IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE and ACTION NC, *Plaintiffs*, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., *Defendants*.	Civil Action No. 1:20-cv-00876 **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM OPINION AND RECOMMENDATION

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Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, Plaintiffs North Carolina A. Philip Randolph Institute and Action NC respectfully object to Magistrate Judge Webster's Memorandum Opinion and Recommendation ("R&R") issued on January 2, 2024 (ECF 107) and request that the District Court grant their motion for summary judgment on both counts in the Amended Complaint (ECF 85-86).

INTRODUCTION

Plaintiffs commenced this action in September 2020 to challenge a state election law, N.C.G.S. § 163-275(5) (the "Strict Liability Voting Law" or the "Law") as unconstitutional under the Equal Protection and Due Process clauses of the Fourteenth Amendment. As enacted, the Law criminalized voting on a strict liability basis by voters who had been convicted of a felony and had not been restored to the "right of citizenship" at the time they voted. In response to Plaintiffs' motion for summary judgment, Defendants conceded that the Law was originally enacted in 1877 with discriminatory intent and that it continues to have a disproportionate impact on Black voters.

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After briefing on Plaintiffs' summary judgment motion had been completed, the North Carolina legislature adopted a statutory amendment ("SB 747") that added a scienter requirement to the Law and became effective on January 1, 2024. The amendment is not retroactive, and Defendants can still enforce the old version of the Law against voters who voted in any election prior to that date without any applicable statute of limitations or other constraint. Nonetheless, Defendants suggested that the case had

become moot once SB 747 was enacted.

In the January 2, 2024 R&R, Magistrate Judge Webster recommended that Plaintiffs' motion for summary judgment should be denied and the case should be dismissed because Plaintiffs could not demonstrate they had standing after SB 747 became effective. The Magistrate Judge declined to evaluate Plaintiffs' substantive arguments and undisputed evidence why the Law violates the Constitution. The Magistrate Judge erred, and the R&R should be rejected, for the following reasons:

First, the Magistrate Judge applied the wrong legal standard and wrong burden of proof in analyzing the impact of SB 747 on this case. Contrary to Supreme Court and Fourth Circuit precedent, the Magistrate Judge incorrectly analyzed whether Plaintiffs had offered sufficient evidence to defeat a summary judgment motion and prove that they had standing to pursue their claims after SB 747 became effective. But the Defendants had not moved for summary judgment on standing grounds and did not mention standing in their supplemental brief concerning the impact of SB 747 on Plaintiffs' claims. The Magistrate Judge improperly conflated the doctrines of mootness and standing and overlooked Supreme Court and Fourth Circuit precedent holding that an intervening development after litigation has been filed—like SB 747—is examined under the doctrine of mootness. This distinction matters because the mootness doctrine requires *Defendants* to demonstrate that the case is moot. Defendants must show that the Court cannot grant "any effectual relief whatever to the prevailing party" and that Plaintiffs have no "concrete interest, however small, in the outcome of the litigation." *Knox v. Serv. Emps.*

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Int'l Union, Loc. 1000, 567 U.S. 298, 307-08 (2012); *United States v. Springer*, 715 F.3d 535, 540 (4th Cir. 2013). The Magistrate Judge did not hold Defendants to this well-established standard or find that they had satisfied it.

Second, analyzed under the proper standard, Plaintiffs continue to have a concrete interest in this litigation and Defendants have not established that the case is moot. Continued public prosecutions under the old Law—on a strict liability basis where harsh penalties can be doled out for voting if mistaken or misinformed about the status of a prior felony conviction—will cause confusion among prospective voters about the current state of the law and will have a chilling effect leading some to avoid voting altogether out of a fear of prosecution. If the old Law can still be enforced, Plaintiffs will need to continue diverting resources from their voting organization efforts to educate voters about the current state of the Law and their eligibility to vote and to educate their own volunteers on the potential risks of voting after a felony conviction so those volunteers can more effectively persuade eligible voters to participate in the democratic process. The amendment of the Law on a prospective basis has therefore not fully resolved Plaintiffs' claims and Plaintiffs continue to have a sufficiently concrete interest in the outcome of this case.

The Magistrate Judge found that the potential harm to Plaintiffs from continued voter confusion is "speculative" based on the assumption that Defendants will not continue to enforce the old Law. But there is no basis in the record for that assumption. Indeed, Defendants have never suggested, let alone agreed, that they would not enforce

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the old Law for past violations. To the contrary, the undisputed record shows that there have been many prosecutions under the old Law, more than 200 cases of alleged violations remain under review by Defendants for potential prosecution, and the State Board is continuing to investigate past violations under the old Law. Enjoining enforcement of the Law would therefore result in a benefit to Plaintiffs, relieving them of the burden to educate voters on the current state of the Law and the recent changes to the Law and to persuade voters who are hesitant to cast their vote even if they face no realistic threat of prosecution. This interest is sufficiently concrete and easily satisfies the permissive standard for finding that the case has not become moot.

Third, because the Magistrate Judge denied summary judgment on standing grounds, he did not reach the underlying merits of Plaintiffs' motion for summary judgment. This Court should reject the Magistrate Judge's recommendation and grant Plaintiffs' motion for summary judgment for the reasons set forth in Plaintiffs' prior briefing and summarized below. To avoid further uncertainty for North Carolina voters about the state of the Law in the upcoming presidential primaries and general election, Plaintiffs respectfully request that the Court rule on this Objection and Plaintiffs' motion for summary judgment as expeditiously as practicable.

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PROCEDURAL BACKGROUND

Plaintiffs moved for summary judgment on June 15, 2023. The factual background of this action and the basis for summary judgment is set forth in detail in the Memorandum of Law in support of Plaintiffs' Motion. *See* ECF 86 at 3-15. Plaintiffs'

motion was fully briefed as of August 14, 2023. After briefing was complete, the North Carolina General Assembly passed SB 747, which, among other things, amended the Law to add a scienter requirement. *See* Session Law 2023-140, SB 747 § 38. The Law became effective on January 1, 2024 and only applies prospectively. *See id.* § 50. Nothing prohibits prosecutions under the old version of the Law for alleged violations that occurred before January 1, 2024.

On October 27, 2023, Magistrate Judge Webster ordered that the parties submit supplemental briefing to address the potential impact of SB 747 on Plaintiffs' claims. (10/27/23 Text Order). In response to that order, the Defendants argued that the case was moot and did not suggest that the Plaintiffs lacked standing. Indeed, their brief did not mention standing at all. *See* ECF 106. On November 14, 2023, Judge Webster heard oral argument. On January 2, 2024, the Magistrate Judge issued the R&R recommending that Plaintiffs' motion be denied as moot and the action be dismissed "for lack of subject matter jurisdiction because Plaintiffs lack standing to pursue their claims." ECF 107 at 2.

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STANDARD OF REVIEW

When a Magistrate Judge issues a report and recommendation, "[a] [J]udge of the [C]ourt shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). The Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the [M]agistrate [J]udge." *Id.*; *see also, e.g.*, *Smith v.*

Sanford City Police Dep't, 2009 U.S. Dist. LEXIS 13888, at *1 (M.D.N.C. Feb. 23, 2009) (rejecting report and recommendation on motion for summary judgment).

ARGUMENT

I. THE MAGISTRATE JUDGE INCORRECTLY DENIED PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. The Magistrate Judge Applied the Wrong Legal Standard in Analyzing the Impact of SB 747 on Plaintiffs' Claims

Magistrate Judge Webster erred as a matter of law because he improperly "confused mootness with standing." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). The Supreme Court has repeatedly "acknowledged the distinction between mootness and standing." *Id.* at 191 (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 109 (1998)). "It is the doctrine of *mootness*, not standing, that addresses whether 'an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) (quoting *Genesis HealthCare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013)). Recognizing this distinction, the Fourth Circuit has held that the impact of an interim legislative amendment on a court's jurisdiction is analyzed under the doctrine of mootness. *See, e.g.*, *Brusznicki v. Prince George's Cnty.*, 42 F.4th 413, 419 (4th Cir. 2022) (holding that legislative amendment did not moot claims asserted in litigation); *see also, e.g.*, *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1268 n.6 (N.D. Ga. 2019) (declining to analyze the impact of legislative change to voting law on plaintiffs' standing since "the passage of the bill after the initiation of litigation does not

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impact Plaintiffs' standing to bring this case at the time of filing" and instead analyzing impact of legislation under mootness).[1]

As the Supreme Court recently held in *West Virginia v. EPA*, the distinction between mootness and standing "matters because [defendant], not [plaintiff], bears the burden to establish that a once-live case has become moot." 142 S. Ct. at 2607 (citing *Friends of the Earth*, 528 U.S. at 189, and *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (*per curiam*)). In addition, the Supreme Court has emphasized that a defendant's burden to establish that a live case has become moot is "demanding." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019); *see also Springer*, 715 F.3d at 540 ("The mootness doctrine, however, constitutes a relatively weak constraint on federal judicial power."). "A case becomes moot *only* when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Id.* (quoting *Knox*, 567 U.S. at 307) (emphasis in *Springer*). As long as the plaintiffs retain a

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[1] By contrast to mootness, standing is determined solely based on "the facts at the time the complaint was filed." *Wild Va. v. Council on Env't Quality*, 56 F.4th 281, 293 (4th Cir. 2022); *see also Friends of the Earth*, 528 U.S. at 180 ("[W]e have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation."); *Republic Bank & Tr. Co. v. Kucan*, 245 F. App'x 308, 315 (4th Cir. 2007) ("[S]tanding is determined by the facts in existence at the time the action is commenced[.]"); *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018) ("Unlike questions of mootness . . . the standing inquiry asks whether a plaintiff had the requisite stake in the outcome of a case 'at the outset of the litigation.'") (citation omitted); *Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003) (same, citing *Friends of the Earth* and decisions of six other circuit courts). Contrary to the Magistrate Judge's statement, these cases show that this point is not "a mischaracterization of the law." R&R at 15 n.7.

"concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, 567 U.S. at 307-08; *see also MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 934 (2023) (same).

The Magistrate Judge conflated mootness with standing, and applied the wrong burden of proof, when he concluded that "[s]ince Plaintiffs have failed to satisfy the three elements to establish standing, the undersigned recommends that their claims be dismissed as moot for lack of subject matter jurisdiction." R&R at 24. The Magistrate Judge should have required Defendants to satisfy their burden of proving this case has become moot under the mootness standards established by the Supreme Court and the Fourth Circuit.

Specifically, the Magistrate Judge revisited his prior decision at the motion to dismiss stage that Plaintiffs had standing to pursue this action in light of SB 747. *See* ECF 60 at 12-18. The Magistrate Judge concluded that Plaintiffs no longer have standing because they had not shown that the future harm from continued prosecutions under the old Law was "certainly impending." R&R at 21 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)). The Magistrate Judge should have analyzed whether *Defendants* had met their burden to demonstrate that it would be "impossible for [the Court] to grant *any* effectual relief whatever" to Plaintiffs. *Springer*, 715 F.3d at 540 (quoting *Knox*, 567 U.S. at 307). Had the Magistrate Judge applied the proper standard, he would have found that Defendants had not, and cannot, meet their burden, and the case has not been mooted by SB 747.

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B. Plaintiffs Continue to Have a Concrete Interest in this Litigation

Plaintiffs have a sufficient interest in this action after SB 747 became effective because the risk of continued prosecutions under the old Law will adversely impact Plaintiffs' voter organization efforts. New prosecutions under the old Law would generate publicity and voter confusion about the state of the Law and could lead prospective voters to second-guess their eligibility and avoid the ballot box altogether so as to not expose themselves to a perceived risk of prosecution. This chilling effect on prospective voters and its harmful effect on Plaintiffs' work is well-supported by the record. *See, e.g.*, ECF 89-20 at ¶ 10 (declaration of Executive Director, North Carolina A. Philip Randolph Institute stating that "[r]ecent prosecutions under [the Law] have really frightened people who might otherwise have been willing to register to vote and cast a ballot").

Continued prosecutions under the old Law would further this harm to Plaintiffs. If voters are prosecuted under the old Law in the lead-up to the presidential elections this year, those prosecutions—like past prosecutions under the old Law—are likely to receive widespread media attention. *See, e.g.*, ECF 89-13 (*New York Times* article reporting on prosecutions under the Law). As a result of such publicity, especially around voters who made honest mistakes and were still prosecuted, more voters are likely to avoid voting altogether, either because they mistakenly believe they can be prosecuted under the old Law for doing so or because they are uncertain whether they violated the old Law in the past and would like to avoid scrutiny by appearing on the voter rolls for future elections.

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Plaintiffs and other voter organizations in North Carolina have faced—and will continue to face—similar barriers to increasing voter participation if the old Law can still be enforced. *See, e.g.*, ECF 89-22 at ¶ 10 (Statement by Director, Down Home North Carolina, that "individuals who have completed all aspects of their sentences" and therefore face no risk of prosecution under the Law have nonetheless "expressed fear that participating in the political process may result in prosecution"). These damaging effects will have the greatest impact in low-income and minority communities that are already disproportionately impacted by the Law. *See id.* at ¶ 11 ("[T]hose whom we work hardest to empower have refrained from voting, and will continue to refrain from voting, in North Carolina elections because of the prosecutions under [the Law].").

The Magistrate Judge incorrectly dismissed this risk of voter confusion and its impact on Plaintiffs as too "speculative" to demonstrate a continuing interest in the litigation under the standing test applied in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). R&R at 20-21. But *Clapper* did not address the impact of an intervening legislative amendment, which under Supreme Court precedent is analyzed under the doctrine of mootness, not standing. *See West Virginia v. EPA*, 142 S. Ct. at 2607. And, unlike in *Clapper*, where the defendant affirmatively moved for summary judgment on standing grounds, Defendants did not argue that SB 747 deprives Plaintiffs of standing. Indeed, Defendants did not cite *Clapper* or invoke its standing test in any of their submissions, and instead argued only that SB 747 moots Plaintiffs' claims. *See* ECF 106. The Supreme Court further found in *Clapper* that the plaintiffs' theory of standing rested

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on a "speculative chain of possibilities" about how the government might choose to invoke a surveillance law that, among other things, required independent court approval of government requests to obtain communications from foreign parties. 568 U.S. at 410-11. Here, no such speculation is necessary in order to find a risk of continued enforcement of the Law, which Defendants have enforced on numerous occasions over several years and which they remain free to enforce without any independent oversight.

The R&R further misunderstands the impact of SB 747 on Plaintiffs' interests. The Magistrate Judge cited *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000), in which the Tenth Circuit found a constitutional challenge to a statute was mooted by a statutory amendment. In that case, however, the plaintiff did not identify any harm to its activities from continued prosecutions under the pre-amendment version of the law, and the Tenth Circuit therefore declined to find that "collateral consequences in a separate lawsuit . . . fall within any exception to the mootness doctrine." *Id.* at 1184 (citation omitted). Here, Plaintiffs have not argued that the harm from continued prosecutions is limited to collateral consequences for voters who may face prosecution under the old Law. Rather, the chilling effect caused by the risk of such prosecutions has a direct impact on Plaintiffs' voter organization efforts and ability to fulfill their objectives in engaging additional voters in the democratic process.

Contrary to the Magistrate Judge's suggestion (R&R at 20-21), Plaintiffs' get-out-the-vote activities and educational efforts are not dependent on affirmative outreach by

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potential voters seeking "clarification" about the state of the Law. These organizations conduct affirmative outreach efforts, and it is through that outreach that Plaintiffs have been forced to dispel misconceptions about the threat of prosecution under the Law. *See* ECF 89-20 at ¶¶ 6-7, 10-11; 89-21 at ¶¶ 4-5, 9-10; 89-22 at ¶¶ 4, 7-11. That work will continue to divert from Plaintiffs' voter organization efforts if the old Law can be enforced. SB 747 does not provide a complete solution to that chilling effect when the risk of prosecution under the old Law persists, and this case is therefore unlike *Citizens for Responsible Government*. *Accord Rembert v. Sheahan*, 62 F.3d 937, 941 (7th Cir. 1995) ("[W]hen an intervening amendment provides no assurance that the complained-of conduct will cease, the case is not moot.").

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In concluding that Plaintiffs lacked a sufficient interest in the case, the Magistrate Judge also assumed that Defendants will voluntarily refrain from future prosecutions under the old version of the Law. The Magistrate Judge noted that "[g]iven the scarcity of prior prosecutions . . . the legislature's acknowledgment that the law should be amended moving forward, and because of the discriminatory intent of the original law, which is conceded by the State . . . the undersigned can think of no reason for any future prosecutions under the old law to take place." R&R at 20 n.10; *id.* at 22 ("It is also somewhat speculative that Defendants will choose to prosecute anyone under the old, challenged statute."). There is no basis in the record for that assumption. And, in any event, a party's "voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged

conduct as soon as the case is dismissed." *Knox*, 567 U.S. at 307. To obtain dismissal based on voluntary cessation, a defendant must "bear[] the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190; *see also, e.g.*, *West Virginia v. EPA*, 142 S.Ct. at 2607 (holding "[w]e do not dismiss a case as moot" where defendant "nowhere suggest[ed] that if this litigation is resolved in its favor it will not" continue the challenged conduct, and had instead "vigorously defend[ed] the legality of such an approach").

Defendants have not met the formidable burden of demonstrating mootness based on voluntary cessation. Defendants have never suggested—let alone formally stipulated—that they will cease enforcing the old version of the Law. Nor have they disputed that the Law can be enforced in its prior form going forward since SB 747 is not retroactive and there is no statute of limitations for felonies under North Carolina law. *See, e.g.*, *State v. Taylor*, 713 S.E.2d 82, 90 (N.C. Ct. App. 2011). Indeed, the Magistrate Judge noted that "Defendants do not argue that it would be impossible for someone to be prosecuted under the old law." R&R at 20 n.10.

The Magistrate Judge's assumption that future prosecutions under the old Law would not occur is also contrary to the undisputed record. The R&R asserts that "neither party notes any prosecutions since 2016" and that "Plaintiffs contend that only two district attorneys pursued any type of prosecution." R&R at 20 n.10. This conclusion is refuted by the undisputed evidence that several indictments have been issued since 2016

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by multiple district attorneys. The record shows 32 indictments, 28 convictions, and 5 deferred prosecution agreements resulting from investigations in 16 different counties in 2017 and 2018. *See* ECF 97-1. In addition, it is undisputed that more than 200 cases are currently subject to DA review and may result in future prosecutions under the old Law. *See id.* Moreover, the NCSBE's general counsel testified the State Board was committed to referring all violations of the Law for potential prosecution. *See* ECF 89-5 at 81:21-82:13 (noting that the NCSBE follows "a mandatory requirement to refer any case of a violation of election laws under the jurisdiction of the State Board").[2]

Contrary to the R&R's suggestion, Plaintiffs are not required to demonstrate that granting summary judgment in their favor would "eradicate all confusion regarding the current state of the law." R&R at 23. Rather, *Defendants* must show that the Court cannot grant any effectual relief at all. And here, the Court can provide a concrete benefit to Plaintiffs by reducing the risk of voter confusion around the current state of the law and, in turn reducing the drain on Plaintiffs' resources from educating prospective voters. The Magistrate Judge's conclusion that declaring the Law unconstitutional would not "tangibly benefit" Plaintiffs (R&R at 23) is based on an incorrect standard and contrary to

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[2] Judge Webster noted that he "can think of no reason for any future prosecutions under the old law to take place," and "[i]f such should occur, it should only be pursued after careful discernment, in good faith, and with a public explanation as to why prosecution is being pursued." R&R at 20 n.10. While Plaintiffs agree that there are no justifiable reasons for continuing to prosecute voters under an undisputedly racist law, the R&R's proposed requirements for future prosecutions under the old Law do not provide adequate safeguards and the potential for such prosecutions should instead be permanently foreclosed through an injunction issued by this Court.

the record. A decision by this Court enjoining Defendants from continuing to enforce the old Law would remove the risk of future strict liability prosecutions under the Law and the related publicity, thereby alleviating Plaintiffs of the burden to educate voters about the current state of the Law and persuade voters who currently are reluctant to participate in elections out of a fear of prosecution under the Law. "However small" the benefit to Plaintiffs may be from such a decision, resolving the case in Plaintiffs' favor "is not simply a matter of academic debate," and that is "enough to save this case from mootness." *Chafin v. Chafin*, 568 U.S. 165, 176 (2013); *see also Knox*, 567 U.S. at 307-08.

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II. THE COURT SHOULD GRANT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Because the Magistrate Judge found that Plaintiffs lack standing, he did not address Plaintiffs' substantive arguments why the Law should be struck down as unconstitutional. For the reasons set forth in Plaintiffs' opening brief (ECF 86) and reply brief (ECF 96) in support of their summary judgment motion, which are incorporated by reference, this Court should declare the Law unconstitutional and enjoin Defendants from enforcing the Law.

1. The Law Violates the Equal Protection Clause

Defendants concede that the Law was enacted in 1877 and reenacted in 1899 with discriminatory intent. ECF 94 at 2-3. Defendants also concede that the Law continues to have a disproportionate effect on Black voters in North Carolina. *Id.* at 8. Defendants have therefore conceded all elements required to find the Law unconstitutional. *See*

Hunter v. Underwood, 471 U.S. 222, 233 (1985) (a statute violates the Equal Protection Clause if "its original enactment was motivated by a desire to discriminate against [B]lacks on account of race" and it "continues to this day to have that effect").

Defendants' only argument in opposing summary judgment on Plaintiffs' Equal Protection claim is that the Law's racist taint was purged via a constitutional amendment in 1971 that did not change any section or clause in the Law. ECF 94 at 8-13. Instead, Defendants argue that the constitutional amendment indirectly changed the "scope" of the Law, and that such indirect amendments can cleanse a statute's racist history. *Id.* Defendants' position is unsupported and should be rejected. A constitutional amendment that makes no reference to the Law or change a single word of the statute cannot "eliminate the taint from a law that was originally enacted with discriminatory intent." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 n.44 (2020) (merely "recodif[ying]" a racist law without amending the law's key features does not purge its "racist history"); *see also* Pls.' Opening Br. (ECF 86) at 15-20; Pls.' Reply Br. (ECF 96) at 2-6.

2. The Law Violates the Due Process Clause

The Law should also be struck down because it is unconstitutionally vague under the Due Process Clause. The Strict Liability Voting Law criminalizes voting before an individual has "been restored to the right of citizenship" but does not provide any guidance on when or how an individual regains those rights. Instead, the Law only *implicitly* references the Citizenship Restoration Law, which provides that citizenship is

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restored upon an individual's "unconditional discharge"—a term that is not defined anywhere in the North Carolina General Statutes. Because of the vagueness in the Law, well-intended individuals with felony convictions may mistakenly vote before sentence completion, unknowingly risking felony charges under the Strict Liability Voting Law.

Defendants do not dispute that "unconditional discharge," a key term under the Law explaining when the right to vote is restored, is not defined in the General Statutes. Moreover, the NCSBE's general counsel conceded that "people could be confused about" their rights under the statute. See ECF 89-5 at 58:6-9. Defendants' attempt in opposition to craft their own definitions and explain away their own witnesses' testimony cannot make up for this inherent ambiguity in the Law. Thus, because the Law fails to give "fair warning about what is prohibited," it is unconstitutionally vague. *Carolina Youth Action Project v. Wilson*, 60 F.4th 770, 781 (4th Cir. 2023); *see also* Pls.' Opening Br. (ECF 86) at 20-23; Pls.' Reply Br. (ECF 96) at 6-9.

The Law's vagueness is furthermore confirmed by Defendants' inconsistent enforcement. The record on summary judgment established that some DAs have interpreted the Law to include an implicit scienter requirement and have declined to prosecute voters without evidence they acted with fraudulent intent, while others have prosecuted voters whose decision to vote was based on their mistaken belief that they were eligible to vote and without any evidence of intent. *See* ECF 86 at 24. Moreover, in at least two instances, the NCSBE has declined to refer cases for potential prosecution for the express reason that the investigators had not found evidence that the voters acted with

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intent. *See id.* Defendants' attempts to justify this inconsistent enforcement under the banner of "prosecutorial discretion" or isolated occurrences of "mistaken" decisions not to refer voters for prosecution are inapt. Inconsistent interpretations of the Law among the very people tasked with enforcing it confirm the Law's inherent vagueness. *See, e.g.*, *Cunney v. Bd. Of Trs. Of Grand View*, 660 F.3d 612, 622 (2d Cir. 2011) ("Defendants' various interpretations of [ordinance's] requirements serve only to reinforce our view that the ordinance's vagueness authorizes arbitrary enforcement."); *see also* Pls.' Opening Br. (ECF 86) at 23-25; Pls.' Reply Br. (ECF 96) at 9-12.

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CONCLUSION

For the foregoing reasons, this Court should reject the Magistrate Judge's recommendation to deny Plaintiffs' motion for summary judgment as moot and dismiss the action for lack of subject matter jurisdiction. The Court should further grant summary judgment in favor of Plaintiffs on both counts asserted in the Amended Complaint.

Dated: January 16, 2024

By: /s/ *Jeffrey Loperfido*

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rules 7.3(d)(1) and 72.4, the undersigned counsel hereby certifies that the foregoing Objections to the Magistrate Judge's Memorandum Opinion and Recommendation contains 4,882 words (including headings and footnotes) as measured by Microsoft Word.

/s/ *Jeffrey Loperfido*
Jeffrey Loperfido

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CERTIFICATE OF SERVICE

I certify that on the 16th day of January, 2024, the foregoing Objections to the Magistrate Judge's Memorandum Opinion and Recommendation was served through the ECF system to all counsel of record, with consent of all counsel to accept service in this manner.

/s/ *Jeffrey Loperfido*
Jeffrey Loperfido

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