

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:20-cv-457

DEMOCRACY NORTH CAROLINA, *et al.*,  
Plaintiffs,  
v.  
THE NORTH CAROLINA STATE  
BOARD OF ELECTIONS; *et al.*,  
Defendants,  
and  
PHILIP E. BERGER, *etc.*, *et al.*,  
Intervenors.

**REPLY MEMORANDUM  
IN SUPPORT OF  
STATE DEFENDANTS’  
MOTION TO DISMISS**

**NOW COME** defendants—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, Jeff Carmon III, and David C. Black, in their official capacities as Members 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 (collectively “the State defendants”)—and hereby submit this Reply Memorandum in Support of their Motion to Dismiss.

## ARGUMENT

### **I. Plaintiffs Fail to Respond to the State Defendants' Arguments that Plaintiffs' Claims Against the North Carolina Department of Health and Human Services Should Be Dismissed.**

In their original Memorandum in Support of their Motion to Dismiss, the State defendants argued that plaintiffs had failed to state a claim against the North Carolina Department of Health and Human Services (“DHHS”). Specifically, in their Memorandum in Support of their Motion to Dismiss, with regard to plaintiffs’ claim for relief regarding the 25-day voter registration deadline, by which plaintiffs seek to have this Court enjoin enforcement of N.C. GEN. STAT. §§ 163-82.6(d) and 163-82.20(g) and (h) imposing those deadlines, and to have this Court force DHHS to offer online voter registration, the State defendants argued that plaintiffs “have identified no legal theory that requires DHHS to offer online voter registration.” [DE 119 at 9] Plaintiffs’ response supplies no such legal theory; indeed, DHHS is not mentioned in their response at all. The Court can and should, therefore, accept the State defendants’ arguments as conceded. See *Hadley v. City of Mebane*, 2020 U.S. Dist. LEXIS 55891, \*19, citing *Brand v. N.C. Dep’t of Crime Control & Pub. Safety*, 352 F. Supp. 2d 606, 617-18 (M.D.N.C. 2004) (“In Plaintiff’s brief in response to Defendants’ motion for summary judgment, Plaintiff does not address Defendants’ [] motion concerning his hostile work environment claim. By failing to respond, Plaintiff concedes that he has not stated a hostile work environment claim.”).

## II. Plaintiffs Fail to Show How Their Allegations Are More than Conclusory.

A fundamental basis for the State defendants' Motion to Dismiss is the nature of plaintiffs' allegations—that plaintiffs have failed to provide specific factual allegations to support their claims and have instead rely heavily on conclusory and speculative allegations. *See, e.g.*, DE 119 at 13, 18–20, 21–22. Plaintiffs' response fails to demonstrate how their allegations are more than conclusory, and how they sufficiently harms and causes of action on which the Court can proceed.

The lack of factually specific allegations forces this Court to presume that plaintiffs' speculation and unsupported conclusions state claims on which the Court can proceed. For example, with regard to plaintiffs' claim concerning contactless drop boxes, the State defendants argued that plaintiffs “have failed to show that the lack of contactless drop boxes presents an undue burden to voters.” [DE 119 at 19] Plaintiffs responded by simply asserting that “the local U.S. Postal Service (“USPS”) infrastructure in North Carolina *may be* overwhelmed with the increase in voting by mail.” (Emphasis added.) Plaintiffs continue

This allegation is plausible in light of the issues of absentee ballot delivery that have occurred in recent elections in other states. 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.

*Id.* (with internal citations omitted). This argument highlights the problem with plaintiffs' allegations. If “State Defendants' conclusory assertions alone” would require the Court

to determine at this stage of the litigation that North Carolina will *not* experience disruption in mail service, then plaintiffs' conclusory assertions similarly require the Court to assume at this point in time that North Carolina *will* experience disruption in mail service. The difference is that the State defendants do not have the burden at this stage of litigation in alleging adequate facts to support their claims. That is plaintiffs' burden.

Plaintiffs' complaint must contain factual allegations sufficient "to raise a right to relief above the speculative level" and to satisfy this Court that the claim is "plausible on its face," or it is subject to dismissal under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). That means that plaintiffs must "plead[] *factual content* that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"—a standard that requires more than facts "that are 'merely consistent with' a defendant's liability." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (emphasis added) (quoting *Twombly*, 550 U.S. at 557). Here, plaintiffs fail to allege anything other than speculation as to what might happen with the USPS services in North Carolina. They plead no "factual content" that supports the claim for relief sought in this action.

Similarly, with regard to a cure process for rejected absentee ballots, plaintiffs simply cite the number of rejected ballots in the March 2020 primary and summarily conclude that the lack of a standardized curative process is the reason these ballots were rejected. They offer no explanation of how their allegations assert a factual basis for their claim, nor do they cite to any factual allegation in their Second Amended Complaint. They

simply assert that they have “adequately alleged” it to be so by pointing to allegations that they are unduly burdened.<sup>1</sup> [DE 129 at 14]

Because plaintiffs consistently fail to assert anything more than conclusory allegations to support their claims for relief, those claims should be dismissed. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

### **CONCLUSION**

For the reasons above, as well as for the reasons stated in their Memorandum in Support of their Motion to Dismiss [DE 119], the State defendants respectfully request that plaintiffs’ Second Amended Complaint be dismissed with prejudice.

This the 3rd day of September, 2020.

JOSHUA H. STEIN  
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<sup>1</sup> Plaintiffs are correct that the State defendants’ brief does, in a few places, assert that plaintiffs have failed to provide “evidence” to support their claims [DE 129 at 14]; and they rightly note that at this stage of the litigation, the Court looks only to allegations, not to evidence that might be developed to support plaintiffs’ claims. However, when the State defendants’ memorandum is read in context, it is clear that the clerical error of using the word “evidence” refers to allegations of specific fact.

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**CERTIFICATE OF WORD COUNT**

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 1,156 words as measured by Microsoft Word.

This the 3rd day of September, 2020.

/s/ Alexander McC. Peters  
Alexander McC. Peters  
Chief Deputy Attorney General