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' REPLY IN SUPPORT OF THEIR 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; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES,

Defendant-Intervenors.

In their Response, Defendant-Intervenors mischaracterize Plaintiffs' Motion for Leave to File a Third Amended Complaint ("Motion"), ECF No. 120, and otherwise fail to show any prejudice or other reason the Motion should not be granted.[1]

First, Defendant-Intervenors incorrectly assert Plaintiffs seek to "expand the scope of their claims" to cover elections other than the 2020 General Election. *See* Legislative Defendants' Response in Opposition to Plaintiffs' Motion for Leave to File a Third Amended Complaint ("Response"), ECF No. 128 at 4. Plaintiffs are not. Instead, Plaintiffs seek only to clarify what was already apparent elsewhere in the operative Complaint: that Plaintiffs' claims, including Counts V through VIII, apply to all

[1] For the purposes of this Reply, Plaintiffs adopt and incorporate by reference the terms defined in the Motion, ECF No. 120.

elections that will take place during the current pandemic. *See* Motion, ECF No. 120 at ¶ 15(e).

This is not the dramatic "transform[ation]" that Defendant-Intervenors describe, Response, ECF No. 128 at 1, 3, 19, 21, and is therefore not prejudicial as they contend. In fact, the Second Amended Complaint already requests relief for all elections administered during the pandemic, *see, e.g.*, ECF No. 30 at p. 79 ¶¶ (h), (i), (j), (k), and Counts I through IV, and IX assert violations beyond the 2020 General Election. *See e.g., id.* at ¶¶ 115 (Count I), 123 (Count II), 129 (Count III), 141-143 (Count IV), 183-84 (Count IX). As the relief sought for Counts V through VIII of the operative Complaint is in no way limited to the 2020 General Election, *see id.* at 79, ¶ (f), the proposed amendments seek only to clarify in the enumerated claims that Counts V through VIII apply to all elections during the pandemic. Defendant-Intervenors were on notice that Plaintiffs' claims were intended to apply to elections administered during the pandemic, and cannot claim prejudice now that Plaintiffs seek

to clarify this in four paragraphs by seeking leave to amend as justice requires.[2]

Second, Defendant-Intervenors' assertions that Plaintiffs' claims would be "speculative and unripe" if applied to future elections, Response, ECF No. 128 at 14, are illogical given the current trajectory of the pandemic and misconstrue what constitutes a futile claim for the purposes of denying a motion to amend. The proposed amendments at issue relate to Counts V through VIII, alleging violations of the Americans with Disabilities Act and Section 504 of the

[2] All three cases on which Defendant-Intervenors rely to assert prejudice are easily distinguished. In *Deasy v. Hill*, the plaintiff sought to amend the complaint "just before trial" to allege a failure to meet applicable standard of care in administering a test where previously only negligence in failure to inform of test results was alleged. *See* 833 F.2d 38, 40-42 (4th Cir. 1987). Similarly, the plaintiff in and *Isaac v. Harvard University* sought to add new claims for fraud, breach of contract, and state constitutional violations four years into the litigation after a pretrial conference had been scheduled. *See* 769 F.2d 817, 828 (1st Cir. 1985). And the Fourth Circuit noted that the plaintiffs in *Abdul-Mumit v. Alexandria Hyundai, LLC* had failed to previously amend their complaint despite explicit invitations to do so by the lower court, and only sought leave to amend after dismissal. 896 F.3d 278, 293-94 (4th Cir. 2018). In contrast, Plaintiffs here have sought leave to amend early in the case (before discovery for trial has begun), and seek leave to clarify certain allegations (without asserting new claims) and provide new facts that were not available at the time of filing the Second Amended Complaint.

Rehabilitation Act arising out of North Carolina's failure to accept Federal Write-In Absentee Ballots ("FWABs") and failure to allow nursing home staff to assist residents in filling out absentee ballots. *See* ECF No. 120 at ¶ 15(e)(ii); ECF No. 120-2 at ¶¶ 155, 165, 173, 181. There is no indication that these provisions of law will be altered, and there is no current indication that pandemic conditions will suddenly disappear after the 2020 General Election. Given the current widespread transmission of Covid-19, it would be speculative to assume otherwise at this point. *See, e.g.*, COVID-19 North Carolina Dashboard, N.C. Dep't of Health and Human Services, *https://covid19.ncdhhs.gov/dashboard* (last updated September 3, 2020) (stating 1,656 new lab-confirmed cases of Covid-19 in North Carolina on September 3, 2020).

In comparable circumstances, courts have recognized that "[t]o ask the court to stay its hand because [the legislature] hypothetically may amend the statutory framework" is tantamount to "asking the court to stay its hand based upon nothing more than mere speculation -- the kind of speculation typically offered by a plaintiff." *United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d 76, 92 (D.D.C. 1998). This same reasoning applies

here. Furthermore, if the Court accepted Defendant-Intervenors' argument and found these claims speculative or unripe merely because the legislature *could* act or the pandemic *could* be over at some point, it is unclear when, if ever, Plaintiffs would be permitted to bring such claims. And given the time from filing to trial, it is doubtful that such claims would ever reach a trial on the merits at all. In other words, Defendant-Intervenors' argument would lead to the absurd proposition that claims concerning the Covid-19 pandemic are always either unripe or moot.

The Court's finding as to ripeness in its August 4, 2020 Memorandum Opinion and Order granting in part and denying in part Plaintiffs' Amended Motion for a Preliminary Injunction ("PI Order"), ECF No. 124, also does not merit denying the motion to amend here as Defendant-Intervenors contend. In the PI Order, the Court was not tasked with assessing whether the allegations would withstand a motion to dismiss. Rather, the Court evaluated the *evidence* available to determine whether issuing a preliminary injunction order was proper. *See* PI Order at 59 (referencing "evidence" available as to FWAB claims). Here, in contrast, the Court must accept the

allegations in the complaint as true and determine only whether the claim is plausible on its face.

The allegations in the proposed Third Amended Complaint plausibly allege ADA and Rehabilitation Act violations arising out of a failure to provide FWABs for elections held during the pandemic because of the risk that absentee ballots will not be timely delivered. *See, e.g.*, ECF No. 120-2 at ¶¶ 5 (alleging the pandemic conditions will "overwhelm[] both county election administration systems and the local U.S. Postal Service infrastructure"); 75 (citing reports that the U.S. Postal Service has failed to deliver "thousands of absentee ballots to voters in the mail" in other states); 152 (alleging election officials and the U.S. Postal Service are not expected to "keep pace with the unprecedented rise in absentee ballot requests"). Accordingly, the proposed amendments are not futile as Defendant-Intervenors contend.

Defendant-Intervenors also contend that the proposed amendments regarding harm to Organizational Plaintiffs are futile because Defendants have not contested Organizational Plaintiffs' Article III standing or are irrelevant in light of the Court's standing determinations in the PI Order. Response, ECF No. 128 at 11-14. None of these purported

arguments for denying the motion to amend dispute that the proposed amendments would conform the complaint to the evidence on the record, further the disposition of Plaintiff's claims on the merits, and refine the discovery process. While Plaintiffs agree with Defendant-Intervenors that Plaintiffs have already adequately pled standing for the Registration Deadline and Failure to Cure claims, *see id.* at 15, the interests of justice would require permitting these and other amendments were the Court to disagree.

Finally, Defendant-Intervenors fail to identify any prejudice from the remaining proposed amendments, including withdrawal of Plaintiff Hutchins' claims relating to the request for an absentee ballot and amendments regarding Defendant Bell's July 17 Emergency Order. As to the latter proposed amendments, Defendant-Intervenors misconstrue the meaning of futility. Amendments are futile when they would, if permitted, only "delay[] the inevitable" dismissal of the claim or complaint. *HealthSouth Rehab. Hosp. v. Am. Nat'l Red Cross*, 101 F.3d 1005, 1011-12 (4th Cir. 1996). As stated in Plaintiffs' Motion, the amendments relating to Defendant Bell's July 17 Emergency Order are sought to "further the disposition of this matter on the merits by refining the scope

of the claims to the current status of North Carolina's election administration, guiding a more precise discovery process," and not to avoid any grounds of a pending motion to dismiss. Motion, ECF No. 120 at ¶ 18(b). Arguments as to futility simply do not apply. Further, the amendments state plausible claims to relief, such that dismissal is not "inevitable."

Defendant-Intervenors have failed to show any prejudice or other reason for denying Plaintiffs' Motion for Leave to File a Third Amended Complaint. Accordingly, and for the reasons stated in Plaintiffs' Motion, leave should be granted.

Dated: September 3, 2020.

Respectfully submitted,

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WORD CERTIFICATION

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that the word count for PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT is 1,461 words. The word count excludes the case caption, signature lines, cover page, and required certificates of counsel. In making this certification, the undersigned has relied upon the word count of Microsoft Word, which was used to prepare the brief.

/s/ Hilary Harris Klein
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