

**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 STATE
DEFENDANTS' 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 North Carolina restrictions on voter registration, mail-in absentee voting, and in-person voting during the ongoing Covid-19 pandemic violates the First and Fourteenth Amendments and federal statutes. State Defendants have moved to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim. Doc. 119. For the following reasons, the motion should be denied.

LEGAL STANDARD

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 Stated Plausible Claims for Relief¹

A. Undue Burden on the Right to Vote

State Defendants contend that “Plaintiffs fail to state a claim because North Carolina’s important regulatory interests in maintaining voting integrity and consistency outweigh any asserted injury by plaintiffs under the *Anderson-Burdick* framework.” Doc. 119, at 7. However, State Defendants’ arguments as to Count 1 suffer from three global defects.

First, the effects of the challenged restrictions must be analyzed *in the context of the Covid-19 pandemic*.

¹ State Defendants do not move to dismiss Plaintiffs’ claims under the Due Process Clause (Count 4) or the Voting Rights Act (Count 9).

Plaintiffs have plausibly alleged that voters in North Carolina are at severe risk of developing severe complications from Covid-19 and that the enforcement of these restrictions during the pandemic will severely burden voters. In fact, while State Defendants recognize that “[t]he COVID-19 pandemic is the greatest threat to global health in the last century,” Doc. 119, at 3, they still analyze the burden on Plaintiffs without assessing the unique burdens these restrictions impose during the pandemic. Because these restrictions are severe, they must be justified by compelling interests and substantiated with concrete evidence. Plaintiffs have plausibly alleged severe burdens on voting rights and that State Defendants have failed to offer 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” during the Covid-19 pandemic. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). State

Defendants' arguments otherwise are conclusory and require the Court to consider underlying evidence of these burdens that would be inappropriate at a motion to dismiss stage.

Third, State Defendants 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 State Defendants 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.

Voter Registration

State Defendants 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. 119, at 9. State Defendants do not dispute that Plaintiffs have plausibly alleged the burden this deadline

imposes on voters is heightened in the context of the Covid-19 pandemic, 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"). Instead, State Defendants only note that in prior years, when there was no global pandemic, the Fourth Circuit has found that the 25-day requirement's burden on voters is "modest." Doc. 119, at 9.

Moreover, Plaintiffs have adequately alleged that the state interests in enforcing these restrictions are insufficient to justify the burdens imposed. State Defendants argue that the State has a compelling interest in ensuring orderly procedures, avoiding voter confusion, securing sensitive voter information, and verifying voters' identities. Doc. 119, at 9. However, it would be improper for the Court to weigh these interests when deciding a motion to

dismiss under Rule 12(b)(6), especially when these interests 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 of this action to determine whether the burdens on voters are in fact justified by those interests. See *Thomas v. Andino*, Civil Action Nos. 3:20-cv-01552-JMC & 3:20-cv-01730-JMC, 2020 WL 2617329, at *20 (D.S.C. May 25, 2020) (“While 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 testing and weighing of evidence at a later phase of this litigation. Here, State Defendants offer no argument as to how voters would be confused or why election officials would be unable to ensure “orderly, fair, and efficient procedures” if the voter registration deadline were extended. Doc. 119, at 9.

Similarly, instead of challenging the plausibility of Plaintiffs’ allegations as to the lack of expanded online

registration opportunities, State Defendants argue that the 25-day deadline is justified by “compelling state interests.” Doc 119 at 10. Again, State Defendants do not explain what these compelling state interests are.

Plaintiffs have plausibly alleged that during a 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 State Defendants contend.

Restrictions on Absentee Ballots

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*, 2020 WL 2617329, at *17 n.20 (“[D]uring this pandemic ... ‘denial of the absentee ballot

is effectively an absolute denial of the franchise [and fundamental right to vote].'" (citations omitted).

a. Assistance Ban

As to the assistance ban concerning absentee ballot requests, State Defendants argue that Organizational Plaintiffs and Plaintiff Schaffer are not prohibited from printing out the forms and distributing blank forms to voters. Doc. 119, at 11. Thus, according to State Defendants, this requirement "imposes no more than a modest burden when weighed against the State's legitimate interests" in reducing voter confusion and preventing voter fraud. *Id.* at 11-12.

Once again, State Defendants do not explain how allowing someone to help voters fill out absentee request forms would cause voter confusion. In fact, the State's interest in "ensuring that all absentee ballot requests comply with North Carolina law and can be processed in a timely fashion," Doc. 119, at 11, would be advanced if Organizational Plaintiffs and Plaintiff Schaffer, who have experience with absentee ballot request forms, were able to help the large numbers of voters who are unfamiliar with filling out absentee ballot requests. See Compl. ¶ 60 (State Board of Elections

anticipates a “dramatic increase in mail-in absentee voting in 2020 to 30 to 40 percent”).

State Defendants also cite a district court case in Ohio to argue that there is an adequate justification for not allowing people to request absentee ballots by phone or online. Doc. 119, at 11 (citing *League of Women Voters v. LaRose*, 2020 U.S. Dist. LEXIS 91631, at *23 (S.D. Ohio, Apr. 3, 2020)). However, that case is irrelevant here. First, in *LaRose*, the court found that the state was justified in requiring eligible voters to fill out absentee ballot applications because the Ohio Revised Code requires the Secretary of State to “properly verify ... a voter’s signature ... as part of the verification process” for absentee ballot requests. *Id.* at *23 (citing Ohio Rev. Code Ann §§ 3505.18; 3509.03(b)(5)). By contrast, North Carolina does not have a signature verification requirement. Second, Plaintiffs have not pled that the State should completely eliminate the requirement to fill out a ballot request form, as the plaintiffs in *LaRose* requested. Plaintiffs seek a waiver of the form requirement under N.C. Gen. Stat. § 163-230.2(a) only to the extent that voters can provide all the requisite

information on the absentee ballot request over the phone. Plaintiffs are not proposing the elimination of the absentee ballot request form.

State Defendants 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. Accordingly, Plaintiffs have plausibly alleged that the assistance ban severely burdens Organizational Plaintiffs and Plaintiff Schaffer without serving any legitimate state interest.²

b. Witness Requirement

Plaintiffs have sufficiently alleged that the Witness Requirement presents an undue burden during the pandemic. State Defendants argue that Plaintiffs have not broken down the 1.1 million single-member households in North Carolina

² State Defendants assert that Organizational Plaintiffs and Plaintiff Schaffer could still assist with voting by printing and distributing the ballot request forms. Doc. 119, at 11. However, this proposal is insufficient--for example, it does not address how Organizational Plaintiffs and Plaintiff Schaffer could assist voters who, because of age or disability, are unable to mark the absentee ballot requests. These are nuances that must be evaluated at a later stage of this lawsuit with the benefit of fulsome discovery.

and determined how many of them intend to vote by mail. Doc. 119, at 15. But an analysis of this data is not required to survive a motion to dismiss. In any event, Plaintiffs do not solely rely on the number of single-member households in alleging that this will cause a severe burden for voters: the Complaint adequately alleges that the 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, 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 possible from infection. *Id.*

State Defendants also argue that the Witness Requirement is justified to “minimize voter fraud,” citing *Thomas*, 2020 WL 2617329, at *20, and *League of Women Voters of Va. v. Va. State Bd. of Elections*, Case No. 6:20-CV-00024, 2020 WL 2158249, at *14, (W.D. Va. May 5, 2020), Doc. 119, at 15-16. But State Defendants fail to mention that both cases found that in the context of the Covid-19 pandemic, “the burdens imposed on [plaintiffs] in having to place their health at

risk during the COVID-19 pandemic likely outweigh the extent to which the Witness Requirement advances the state's interest of voter fraud and integrity." *Thomas*, 2020 WL 2617329, at *21; see also *League of Women Voters of Va.*, 2020 WL 2158249, at *8 ("In our current era of social distancing—where not just Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden is substantial for a substantial and discrete class of Virginia's electorate.").

Accordingly, Plaintiffs' allegations under *Anderson-Burdick* that the Witness Requirement imposes severe unjustified burdens during this pandemic are sufficient. *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 alleged that the State's failure to provide voters a uniform opportunity to cure deficient absentee ballots presents an undue burden on voters during the Covid-19 pandemic. Plaintiffs have specifically alleged that the lack of an opportunity to cure presents a severe burden in light of (1) the historical rejection rates for absentee ballots in North Carolina during non-pandemic times; (2) the anticipated influx of voters submitting mail-in ballots for the first time; and (3) the severe restrictions on the assistance available to these voters. Compl. ¶¶ 76, 103.

State Defendants again rely on a purported lack of evidence instead of arguing against the plausibility of these allegations on their face. Doc. 119, at 21. While such arguments may properly be considered at summary judgment or trial, they cannot compel this dismissal of this claim as legally insufficient at this stage. Moreover, State Defendants claim that Plaintiffs' request limits the "flexibility with which the State Board might respond to changing circumstances" on the group. Doc 119, at 21. However, Plaintiffs have not requested that the Court create a cure

process for the State Defendants; Plaintiffs only request that State Defendants create an adequate cure process so that voters are given the ability to cure their ballots.

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 issues of absentee ballot delivery that have occurred in recent elections in other states. *Id.* ¶ 103. It is undisputed that the USPS is a 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 State Defendants' request that the Court determine now that North Carolina will not experience similar issues, based on State Defendants' conclusory assertions alone, is inappropriate at a motion to dismiss stage.

Moreover, State Defendants argue that this is not the kind of issue in which the Court can intervene. Doc. 119, at

20. However, Plaintiffs allege that a failure to provide drop boxes is unconstitutional, as it impedes voters' abilities to exercise their fundamental right to vote. The Court unquestionably can exercise its Article III authority to determine whether Defendants have violated Plaintiffs' rights under the U.S. Constitution in this way.

e. Federal Write-In Absentee Ballots

As the operative complaint alleges, Plaintiffs Clark, Edwards, Priddy, Cates, and Bentley all plan to vote by mail. Compl. ¶ 101; see also *id.* ¶¶ 147, 157, 167, 175 (Clark, Edwards, and Priddy plan to vote by mail due to their disabilities, as defined by the ADA and Rehabilitation Act). If, as expected, North Carolina's state and local election officials and/or the USPS cannot keep pace with the unprecedented rise in absentee ballots, then Plaintiffs will not receive their absentee ballots in a timely fashion such that they can be cast and counted. *Id.* ¶¶ 101, 149, 159, 167, 175; see also *id.* ¶ 73 ("Wisconsin, Ohio, and Georgia that state and local election officials, as well as the U.S. Postal Service, are failing to deliver thousands of absentee ballots to voters in the mail"). As a result, these Plaintiffs must

be permitted to cast Federal Write-In Absentee Ballots (“FWABs”) as a fail-safe option (and as an accommodation under the ADA/Rehabilitation Act for Clark, Edwards, and Priddy) if they do not receive their absentee ballots on time. *Id.* ¶¶ 101, 149, 159, 167, 175.

State Defendants argue that allowing voters to vote by FWABs would pose “significant administrative concerns,” but fail to explain what those concerns would be. Doc. 119, at 22. Moreover, since Plaintiffs only seek to allow voters to vote by FWABs if they do not receive their absentee ballots on time, State Defendants essentially admit that they expect there to be issues with absentee ballot delivery. This only substantiates Plaintiffs’ allegations that the failure to offer FWABs will severely burden Plaintiffs’ right to vote.

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. Compl. ¶ 5. Plaintiffs have alleged facts showing that the State is already having issues recruiting poll workers: during the

Congressional District 11 Second Republican Primary, several county boards cited poll worker shortages in their requests to consolidate 64 precincts. *Id.* ¶ 79. Furthermore, poll worker shortages continue to be an issue in elections that have been conducted during the Covid-19 pandemic, as shown in Wisconsin and Georgia. *Id.* ¶¶ 5, 82, 106.

State Defendants argue that Plaintiffs “offer nothing more than speculation” about the burden the Home County Requirement will cause. Doc. 119, at 19. However, any geographic restriction on poll workers, whether at the county level (only for the November 2020 election) or the precinct level (which will apply to subsequent elections administered, even if the pandemic is still ongoing) narrows the field of available poll workers for each given polling site, and State Defendants 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. Indeed, State Defendants “acknowledge that the uniform hours requirement may reduce the flexibility of county boards of elections to respond to exigencies that may occur in light of

the COVID-19 pandemic.” Doc. 119, at 18. Despite this admission, State Defendants argue that Plaintiffs “have not provided information sufficient to understand the nature of the burdens to voters.” Doc 119, at 18. However, the Complaint makes it abundantly clear how voters are burdened. For example, Plaintiff Permar, who is blind and needs to access a voting location by public transportation, will be severely burdened if publicly-accessible polling places become unavailable. Compl. ¶ 108.

State Defendants also allege that there is a state interest in avoiding voter confusion and in avoiding even an “appearance of partisanship in the setting of early voting hours.” Doc 119, at 18. Again, State Defendants fail to explain why enjoining the Uniform Hours requirement during the extreme situation of a global pandemic would appear partisan or cause voter confusion. State Defendants also ignore Plaintiffs’ plausible allegations that a reduction in polling places will cause long lines (and resulting risk to Covid-19 infection), Compl. ¶ 85. Thus, Plaintiffs have sufficiently pled a plausible constitutional violation.

Precinct Consolidation Monitoring

Plaintiffs have also sufficiently alleged that North Carolina's failure to provide a more accessible, centralized way in which voters and advocates can monitor precinct consolidation is a severe burden on Plaintiffs' right to vote. Compl. ¶ 113. State Defendants argue that Plaintiffs have failed to plead why the current standards for voter education impose a burden. Doc. 119, at 22. However, Plaintiff DemNC alleged that there would be "a huge drain on its resources to not have easy access to proposed precinct consolidations to inform voters" during a global pandemic, Compl. ¶ 113. Moreover, the Complaint noted that procedures for monitoring precinct consolidation are necessary because the in-county residency requirement will likely exacerbate a shortage of poll workers, leading to precinct consolidation and relocation, and voters must be aware of these changes. *Id.* ¶ 106. On a motion to dismiss, the Court should accept all well-pleaded allegations of fact as truthful for the purposes of the motion. With these facts, Plaintiffs have plausibly pled that the lack of a centralized way to monitor precincts would cause a severe burden on voters.

B. Unconstitutional Conditions Doctrine

State Defendants argue that the unconstitutional conditions doctrine does not apply here, Doc. 119, at 16, but they fail to acknowledge 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)).

Further, contrary to State Defendants’ assertion that violations of the constitutional right to bodily integrity only apply “to the most egregious official conduct,” Doc. 119, at 17, 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 v. Peters*, 387 F.3d 1303, 1324–25 (11th Cir. 2004) (“[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)).

State Defendants also claim that the standard for an unconstitutional conditions violation request a finding that the government's conduct "shocks the conscience." Doc. 119, at 17. That is incorrect, as the Supreme Court has explained. See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) ("[T]he substantive component of the Due Process Clause is violated by executive action" that is "arbitrary, or conscience shocking." (emphasis added, quotation marks omitted)); *United States v. Salerno*, 481 U.S. 739, 746 (1987) (government may not "engag[e] in conduct that 'shocks the conscience,' . . . or interfere[] with rights 'implicit in the concept of ordered liberty'" (emphasis added, citations omitted)). Enforcing the witness requirement during the Covid-19 pandemic is arbitrary and interferes with rights implicit in the concept of ordered liberty. In addition, Plaintiffs submit that requiring vulnerable voters to expose themselves to the unprecedented risks Covid-19 presents in order to exercise the fundamental right to vote indeed shocks the conscience.

In any event, the correct standard in this case is strict scrutiny: "[W]hen a condition on a government benefit burdens

a constitutional right, it generally triggers the same scrutiny as a direct penalty would." *McCabe v. Sharrett*, 12 F.3d 1558, 1562 (11th Cir. 1994). Thus, laws that burden the right to bodily integrity must be "narrowly drawn" to serve a "compelling state interest." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998). Plaintiffs have sufficiently alleged that the Witness Requirement fails strict scrutiny because it does not further a compelling government interest, but does cause a severe burden to voters like Plaintiff Bentley. Compl. ¶¶ 71, 99, 121, 123.

Finally, State Defendants argue that there is no violation of bodily integrity because there is no substantial burden on voters. Doc. 119, at 17. However, Plaintiffs have plausibly alleged that forcing Plaintiff Bentley to seek a witness would be a severe burden on her right to vote. See Compl. ¶¶ 71, 99, 123. Because of Plaintiff Bentley's pre-existing medical condition, she has been self-isolating at home and does not leave her home unless absolutely necessary. *Id.* ¶ 19. She lives alone and is uncomfortable asking her neighbors to be her witness because she has observed them breaking social distancing guidelines. *Id.* Thus, she has no

way to safely comply with the Witness Requirement. *Id.* ¶ 71. As a result, she will need to choose between exercising her fundamental right to vote or risk contracting and spreading COVID-19 – a disease which could put her at risk of serious illness or death. *Id.* ¶ 71. These facts, taken as true on a motion to dismiss, plausibly show that there is a severe burden.

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).

State Defendants argue that the restriction on the assistance ban is not a violation of the First Amendment, but

is designed to reduce the incidence of absentee voter fraud. Doc. 119, at 14. State Defendants, however, 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. Compl. ¶ 96. This assistance includes "completing," "signing," and "delivering" request forms as they have educational, associational and communicative aspects, and is conduct that expresses the view that the acts of voting and helping others to participate promote democracy. *Id.*

Courts have recognized that such voter assistance activities are political expression manifested through conduct. *See, e.g., Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp.2d 1183, 1215-16 (D.N.M. 2010) (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”, and thus the plaintiffs sufficiently stated a First-Amendment expressive-conduct claim), *ruling upheld on reconsideration in part*, 2010 WL 3834049 (D.N.M. July 28, 2010); *Priorities USA v. Nessel*, 2020 WL 2615766, at *7-8, 11 (E.D. Mich. May 22, 2020) (seeking 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,” triggering application of strict scrutiny).

As in *Herrera* and *Priorities USA*, the Organizational Plaintiffs and Plaintiff Schaffer wish to conduct 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).

D. ADA/RA Claims

State Defendants also argue that ADA/RA Plaintiffs are unable to show that they cannot request the assistance of a close relative, legal guardian, or member of a MAT. Doc.

119, at 14. However, the Complaint alleges that Plaintiff Hutchins' "nursing home is closed to visitors," which includes all relatives and MAT members. Compl. ¶ 150. This directly supports Plaintiffs' allegations that preventing Plaintiff Hutchins from receiving assistance from the nursing home staff members would limit his ability to vote.

CONCLUSION

For the foregoing reasons, State Defendants' motion to dismiss should be denied.

Dated: August 20, 2020.

Respectfully submitted,

/s/ Jon Sherman

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WORD CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for PLAINTIFFS' RESPONSE IN OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS is 4517 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/ George Varghese
George Varghese