UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRACY NORTH CAROLINA, *et al.*, *Plaintiffs*, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*, *Defendants*, and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, *et al.*, *Defendant-Intervenors.*	Civil Action No. 20-cv-00457 **REPLY IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR RECONSIDERATION**

Legislative Defendants respectfully request that the Court reconsider its preliminary injunction ruling to find that Organizational Plaintiffs lack prudential standing to assert Plaintiffs' procedural due process claims. Plaintiffs' arguments to the contrary are without merit because: (1) Legislative Defendants' motion is proper under Rule 54(b); (2) as the Court recognized in ruling on Plaintiffs' right-to-vote claim, Organizational Plaintiffs must satisfy *both* organizational and prudential standing requirements to assert Plaintiffs' procedural due process claims; and (3) Individual Plaintiffs do not have standing to assert these claims because their purported injury is highly speculative, especially in light of the State Board of

Elections' recently adopted procedures for curing absentee ballot deficiencies.

ARGUMENT

I. Legislative Defendants' Motion Is Proper Under Rule 54(b).

"[A] district court retains the power to reconsider and modify its interlocutory judgments . . . at any time prior to final judgment when such is warranted." *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514–15 (4th Cir. 2003). Moreover, "[m]otions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment." *Id.* at 514; *see also United States v. Duke Energy Corp.*, 2014 WL 4659479, at *3 n.4 (M.D.N.C. Sept. 17, 2014) (Osteen, J.) (explaining that a motion for reconsideration of an interlocutory order is subject to Rule 54(b) rather than "the heightened standards of Rule 59(e) or 60(b)" and that courts will only look to Rule 59(e) cases for guidance on applying the exceptions to the law of the case doctrine). And while courts have used the law of the case doctrine to help guide their discretion to reconsider orders, "law of the case . . . does not and cannot limit the power of a court to reconsider an earlier ruling," as it is "[t]he ultimate responsibility of the federal courts . . . to reach the correct judgment under the law." *Am. Canoe Ass'n*, 326 F.3d at 515; *see also Duke Energy Corp.*, 2014 WL 4659479, at *3 (The law of the case doctrine "is designed to serve the goals of

finality and predictability in the trial court[,] . . . [but] is neither absolute nor inflexible; it is a rule of discretion rather than a jurisdictional requirement." (quoting *Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801, 807–808 (E.D. Va. 2007)).

In any event, Legislative Defendants have demonstrated that they satisfy the exception to the law of the case doctrine for correcting prior judgments that are "clearly erroneous and would work manifest injustice." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (quotation omitted). Plaintiffs themselves acknowledge, *see* Pls.' Resp. in Opp'n to Def-Intervenors' Mot. to Recons. at 4–5, Doc. 132 (Aug. 26, 2020) ("Pls.' Resp."), that "[a] motion to reconsider is appropriate when the court has obviously misapprehended a party's position or the facts or applicable law," *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 402 F. Supp. 2d 617, 619 (M.D.N.C. 2005) (quotation omitted).

As Legislative Defendants explained in their reconsideration motion, the Court misapprehended either Legislative Defendants' position——that Organizational Plaintiffs must satisfy organizational *and* prudential standing requirements for both the right-to-vote and procedural due process claims——or the applicable law. *See* Defendant-Intervenors' Mot. for Recons. & Mem. in Supp. at ¶¶ 6–10, Doc. 125 (Aug. 5, 2020). This is because the Court did not apply the standing requirements uniformly to both claims

despite noting that it would "consider the standing for both" "together." *See id.* The Court gave no explanation for doing so, as it did not evaluate prudential standing in its analysis of Plaintiffs' procedural due process claim. *See* Mem. Op. & Order at 45–48, Doc. 124 (Aug. 5, 2020) ("Op. & Order"). This error is "direct, obvious, and observable," *Duke Energy Corp.*, 2014 WL 4659479, at *5 (quotation omitted), and works manifest injustice by placing an unwarranted injunction on the State. Legislative Defendants do not ask for a second bite at the apple, but rather seek to bring to the Court's attention a crucial portion of the standing analysis that it overlooked in finding that Organizational Plaintiffs have standing to assert Plaintiffs' procedural due process claim.

II. Organizational Plaintiffs Must Satisfy Both Organizational and Prudential Standing Requirements to Assert Plaintiffs' Procedural Due Process Claim.

Plaintiffs contend that because Organizational Plaintiffs need only satisfy organizational standing requirements to assert Plaintiffs' procedural due process claims, the Court need not address prudential standing. *See* Pls.' Resp. at 6–8. This is wrong. As Legislative Defendants have shown——and the Court recognized in its ruling on Plaintiffs' right-to-vote claim——Organizational Plaintiffs must meet *both* requirements because they seek to assert the rights of third parties in pursuing the procedural due process claim. For purposes of this motion, Legislative Defendants do not

dispute that Organizational Plaintiffs have satisfied the first part of the equation (organizational standing); only that they must meet the second (prudential standing).

Organizational Plaintiffs seek to vindicate the rights of third parties in bringing the claim that absentee ballot curing processes violate procedural due process. Indeed, "the injuries upon which [they] base[] [their] organizational standing—frustration of mission and diversion of resources—arise not from [lack of procedural due process for] itself, but from alleged [lack of procedural due process for] third parties." *Equal Rights Ctr. v. Abercrombie & Fitch Co.*, 767 F. Supp. 2d 510, 520 (D. Md. 2010), *on reconsideration in part* (Jan. 31, 2011) (substituting "discrimination against" with "lack of procedural due process for"); *see also Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, __ F. Supp. 3d __, 2020 WL 5232076, at *20 (D.D.C. Sept. 2, 2020) (finding that organizational plaintiffs must satisfy organizational and prudential requirements for several constitutional claims, including equal-protection, substantive due process, and free speech, because such claims "do not invoke organizational injuries, but rather are clearly premised on the rights of individuals"); *Priorities USA v. Nessel*, __ F. Supp. 3d __, 2020 WL 2615766, at *8 (organizational plaintiffs' right-to-vote claims subject to prudential standing analysis

"because plaintiffs assert the legal rights of third-parties—voters themselves").

Thus, Organizational Plaintiffs must demonstrate organizational standing as required by Article III *and* prudential standing to assert the rights of third parties. *Cf. Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[E]ven when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."); *Hispanic Nat'l Law Enf't Ass'n NCR v. Prince George's Cty.*, 2019 WL 2929025, at *4 (D. Md. July 8, 2019) (explaining that if the organizational plaintiffs can demonstrate associational, as opposed to organizational, standing "they do not need [to] satisfy the third-party standing exception to the prudential rule against asserting the rights of others").[1]

The Court's analysis with regards to these standards started on the right foot. The Court explained that "[b]ecause the same conduct underlies both the right-to-vote claim and the procedural due process claim, [it] consider[ed] the standing for these claims

[1] *Kennedy v. Allera*, 612 F.3d 261 (4th Cir. 2010) is inapposite, as the court noted that it would not address standing when the plaintiff had not established a plausible claim. *See id.* at 270. Further, the court did not consider the issue here: whether a plaintiff with organizational standing can assert the rights of a third party without satisfying prudential standing requirements.

together." Op. & Order at 44. It then determined that Organizational Plaintiffs had organizational standing for *both* the right-to-vote and procedural due process claims. *Id.* at 48. But the Court then only analyzed prudential standing for the right-to-vote claim. *Id.* at 53–56. The Court's determination that Organizational Plaintiffs——despite having organizational standing——may not assert third-party standing for the right-to-vote claim, demonstrates that the Court agrees with Legislative Defendants that *both* requirements must be satisfied. But the Court gave no explanation as to why it treated the two claims differently at the second step of the inquiry, even after finding that the underlying conduct animating both claims was the same. Indeed, Organizational Plaintiffs seek to assert the rights of voters in *both* claims. Thus, Legislative Defendants respectfully ask the Court to reconsider its preliminary injunction ruling to find that Organizational Defendants also lack prudential standing to assert Plaintiffs' procedural due process claims.

III. Individual Plaintiffs Do Not Have Standing for the Procedural Due Process Claim.

Plaintiffs contend that if this Court determines that Organizational Plaintiffs do not have standing, Individual Plaintiffs can bring the procedural due process claim. But Plaintiffs have failed to cite any controlling precedent to support the conclusion that Individual Plaintiffs can demonstrate injury-

in-fact for standing purposes. *See* Pls.' Resp. at 9–11. Plaintiffs merely assert that Individual Plaintiffs have "demonstrated a risk of deprivation of [the statutory right to cast a mail-in ballot] arising from the lack of a uniform cure procedure, thereby denying them notice and an opportunity to be heard before their mail-in ballots may be rejected." *Id.* at 11. But their alleged risk is purely speculative and does not meet the requirements of Article III standing, as the Supreme Court has reiterated the " 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

What is more, Individual Plaintiffs' speculative risk has become a nullity, as the State Board of Elections has issued uniform, statewide absentee ballot cure procedures, thereby mooting any claim they seek to assert. *See* Letter from Karen Brinson, Executive Director of the North Carolina State Board of Elections to County Boards of Election (Aug. 21, 2020), https://bit.ly/35d7wkh. The procedures not only prohibit signature matching for absentee ballots, but also provide cure procedures for any deficiencies discovered after ballot intake. *See id.* at 1–6. A County board must contact a voter in writing within one business day if it receives a deficient ballot, and, depending on

the type of deficiency, provide the voter with a cure affidavit or new ballot to fix the issue. *See id.* at 3. The notice must also include information about voting in-person and "state that, if the voter prefers, they may appear at the county canvass to contest the status of their absentee ballot." *Id.* And if there is not enough time to reissue a ballot, the county board must notify the voter by phone or email about these options. *See id.* Thus, these cure procedures provide every opportunity for voters to cast a ballot in the event a county board finds a deficiency with a timely-received absentee ballot. *See id.* at 4 (noting the deadlines for absentee ballots). These procedures also fulfill the Court's injunction, which "remain[ed] in force until such time as Defendants implement a law or rule which provides a voter with notice and opportunity to be heard before an absentee ballot with a material error subject to remediation is disallowed or rejected." Op. & Order at 187.

CONCLUSION

For the foregoing reasons, Legislative Defendants' motion for reconsideration should be granted.

Dated: September 9, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Reply in Support of Defendant-Intervenors' Motion for Reconsideration, including body, headings, and footnotes, contains 1,872 words as measured by Microsoft Word.

/s/ Nicole J. Moss
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 9th day of September, 2020, she electronically filed the foregoing Reply in Support of Defendant-Intervenors' Motion for Reconsideration 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
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