminary Injunction, on June 5, 2020. This Court granted Legislative Defendants' motion to intervene in this matter on June 12, 2020.

On June 11, 2020, the North Carolina General Assembly passed the Bipartisan Elections Act of 2020, Session Law 2020-17 ("HB 1169"), which aimed to adapt the State's election procedures to

the ongoing pandemic. HB 1169 addressed, either in whole or in part, many of the grievances in Plaintiffs' initial complaint. With Defendants' consent, Plaintiffs filed their Second Amended Complaint ("SAC") and Amended Motion for Preliminary Injunction on June 18, 2020. The SAC updated Plaintiffs' allegations and demands in response to HB 1169's changes.

This Court held an evidentiary hearing and oral argument on Plaintiffs' Amended Motion for Preliminary Injunction from July 20–22, 2020. On August 4, 2020, this Court issued a Memorandum Opinion and Order granting in part and denying in part Plaintiffs' motion.

On July 30, 2020, Plaintiffs moved for leave to amend to file their PTAC. The PTAC makes a variety of scattered changes to the SAC, including changes which respond to a July 17, 2020 Emergency Order by State Board of Elections Director Karen Brinson Bell. That order requires county election boards to hold additional early voting hours, to open at least one early voting site per 20,000 registered voters in the county, and to provide certain protective equipment to poll workers and voters. It also provides for a centralized online webpage where residents may monitor precinct consolidation.

ARGUMENT

I. Legal Standard.

Motions for leave to amend are governed by Rule 15. After amending once as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). "Although leave to amend should be 'freely given when justice so requires,' a district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse to grant the leave without any justifying reason." *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010) (cleaned up). "Valid reasons to deny leave to amend include futility, waste of judicial resources, undue delay, and unfair prejudice to the non-moving party." *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04-CV-765, 2006 WL 1286186, at *7 (M.D.N.C. May 4, 2006).

II. Plaintiffs' proposed amendments are futile and would waste judicial resources.

Plaintiffs propose a variety of disconnected amendments which introduce newly transpired facts, clarify older facts, and modify the content and scope of their claims. But all of Plaintiffs' proposed amendments are futile and would merely waste judicial resources. Plaintiffs divide the proposed amendments into five categories: (1) withdrawal of certain claims by Plaintiff Walter Hutchins; (2) addition of allegations concerning the July 17, 2020

Emergency Order; (3) clarification of allegations concerning the witness requirement in light of the Representative Ballot Return Envelope filed by the State Defendants; (4) clarification of allegations concerning the challenged restrictions' impact on Organizational Plaintiffs; and (5) other "clarifications," including a broadening of the scope of certain claims to cover elections after the November 2020 general election. MFL ¶ 15. In light of this court's recent ruling on the motion for preliminary injunction, the quickly approaching election, and the rapidly evolving pandemic, Plaintiffs' motion for leave to amend should be denied as futile with respect to each category of amendments.

A. Withdrawal of claims that have become moot does not warrant leave to amend.

Two of Plaintiffs' five categories of amendments merely withdraw allegations that have been mooted by subsequent developments. *First*, Plaintiffs propose to "withdraw Walter Hutchins' claims regarding absentee ballot request forms." MFL ¶ 15(a). Such a clarification is unnecessary, given that Plaintiffs have already noticed the withdrawal of those claims. *See id.* But even more to the point, this Court has already declared Hutchins' claim on this point moot. PI Order at 42. Plaintiffs argue that this Court's "discretion [to deny leave to amend] is limited by the general policy favoring the resolution of cases on the merits." MFL ¶ 14; *see also Island Creek Coal Co. v. Lake Shore, Inc.*, 832

F.2d 274, 279 (4th Cir. 1987). Plainly, that policy does not require granting leave to amend merely to remove an allegation that this court has already disposed of. Such an amendment would not prejudice Defendants, but neither would it advance the development of Plaintiffs' live claims. Accordingly, it is futile and cannot provide an independent basis for granting Plaintiffs leave to amend.

Second, Plaintiffs propose to "clarify allegations as to HB 1169's impact on the witness requirement in light of the Representative Ballot Return Envelope filed by the State Defendants." MFL § 15(c). While Plaintiffs style this change as a "clarif[ication]," in reality, Plaintiffs merely propose removing one sentence from the SAC which alleged that due to ambiguity in North Carolina's regulatory framework, absentee voters might receive an envelope with space for two witness signatures, creating confusion as to the number of witnesses required. *See* SAC ¶ 68; PTAC ¶ 70. The Representative Ballot Return Envelope filed by the State Defendants apparently alleviates this concern to Plaintiffs' satisfaction; accordingly, they have decided not to pursue this allegation any further. But leave to amend is not warranted merely because subsequent events have mooted one supporting allegation for one of Plaintiffs' claims. Instead, Plaintiffs may simply elect not to press this allegation in subsequent aspects of the proceedings. The purpose of Rule 15——reflected in the command to

"give leave when justice so requires," Fed. R. Civ. P. 15(a)(2)—is to help "resolv[e] cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006); *see also Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999) (purpose of Rule 15 is to allow plaintiff "to cure a formal defect in his pleading"). Removing allegations concerning the ballot envelope is not needed to cure a defect in Plaintiffs' pleadings or otherwise advance the adjudication of this litigation on the merits. Accordingly, leave to amend should be denied with respect to Plaintiffs' allegations concerning the Representative Ballot Return Envelope.

B. Plaintiffs' proposed amendments regarding the July 17 Emergency Order are futile because that order only governs the upcoming general election.

A motion for leave to amend should be denied as futile if the complaint's claims, as amended, will be non-justiciable due to mootness. *Alpha Iota Omega Christian Fraternity v. Moeser*, No. 1:04-CV-765, 2006 WL 1286186, at *8 (M.D.N.C. May 4, 2006) ("Plaintiffs' motion for leave to file the proposed amended complaint is futile because even if it were allowed, the case would still be moot."); *Nat'l All. for Accessibility, Inc. v. Millbank Hotel Partners*, No. RDB-12-3223, 2013 WL 4934479, at *2 (D. Md. Sept. 11, 2013) ("[T]his Court finds that amendment would be futile because Plaintiffs' suit, as alleged in the Proposed Second Amended Complaint, is moot."). Moreover, even if the claims are not yet

technically moot, proposed amendments are futile if the claims they supplement will inevitably be dismissed on mootness grounds. *Cf. HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1011-12 (4th Cir.1996) (finding that proposed amendments were futile because they would have "at most, delayed the inevitable dismissal" of plaintiff's claims).

Plaintiffs seek "to add allegations regarding the July 17, 2020 Emergency Order and its impact on the uniform hours requirement and other relief requested." MFL ¶ 15(b). Plaintiffs' updated allegations essentially argue that the Emergency Order—which responded to some of their vote-burdening concerns—does not go far enough and does not negate the validity of their claims. *E.g.*, PTAC ¶ 88. Specifically, Plaintiffs wish to supplement three specific claims with allegations concerning the Emergency Order's effect: (1) their claim that the uniform hours requirement unconstitutionally burdens Plaintiffs' right to vote, *see id.*; (2) their claim for injunctive relief requiring the state to provide more information about precinct consolidation, *see id.* ¶ 89; and (3) their claim for injunctive relief requiring the state to provide poll workers and voters with Personal Protective Equipment for use during in-person voting, *see id.* ¶ 90.

But this Court already declined to grant Plaintiffs a preliminary injunction with respect to these claims. *See* PI Order at 51–52, 128 (uniform hours requirement); *id.* at 128–30

(affirmative requests). And if anything, the Emergency Order only makes Plaintiffs' case for immediate relief weaker——indeed, their additional allegations merely attempt to rebut the significance of the Emergency Order. Given the denial of a preliminary injunction, Plaintiffs' only chance to obtain their requested relief would be to win at trial.

Yet, as Plaintiffs note, the Emergency Order "is only in effect for the November 3, 2020 general election and thus inapplicable to subsequent elections during the pandemic." PTAC ¶ 8. With less than three months before that election, there is insufficient time to prepare for and conduct a trial and then reach a verdict——let alone leaving enough time for the State's election infrastructure to implement the Court's judgment. Because Plaintiffs' proposed allegations concerning the Emergency Order are only relevant to the upcoming November election, the associated claims——insofar as they rely on those allegations——will be moot before any further relief can be provided to Plaintiffs. Leave to amend cannot cure the "inevitable dismissal" of Plaintiffs' claims due to mootness. *HealthSouth*, 101 F.3d at 1012. Accordingly, leave to amend to add allegations concerning the Emergency Order should be denied.

C. Plaintiffs' proposed amendments regarding standing are futile because the new allegations are unnecessary for adjudicating standing.

Plaintiffs also propose to modify the SAC's "allegations as to the impact of the challenged restrictions to the Organizational Plaintiffs" in order to conform them to "the declarations submitted in support of the plaintiffs' Amended Motion for Preliminary Injunction." MFL ¶ 15(d). The PTAC contains additional background information about the Organizational Plaintiffs, *see* PTAC ¶¶ 16–17, and it adds supplemental standing-related allegations to six of Plaintiffs' vote-burdening challenges: (1) the challenge to the voter registration deadline, *id.* ¶ 97; (2) the challenge to the ballot harvesting ban, *id.* ¶¶ 99–100, 131; (3) the challenge to the State's failure to provide drop boxes, *id.* ¶ 106; (4) the challenge to the State's failure to provide an opportunity to cure rejected absentee ballots, *id.* ¶ 107; (5) the challenge to the home-county requirement, *id.* ¶ 111; and (6) the challenge to the lack of "a more accessible, centralized way" to monitor precinct consolidation, *id.* ¶ 116.

All of these proposed amendments are futile and unnecessary for adjudicating standing on the merits. *First*, Plaintiffs' standing-related amendments concerning the ballot harvesting ban are unnecessary because Defendants have not contested Organizational Plaintiffs' Article III standing to pursue this claim. *See* Br. in Support of Legislative Defendants' Mot. to

Dismiss in Part Pls.' SAC at 3–9. And even if this Court were to question Organizational Plaintiffs' Article III standing to challenge the ballot harvesting ban, Plaintiffs' SAC already pleads harm to the Organizational Plaintiffs allegedly caused by the ban. *See* SAC ¶¶ 96, 128.

Second, Plaintiffs' standing-related amendments concerning drop boxes and the home-county requirement would be futile because this Court has already found that Organizational Plaintiffs' lack standing regarding these claims even while considering all the information Plaintiffs propose to add. As Plaintiffs admit, all they intend to do is update their standing-based allegations to match declarations already submitted to this Court. MFL ¶ 15(d). But in its preliminary injunction order, this Court "considered the entire record, including the declarations and testimony," PI Order at 7, and still found that Organizational Plaintiffs lack standing to challenge the absence of drop boxes and the home-county requirement. *Id.* at 43, 51. Adding the exact same allegations to their complaint that this Court has already found do not suffice to support standing would be futile.

Third, Plaintiffs' amendments concerning precinct-consolidation monitoring are also futile. No Individual Plaintiff has standing to bring this claim; Plaintiff Permar is the only Individual Plaintiff who intends to vote in person, and as this Court has found, she only alleged "purely hypothetical" injuries.

Id. at 49. Neither, under the reasoning of this Court's preliminary injunction order, may Organizational Plaintiffs assert prudential standing to bring this claim. *Id.* at 57. And as with drop boxes, any diversion of resources resulting from the State's failure to grant this affirmative request stems from the Organizational Plaintiffs' own choices and cannot be attributed to the State. *See id.* at 43.

Fourth, Plaintiffs' standing-related amendments concerning their voter-registration-deadline and opportunity-to-cure claims are unnecessary to adequately plead standing at the motion-to-dismiss stage under the organizational standing framework this Court has adopted. This Court has held that "[o]rganizational standing requires impaired ability to provide its intended services, including a drain of resources." PI Order at 36. Plaintiffs' SAC already alleges impairment of organizational mission and a diversion of resources with respect to both of these claims. *See* SAC ¶ 94 ("The 25-day deadline will hinder LWVNC's efforts to promote voter registration and require LWVNC and its members to divert significant resources."); *id.* ¶ 104 ("[T]he lack of any uniform mechanism to cure will require LWVNC and Democracy NC to devote additional resources . . . ."). Plaintiffs' amendments attempt to buttress these allegations by adding a variety of specific details. *E.g.*, PTAC ¶ 97. But these additional allegations are unnecessary at the motion to dismiss stage, and they are

already in the record for consideration at later stages of this litigation. Amending Plaintiffs' complaint to include them would thus be unnecessary.

In sum, Plaintiffs' proposal to backfill standing-related allegations from their declarations into their complaint would be futile and wasteful of judicial resources. Many of their proposed amendments concern claims where standing is uncontested or claims where the additional allegations are unnecessary to establish standing under this Court's framework for purposes of a motion to dismiss. And the rest of the proposed amendments are futile because this Court has already found a lack of standing even while considering the information contained therein. Defendants' motion for leave to amend should thus be denied as futile insofar as it seeks leave to add standing-related allegations.

D. Plaintiffs' proposal to expand this litigation to apply to post-2020 elections is futile because such claims are speculative and unripe.

Ripeness doctrine "prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 190 (4th Cir. 2018). "A claim should be dismissed as unripe if the plaintiff has not yet suffered injury and any future impact 'remains wholly speculative.'" *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013). In determining ripeness, the Court must "balance the fitness of the issues for judicial decision with the hardship

to the parties of withholding court consideration. A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Id.*

Leave to amend should be denied due to futility if the claims plaintiffs propose to add are unripe or if the allegations are too speculative to support a ripe claim. *See, e.g.*, *NAACP v. Bureau of Census*, No. PWG-18-891, 2019 WL 5964522, at *1 (D. Md. Feb. 28, 2019) (denying leave to amend to add "Constitutional claims for injunctive relief [that] are not yet ripe"); *WTGD 105.1 FM v. SoundExchange, Inc.*, 88 F. Supp. 3d 580, 588 (W.D. Va. 2015) (denying leave to amend after finding claims unripe due to "the tenuous and anticipatory nature of the allegations in this case"); *Gallenthin Realty Development, Inc. v. BP Prods. of N. Am.*, No. Civ.A.04-4849, 2005 WL 408041, at *2 (E.D. Pa. Feb. 18, 2005) (denying leave to amend "because the claims are not ripe and because abstention doctrine would not permit the exercise of jurisdiction").

Most of the claims in the SAC were specifically targeted at North Carolina's administration of the November 2020 general election. *See, e.g.*, SAC ¶ 91 ("Unless Plaintiffs are granted the relief requested, the right to vote and ability to freely associate of thousands of North Carolinians . . . will be severely burdened (if not denied entirely) in the general election on November 3,

2020."); *see also id.* ¶¶ 152, 162, 170, 178 (each alleging violations concerning the "November 3, 2020 general election"). But with their fifth category of proposed amendments, Plaintiffs seek to "clarify" that many of their claims "are intended to apply to all elections during the pandemic." MFL ¶ 15(e). They also seek leave to adjust their prayer for relief accordingly. *Id.* The PTAC would broaden most of the SAC's claims to seek relief for all "subsequent elections for the duration of the pandemic"—an indefinite and potentially far-reaching number of elections. *E.g.*, PTAC ¶ 155.

Plaintiffs' claims concerning post-2020 election administration are unfit for judicial resolution because they are doubly "dependent on future uncertainties." *Va. Dep't of State Police*, 713 F.3d at 758. *First*, North Carolina's election administration is rapidly changing in light of the pandemic—indeed, the motion to amend at issue here was prompted in part by the State's adaptation of its election procedures to the pandemic. Given the State's evolving policy response, many of Plaintiffs' specific claims and assumptions—for example, allegations of omissions—are entirely speculative with respect to elections in 2021 and beyond. *E.g.*, PTAC ¶ 163 (alleging that Multipartisan Assistance Team guidelines required by HB 1169 do not yet exist). Any assumptions by Plaintiffs as to how North Carolina's election policies will evolve after this fall's general election are too

"dependent on future uncertainties" for them to present a ripe controversy now. And granting Plaintiffs' motion, which in large part addresses a single election-related order issued on July 17, would invite a new motion for leave to amend each time the State changes an election law or regulation in response to the pandemic. If this litigation persists throughout the entire "duration of the pandemic," such an approach could generate numerous amended complaints, unnecessarily draining judicial and party resources.

Second, the pandemic *itself* is rapidly evolving, such that determining the policies and precautions that will be reasonably required for a safe election months and years into the future is impossible. This prevents the fashioning of effective judicial relief governing all elections "for the duration of the pandemic." PTAC ¶ 155. Indeed, there is no simple way to measure "the duration of the pandemic," let alone to craft a formula to determine which election procedures will be appropriate as the disease becomes more or less widespread—or as experts learn more about how the virus is spread. The rapidly evolving nature of both the pandemic and the response of this State's election administration make this the opposite of a case "fit for judicial decision," where "the issues are purely legal and . . . the action in controversy is final and not dependent on future uncertainties." *Va. Dep't of State Police*, 713 F.3d at 758.

The hardship prong of the ripeness inquiry also illustrates that Plaintiffs' post-2020 claims are unripe. "The hardship prong [of] ripeness analysis is 'measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law.'" *Id.* at 759. But Individual Plaintiffs' concrete allegations of hardship arising from North Carolina's election laws all concern their ability to vote in the upcoming November election. Accordingly, both the fitness and hardship prongs indicate that Plaintiffs' proposed amendments are unripe and thus futile insofar as they concern post-2020 elections.

Significantly, this Court already found that some of Plaintiffs' Rehabilitation Act and ADA claims——two of the claims that Plaintiffs propose to broaden beyond the 2020 election, PTAC ¶¶ 165, 173——are unripe even with respect to the November 2020 general election. PI Order at 59. And whereas the November 2020 general election was less than three months away at the time of the preliminary injunction order, Plaintiffs' amended claims would seek relief applicable to all North Carolina elections for an indefinite period of time. Because the amendments proposed in Paragraph 14(e) of Plaintiffs' motion to amend merely add unripe claims, the amendments would be futile and leave to amend should be denied.

III. Plaintiffs' attempt to broaden the scope of this litigation beyond the 2020 general election is prejudicial.

Plaintiffs' attempt to broaden their claims beyond the November 2020 general election should also be rejected because it would prejudice Defendants. "Prejudice to the opposing party 'will often be determined by the nature of the amendment and its timing.'" *Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 293 (4th Cir. 2018). A court must "look to the 'particular circumstances' presented, including previous opportunities to amend and the reason for the amendment." *Id.* "Belated claims which change the character of litigation are not favored." *Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987).

Both the nature and the timing of Plaintiffs' motion to amend indicate that it would prejudice Defendants. As regards the nature of the amendments, Plaintiffs' PTAC would transform this litigation from a finite and concrete dispute over the upcoming general election into an unbounded lawsuit applicable to all "subsequent elections for the duration of the pandemic." *E.g.*, PTAC ¶ 155. Not only does this substantially broaden the scope of this litigation, but it also makes the scope of this litigation entirely indeterminate. Plaintiffs' motion is thus prejudicial because it would "very materially change the nature of the complaint," unexpectedly amplifying the scope and potential

consequences of the litigation. *Isaac v. Harvard University*, 769 F.2d 817, 829 (1st Cir. 1985).

The timing of Plaintiffs' motion also contributes to its prejudice. It is true that prejudice most often results from post-discovery or post-trial motions, and that is not the case here. *E.g.*, *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (noting that prejudicial amendments are commonly "offered shortly before or during trial"). But this litigation was a targeted challenge to North Carolina's administration of the 2020 general election, brought just months before that election was set to take place. *See, e.g.*, SAC ¶¶ 91, 152, 162, 170, 178. Because the timing of Plaintiffs' suit left insufficient time for a trial, the preliminary injunction ruling was likely to be the last disposition reached before the election——and the dispute would subsequently be mooted after the election passed by. But Plaintiffs, at roughly the same time as this Court's preliminary injunction ruling, now seek to expand this litigation to cover all North Carolina elections for an indeterminate period into the future. Plaintiffs' proposed amendments thus constitute "[b]elated claims which change the character of litigation," *Deasy*, 833 F.2d at 42, because, shortly before the controversy would otherwise end, Plaintiffs seek to throw off the constraint which previously limited the scope of the litigation and instead use this lawsuit to control North Carolina's election administration for an indefinite duration.

This transformative change to the character of this litigation, coming right as the litigation would otherwise begin to wind down, is prejudicial to Defendants. Plaintiffs' motion for leave to amend should be denied to the extent that it adds claims regarding post-2020 elections.

Conclusion

For the foregoing reasons, Plaintiffs' motion for leave to amend should be denied.

Dated: August 20, 2020

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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 Legislative Defendants' Response in Opposition to Plaintiffs' Motion for Leave to File a Third Amended Complaint, including body, headings, and footnotes, contains 4,452 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 Legislative Defendants' Response in Opposition to Plaintiffs' Motion for Leave to File a Third 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