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; 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; JEFF CARMON III, 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; and JOSH STEIN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA,

Defendants.

Civil Action No.
1:20-cv-00876

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiffs the North Carolina A. Philip Randolph Institute and Action NC (together, "Plaintiffs") respectfully file this response in opposition to Defendants' Motion to Dismiss ("Motion") in the above-captioned action. For the reasons set forth below, this Court should deny the Motion as moot in view of Plaintiffs' pending Motion to Amend their Complaint or, alternatively, deny the Motion on the merits in its entirety.

INTRODUCTION

This suit challenges the constitutionality of N.C.G.S. § 163-275(5) (the "Strict Liability Voting Law"), a racially discriminatory relic of the nineteenth century that imposes felony-level criminal penalties on North Carolina residents who vote while they are on parole, probation or post-release supervision for a felony conviction—even if those individuals mistakenly believe they are eligible to vote. As alleged in the Complaint, past prosecutions of individuals who inadvertently violated this law have led to a widespread fear of future enforcement. Many eligible North Carolina voters with criminal convictions are now too scared to vote, for fear of unintentionally violating the Strict Liability Voting Law and facing felony charges. This chilling effect has been particularly pronounced in the State's Black and low-income communities.

Plaintiffs are organizations whose core missions include encouraging broad political participation by members of Black and low-income communities in North Carolina. The chilling effect caused by the Strict Liability Voting Law has injured Plaintiffs by impeding this core mission, and by requiring Plaintiffs to divert resources from their get-out-the-vote and voter registration activities to reassure and educate

eligible voters that they can safely vote without fear of prosecution.

The defendants in this action are the North Carolina State Board of Elections ("NCSBE"), the NCSBE's members, and the NCSBE's Executive Director (collectively, the "NCSBE Defendants"); and the Attorney General (together with the NCSBE Defendants, the "Defendants"). The NCSBE Defendants and the Attorney General have statutory authority to enforce the Strict Liability Voting Law in different respects. The NCSBE Defendants played a significant role in the past prosecutions in Alamance and Hoke Counties. While the Attorney General was not involved in those prosecutions, he has not disclaimed an intent to exercise his authority to enforce the Strict Liability Voting Law in the future.

Contemporaneously with the filing of the complaint, Plaintiffs filed a motion for a preliminary injunction (the "PI Motion") to enjoin Defendants from enforcing the Strict Liability Voting Law in time for eligible voters with criminal convictions to register to vote and vote in the November 3, 2020 General Election. Dkts. 2 &3. On November 4, 2020, Magistrate Judge Webster issued a Memorandum Opinion and Recommendation ("R&R") recommending, *inter alia*, that the Court find that (i) Plaintiffs have been injured by the Strict Liability Voting Law, and (ii) the requirements for Article III standing and the *Ex parte Young* exception are satisfied as to the NCSBE Defendants. *Id.* at 9-12. However, the Magistrate Judge recommended that the Court dismiss Plaintiffs' claims against the Attorney General. *Id.* at 12-14, 20. Defendants did not object to the R&R, and have thus waived any challenge to the Magistrate Judge's recommendations.

Plaintiffs objected to the R&R solely with respect to the Magistrate Judge's recommended dismissal of Plaintiffs' claims against the Attorney General.

Defendants ask this Court to dismiss the Complaint in its entirety on Eleventh Amendment immunity and standing grounds. This effort should be rejected. As demonstrated below, the requirements for the *Ex parte Young* exception to Eleventh Amendment immunity are satisfied as to all Defendants, and Plaintiffs have adequately alleged each of the requirements for Article III standing.

Defendants also move under Rule 12(b)(6) to dismiss Plaintiffs' claim that the Strict Liability Voting Law is void-for-vagueness under the Fourteenth Amendment because it incorporates by reference the unconstitutionally vague and undefined term "unconditional discharge." In support of this aspect of their motion, Defendants argue that the meaning of the term "unconditional discharge" is obvious to a layperson, and cite inapposite case law. Dkt. 19 at 21. These contentions do not meet the high standard for dismissing a civil rights claim under Rule 12(b)(6). Notably, Defendants do not move to dismiss Plaintiffs' claim that the Strict Liability Voting Law violates the Equal Protection Clause, thus implicitly conceding that Plaintiffs have adequately alleged this claim.

This Court should therefore deny Defendants' Motion to Dismiss as moot, without prejudice to refiling, in view of Plaintiffs' pending motion to amend their Complaint. Should this Court decide to reach the merits of Defendants' Motion to Dismiss, this Court should reject that motion for the reasons set forth below.

ARGUMENT

I. The Court Should Deny Defendants' Motion to Dismiss as Moot

In their Motion to Dismiss, Defendants argue that Plaintiffs should have brought suit against the State's district attorneys. *See* Dkt. 19 at 18 ("The only prosecutions under this statute which appear to have occurred, and which Plaintiffs can cite to in their Complaint, were brought by the district attorneys of Alamance and Hoke Counties. And yet, Plaintiffs have named no district attorney in this lawsuit."). Plaintiffs have moved to amend their Complaint to name the district attorneys as additional defendants, and to make certain other minor changes to the Complaint. This Court should therefore deny Defendants' pending Motion to Dismiss as moot without prejudice to Defendants filing a new motion to dismiss addressing the amended complaint. *See, e.g.*, *Fox v. City of Greensboro*, No. 1:10-cv-229, 2011 WL 13239927, at *2 (M.D.N.C. March 31, 2011) ("[F]or the sake of judicial efficiency and to streamline and focus the analysis in this case, the court will grant Plaintiffs' motion to amend and deny Defendants' motions to dismiss as moot and without prejudice to their being refiled as to Plaintiffs' amended complaint."); *see also North Carolina Mut. Life Ins. Co. v. Stamford Brook Capital, LLC*, No. 1:16-cv-1174, 2018 WL 7982867, at *2 (M.D.N.C. Aug. 1, 2018) (granting motion to amend the complaint and "deny[ing] the Motion to Dismiss as moot").

II. Defendants' Motion to Dismiss Under Rules 12(b)(1) and 12(b)(2) for Lack of Subject Matter and Personal Jurisdiction Should Be Denied Because the *Ex Parte Young* Exception to Eleventh Amendment Immunity Applies as to All Defendants

The *Ex parte Young* exception to Eleventh Amendment immunity allows plaintiffs

"to petition a federal court to enjoin State officials in their official capacities from engaging in future conduct that would violate the Constitution." *Antricam v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002).[1] To satisfy the *Ex parte Young* exception, "a defendant must have some connection with the enforcement of the act" in question. *South Carolina Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332 (4th Cir. 2008). However, "the *Ex parte Young* exception does not require a defendant to have the authority to commence civil or criminal proceedings against the parties affected by an unconstitutional act." *ACLU of Missouri Found. v. Lombardi*, 59 F. Supp. 3d 954, 959 (W.D. Mo. 2014); *see also Doe v. DeWine*, 910 F.3d 842, 848 (6th Cir. 2018) (*Ex parte Young* exception applied to claims against the Ohio Attorney General despite his "lack of direct criminal enforcement authority" as to the challenged statute). Because the NCSBE Defendants and the Attorney General have "some connection" with the enforcement of the Strict Liability Voting Law, this Court should deny Defendants' motion to dismiss under Rule 12(b)(1).

A. The NCSBE Defendants Have Clear Statutory Authority in Connection with the Enforcement of the Strict Liability Voting Law.

The NCSBE is statutorily empowered to investigate violations of the Strict Liability Voting Law and refer such cases for prosecution. *See* N.C.G.S. § 163-278 (providing that the NCSBE has a "duty…to investigate any violations" of the criminal statutes governing voting and elections, including the Strict Liability Voting Law); *id.*

[1] Unless otherwise noted, internal citations, alterations and quotations are omitted throughout.

§ 163-22(d) (the NCSBE "shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections"). Following an audit of the 2016 election, the NCSBE actively encouraged prosecutions under the Strict Liability Voting Law, and took steps to ensure that district attorneys would have the evidence to successfully prosecute future violations. Dkt. 3-2 at 5, 22-27; Dkt. 3-3 at 3-4, Dkt. 3-5 at 3-4.

The Magistrate Judge recommended that this Court find that "[t]he NCSBE Defendants are proper parties to this action." Dkt. 24 at 16. The Magistrate Judge reasoned that the "conduct on the part of the NCSBE" in connection with recent prosecutions under the Strict Liability Voting Law, "and the statutory authority given to [the NCSBE Defendants], sufficiently established a connection required to invoke the *Ex parte Young* exception." *Id.* at 17. Defendants did not object to this recommendation, and have therefore waived any challenge to it. *See, e.g.*, *North Olmsted Chamber of Commerce v. City of North Olmsted*, 108 F.Supp.2d 792, 793 (N.D. Ohio 2000) (finding the defendant had "waived its argument on [an] issue" because the defendant "did not file specific, written objections to [the Magistrate Judge's] determination on this specific issue"); *Slavich v. Broadhurst*, No. 93-civ-1646, 1994 WL 10356, at *1 (E.D. La. Jan. 4, 1994) (where Defendants did not object to the Magistrate Judge' recommendation, that recommendation "serves as the law of the case"). This Court should find no clear error with respect to the recommendations in the R&R as to which there were no objections, and should adopt those recommendations. *See, e.g., Robinson v. Bowser*, No. 1:12-cv-

301, 2014 WL 12786920, at *6 (M.D.N.C. Feb. 24, 2014) (where a party did not object to the Magistrate Judge's recommendation, the court "was not required to conduct a *de novo* review of [the Magistrate Judge's] factual findings and legal conclusions" and instead "reviewed the Recommendation for clear error only").

B. The Attorney General Plainly Has "Some Connection" to the Enforcement of the Strict Liability Voting Law.

Although the Attorney General does not have primary enforcement authority, the numerous state statutory provisions detailed below vest the Attorney General with a significant role in the enforcement of the Strict Liability Voting Law.

1. The Attorney General Has Discretionary Authority Under N.C.G.S. § 114-11.6 to Prosecute Violations of the Strict Liability Voting Law Upon Request by a District Attorney

First, the Attorney General has discretionary authority pursuant to N.C.G.S. § 114-11.6 to prosecute violations of any North Carolina criminal statute upon request by a district attorney. *See* N.C.G.S. § 114-11.6 (providing that attorneys in the Special Prosecution Division of the Office of the Attorney General may "prosecute or assist in the prosecution of criminal cases when requested to do so by a district attorney").

Numerous North Carolina federal district courts have held that Section 114-11.6 provides the Attorney General with a sufficient connection to the enforcement of the state's criminal statutes for *Ex parte Young* purposes. *See, e.g.*, *Does 1-5 v. Cooper*, 40 F. Supp. 3d 657, 673-74 (M.D.N.C. 2014) (holding that the Attorney General "is a proper defendant" in a suit challenging a North Carolina criminal statute in view of Section 114-

11.6); *Grabarcyk v. Stein*, No. 5:19-cv-48-BO, 2020 WL 2441418, at *3 (E.D.N.C. May 12, 2020) (emphasizing that "North Carolina's attorney general has, upon the request of a district attorney, the authority to prosecute or assist in the prosecution of criminal cases"), *vacated on other grounds and remanded*, 2020 U.S. App. LEXIS 25948 (4th Cir. Aug. 14, 2020); *Martin v. Cooper*, No. 2:19-cv-2-BO, 2019 WL 4958208, at *5 (E.D.N.C. Oct. 7, 2019) (finding that the Attorney General is "closely related to the enforcement of the challenged" criminal statutes because of his discretionary prosecutorial authority under Section 114-11.6), *aff'd on other grounds*, 797 F. App'x 111 (4th Cir. 2020); *Nat'l Ass'n for Rational Sexual Offense Laws v. Stein*, No. 1:17-cv-53, 2019 WL 3429120, at *5 (M.D.N.C. July 30, 2019) (finding that plaintiffs "sufficiently alleged" that "the Attorney General has the statutory authority to prosecute or assist in the prosecution of criminal actions" pursuant to Section 114-11.6); *Meredith v. Stein*, No. 5:17-cv-528-BO, 2018 WL 2050143, at *2 (E.D.N.C. May 2, 2018) (holding that the Attorney General "has enough of a connection to the enforcement of North Carolina criminal laws" pursuant to Section 114-11.6 "to satisfy [*Ex parte Young*'s] requirements"); *see also 281 Care Comm. v. Arneson*, 638 F.3d 621, 632-33 (8th Cir. 2011) (holding that the *Ex parte Young* exception applied to the Minnesota Attorney General based, *inter alia*, on a discretionary prosecutorial provision similar to Section 114-11.6, and reasoning that the requisite "connection does not need to be primary authority to enforce the challenged law"). The Attorney General's discretionary prosecutorial authority pursuant to Section 114-11.6 "is in contrast to the Virginia Attorney General's lack of any specific statutory authority to

enforce the challenged statute in *McBurney v. Cuccinelli*, [616 F.3d 393, 399-402 (4th Cir. 2010)], which was part of the reason why the Fourth Circuit affirmed the dismissal of Virginia's Attorney General in that case." *Does 1-5*, 40 F. Supp. 3d at 673-74.

That the Attorney General has not previously been asked by a district attorney to prosecute a violation of the Strict Liability Voting Law pursuant to Section 114-11.6 is immaterial to the question of whether the Attorney General has statutory authority to enforce the Strict Liability Voting Law. The Eastern District of North Carolina recently so held in an analogous context:

> Defendants argue that the [Attorney General] has not been asked nor has it accepted an invitation by a local district attorney to prosecute [ ] violations [of the challenged criminal statutes], but that argument misses the mark. The fact that the Attorney General has not exercised his power to prosecute [such] violations does not alter the analysis as to whether he has the authority to do so.

Grabarczyk, 2020 WL 2441418, at *3 (addressing the *Ex parte Young* exception); *see also Final Exit Network*, 370 F. Supp. 3d at 1012-13 (finding allegations regarding a similar discretionary prosecutorial provision sufficient to satisfy traceability and the *Ex parte Young* exception as to the Minnesota Attorney General, even though plaintiffs did not allege that he had "been asked by any county attorney to take any action to enforce the statute" pursuant to this provision).

Defendants argue that N.C.G.S. § 114-11.6 "gives way to" N.C.G.S. § 163-278, which vests district attorneys with the authority to prosecute voting-related crimes. Dkt.

19 at 13-14.[2] But nothing in N.C.G.S. § 163-278 abrogates the Attorney General's authority to prosecute violations of the Strict Liability Voting Law upon a district attorney's request. Defendants concede as much by noting that they are not aware of any instance in which a district attorney has asked the Attorney General to prosecute a violation of the Strict Liability Voting Law pursuant to N.C.G.S. § 114-11.6. *Id.* at 3, 14.

2. The Attorney General Has the Exclusive Authority to Handle Criminal Appeals of Convictions Under the Strict Liability Voting Law

The Attorney General is solely responsible for representing the state in all criminal appeals, including appeals of convictions under the Strict Liability Voting Law. *See* N.C.G.S. § 114-2(1) (providing that the Attorney General's "duty to represent the State in criminal appeals shall not be delegated to any district attorney's office or any other entity"). This statutory obligation unquestionably links the Attorney General to the enforcement of the Strict Liability Voting Law, even if the Attorney General has not yet defended a conviction under this law on appeal.

The Southern District of Indiana's decision in *Whole Woman's Health Alliance v. Hill* is instructive on this point. There, the court held that the Indiana Attorney General was a proper defendant under the *Ex parte Young* exception in a challenge to criminally-

[2] Defendants' argument disregards the longstanding principle of North Carolina law that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Vaughan v. Mashburn*, 371 N.C. 428, 432 (N.C. 2018) (emphasis added).

enforceable state statutes, even though the Indiana Attorney General "cannot initiate prosecutions" under those statutes. 377 F. Supp. 3d 924, 935 (S.D. Ind. 2019). The court found dispositive "the Attorney General's complete and exclusive control over the criminal appeals process." *Id.* at 936. The court reasoned that it would be "incredible and unsustainable to hold that the state officer responsible for defending criminal convictions secured under a statute does not have 'some connection' with the statute's enforcement." *Id.* The court observed that the Attorney General could "carry out an injunction invalidating the challenged statutes" by, *inter alia*, "confess[ing] error before the intermediate and high courts on appeal from a conviction" under the statutes. *Id.*

3. The Attorney General May Investigate Violations of the Strict Liability Voting Law Upon Request by the NCSBE

Pursuant to N.C.G.S. § 163-278, the NCSBE and the district attorney have a "duty . . . to investigate any violations" of Article 22, which includes the Strict Liability Voting Law. While the NCSBE and the district attorneys have primary responsibility for investigating violations of the Strict Liability Voting Law, the Attorney General has statutory authority to conduct "further investigation" of violations of the election laws, including the Strict Liability Voting Law, upon referral by the NCSBE. *See* N.C.G.S. § 163-22(d) (providing that the NCSBE "shall report violations of the election laws to the Attorney General or district attorney or prosecutor of the district for further investigation and prosecution"); *see also* Dkt. 3-2 at 3.

4. The Attorney General May Advise the NCSBE and District Attorneys on the Investigation and Enforcement of the Strict Liability Voting Law

The Attorney General has a "duty. . . [t]o consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office." N.C.G.S. § 114-2(4). In *Whole Woman's Health Alliance*, the Southern District of Indiana found that a similar statutory provision contributed to a finding that the Indiana Attorney General had some connection to the enforcement of the challenged Indiana criminal statutes for *Ex parte Young* purposes. 377 F. Supp. 3d at 936. The court explained that "the Attorney General could consult with and advise local prosecuting attorneys not to bring a prosecution under the statutes." *Id.* Here, the Attorney General could similarly advise district attorneys not to prosecute unintentional violations of the Strict Liability Voting Law.

C. Defendants Have Not Disclaimed an Intent to Enforce the Strict Liability Voting Law.

Plaintiffs in this action allege that they have been harmed by the fear among eligible voters with criminal convictions of future enforcement of the Strict Liability Voting Law. Complaint ¶¶ 15-16. Here, neither the NCSBE nor the Attorney General has disclaimed enforcement of the Strict Liability Voting Law. Although the NCSBE has issued a policy prioritizing the investigation of "[k]nowing or intentional violations." Dkt. 17-4 at 4, this policy is subject to change "without notice." *Id.* Nothing in the policy "restricts" the NCSBE's authority to investigate unintentional violations. *Id.* Moreover,

nowhere in the numerous briefs submitted in this action have Defendants affirmatively disclaimed their intent to prosecute violations of the Strict Liability Voting Law. *Cf. 281 Care Committee v. Arneson*, 766 F.3d 774, 796-97 (8th Cir. 2014) (court found no threat of enforcement where the Attorney General submitted an affidavit attesting, *inter alia*, that "the attorney general's office would decline any request to prosecute" any of the challenged violations of the statute at issue). Consequently, there remains a threat of enforcement of the Strict Liability Voting Law by all of the Defendants in this action. *See Meredith v. Stein*, 355 F. Supp. 3d 355, 363 (E.D.N.C. 2018) (finding a credible threat of enforcement where defendants had not disclaimed an intent to enforce the law); *see also generally North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) ("credible threat of prosecution" where the NCSBE provided "no guarantee" that it would not enforce a criminal election statute against plaintiff); *Mobil Oil Corp. v. Att'y Gen. of the Commonwealth of Va.*, 940 F.2d 73, 76 (4th Cir. 1991) (credible threat of enforcement where the Attorney General had not "disclaimed any intention of exercising…enforcement authority").

III. Defendants' Motion to Dismiss Under Rule 12(b)(1) for Lack of Subject Matter Jurisdiction Should Be Denied Plaintiffs Have Also Demonstrated That Article III's Standing Requirements Are Satisfied Here.

To satisfy Article III's standing requirements, plaintiffs must demonstrate that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Deal v. Mercer County Bd. of Educ.*, 911 F.3d 183, 187 (4th Cir. 2018)

(quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)). Because Plaintiffs have adequately alleged each of the elements of standing, this Court should deny Defendants' motion to dismiss under Rule 12(b)(2).

A. Plaintiffs Have Established an Injury-in-Fact.

It is well-established that voter advocacy organizations suffer an injury-in-fact when an unconstitutional voting-related law impedes their core mission and forces them to divert resources to address the impact of that law. *See Action NC v. Strach*, 216 F. Supp. 3d 597, 616-18 (M.D.N.C. 2017) (finding voting rights organizations adequately alleged standing based on analogous allegations, and explaining that "[t]he Supreme Court has held that if a defendant's practices have hampered an organization's stated objectives causing the organization to divert its resources as a result, then there can be no question that the organization has suffered injury in fact."); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952-53 (7th Cir. 2019) (collecting circuit court cases upholding standing where "voter-advocacy organizations…challenged election laws based on similar drains on their resources").

Courts have specifically recognized that an organization is injured when a chilling effect caused by a law or policy impedes the organization's mission and requires the organization to divert resources to counteract that chilling effect. *See, e.g.*, *New York v. Trump*, No. 20-cv-5770 (RCW) (PWH) (JMF), 2020 WL 5422959, at *16-20 (S.D.N.Y. Sept. 10, 2020) (census outreach organizations were injured by a presidential memorandum, which deterred participation in the census because of a fear of

immigration enforcement and required the organizations to expend resources to counteract that chilling effect); *SurvJustice Inc. v. DeVos*, No. 18-cv-00535-JSC, 2018 WL 4770741, at *6-8 (N.D. Cal. Oct. 1, 2018) (advocacy organizations for survivors of sexual harassment were injured by guidance from the Department of Education, which deterred students from filing sexual harassment complaints and required the organizations to divert resources to counteract that chilling effect), *amended on other grounds*, 2019 WL 1434144 (N.D. Cal. Mar. 29, 2019).

Here, Plaintiffs have demonstrated that they have suffered injuries as a result of the chilling effect caused by the Strict Liability Voting Law, which impedes Plaintiffs' missions of encouraging broad political participation by members of Black and low-income communities in North Carolina. *See* Complaint at ¶¶ 15-16; *see also* Dkt. 3-22 (Montford Decl.) at ¶¶ 9-12; Dkt. 3-23 (McCoy Decl.) at ¶¶ 9-12. To counteract this chilling effect, Plaintiffs have been forced to divert resources from their get-out-the-vote and voter registration activities to educate and reassure eligible voters with criminal convictions that they can safely vote without fear of prosecution under the Strict Liability Voting Law. *See* Complaint at ¶¶ 15-16; *see also* Dkt. 3-22 (Montford Decl.) at ¶¶ 10-11; Dkt. 3-23 (McCoy Decl.) at ¶¶ 9-10.

The Magistrate Judge found that Plaintiffs' "efforts to carry out their missions have been impeded" by the Strict Liability Voting Law, and "they have both been forced to divert resources to address fears surrounding the enforcement of" the Strict Liability Voting Law. Dkt. 24 at 10. Consequently, the Magistrate Judge recommended that the

Court find that "Plaintiffs have established organizational injury for the purposes of standing." *Id.* Defendants did not object to this recommendation, and have therefore waived any challenge to it. This Court should find no clear error in this recommendation and adopt it.

B. Plaintiffs Have Demonstrated Traceability.

"[T]raceability merely requires a causal connection between the defendant's conduct and the plaintiff's injury, such that there is a genuine nexus between the two." *Kadel v. Folwell,* 446 F. Supp. 3d 1, 10 (M.D.N.C. 2020). It "is not equivalent to a requirement of tort causation," *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 623 (4th Cir. 2018), and "does not create an onerous standard," *Carter v. HealthPort Tech., LLC*, 822 F.3d 47, 55 (2d Cir. 2016).

A defendant's challenged conduct need not "be the sole or even immediate cause of the injury" to satisfy traceability. *Sierra Club v. United States Dep't of the Interior*, 899 F.3d 260, 284 (4th Cir. 2018). "Even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006). If a defendant's challenged conduct is "at least in part responsible" for the plaintiff's injuries, then traceability "is satisfied, and [the plaintiff] can attempt to hold [the defendant] accountable notwithstanding the presence of another proximate cause." *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013).

Here, Plaintiffs have suffered an injury-in-fact because of the chilling effect caused by prospective voters' continued fear of the enforcement of the Strict Liability Voting Law, and the necessary expenditure of resources to counteract that fear. Complaint at ¶¶ 15-16; Dkt. 3-22 (Montford Decl.) at ¶¶ 10-11; Dkt. 3-23 (McCoy Decl.) at ¶¶ 9-10. The possibility that Defendants may exercise their statutory authority to enforce the Strict Liability Voting Law contributes to this fear. Consequently, Plaintiffs have established traceability as to all Defendants. *See, e.g.*, *Nat'l Ass'n for Rational Sexual Offense Laws*, 2019 WL 3429120, at *9 (traceability satisfied by the "causal connection between the injury…*i.e.*, the fear and risk of future prosecution by Defendants" and Defendants' authority as to the enforcement of the challenged statute).[3]

The Magistrate Judge found that "there is clearly a causal connection between Plaintiffs' injury and the challenged actions of the NCSBE Defendants." Dkt. 24 at 11. The Magistrate Judge therefore recommended that this Court find that "traceability is established as to the NCSBE Defendants for the purposes of standing." Dkt. 24 at 12.

[3] In *NC RSOL v. Boone*, the court held that plaintiffs' injuries were not traceable to the Attorney General because district attorneys had not "actually instructed the North Carolina Attorney General's office to investigate or prosecute [the plaintiff] for a potential violation" of the challenged statute. 402 F. Supp. 3d 240, 254 (M.D.N.C. 2019). There, however, plaintiffs did not contend that their injuries arising from an allegedly unconstitutional North Carolina criminal statute were traceable to the Attorney General. *Id.* at 254 ("Plaintiffs do not appear to dispute that their injuries are traceable only to the individual district attorneys, rather than to the Attorney General's Office.").

Defendants did not object to this recommendation, and have therefore waived any challenge to it. This Court should find no clear error in this recommendation and adopt it.

This Court should further find that Plaintiffs' injuries are also traceable to the Attorney General. The Magistrate Judge erroneously found that Plaintiffs' injuries are "not fairly traceable to the AG" because he played no role in the Alamance and Hoke County prosecutions. *Id.* at 12-13. As detailed in Plaintiffs' objections to the R&R, the Magistrate Judge's conclusion rests on a misapprehension on the nature of Plaintiffs' injuries. Dkt. 27 at 6-9. Contrary to the Magistrate Judge's assumption, Plaintiffs' injuries do not stem solely from past prosecutions, but are also caused by the fear of future enforcement by any entity with authority to enforce the Strict Liability Voting Law, including the Attorney General. Plaintiffs' injuries are fairly traceable to the threat of future enforcement by the Attorney General because this contributes to the fear of voting that is the source of Plaintiffs' injuries. *See, e.g.*, *Meredith*, 355 F. Supp. 3d at 361 (plaintiff's fear of future enforcement of a North Carolina criminal statute was fairly traceable to the Attorney General, even though the Attorney General had played no role in the past enforcement of the statute against the plaintiff).

C. Plaintiffs Have Adequately Demonstrated Redressability

The redressability "requirement is not onerous." *Deal*, 911 F.3d at 189. "Plaintiffs need not show that a favorable decision will relieve their every injury. Rather, plaintiffs need only show that they personally would benefit in a tangible way from the court's intervention." *Id.*

Plaintiffs would benefit greatly from an injunction prohibiting the NCSBE Defendants from enforcing the Strict Liability Voting Law. As the Magistrate Judge found, "enjoining the NCSBE Defendants from enforcement of the challenged statute would necessarily prohibit them from investigating or referring for prosecutions any violation of the statute." Dkt. 24 at 14. The Magistrate Judge further found that "there can be no question that enjoining the NCSBE Defendants would be a tangible benefit to Plaintiffs." *Id.* Based on these findings, the Magistrate Judge recommended that this Court find that "redressability is satisfied as to the NCSBE Defendants for the purposes of standing." *Id.* Defendants did not object to this recommendation, and have therefore waived any challenge to it. This Court should find no clear error in this recommendation and adopt it.

Plaintiffs would also benefit from an injunction prohibiting the Attorney General from enforcing the Strict Liability Voting Law An injunction would prohibit the Attorney General from (i) investigating violations of the Strict Liability Voting Law referred by the NCSBE pursuant to N.C.G.S. § 163-22(d); (ii) prosecuting violations of the Strict Liability Voting Law in any case referred by a district attorney pursuant to N.C.G.S. § 114-11.6; and (iii) defending any conviction under the Strict Liability on appeal pursuant to N.C.G.S. § 114-2(1). Such an injunction would substantially alleviate the fear of prosecution by eligible voters with criminal convictions, and reduce the resources that Plaintiffs must expend to educate and reassure eligible voters. This Court should therefore find that redressability is also satisfied as to the Attorney General.

IV. Defendants' Motion to Dismiss for Failure to State a Claim Under Rule 12(b)(6) Should Be Denied Because Plaintiffs Have Adequately Alleged that the Strict Liability Voting Law Violates the Constitution.

"[A] motion for dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would supports its claim and would entitle it to relief." *Mylan Laboratories, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993); *see also DeSole v. U.S.*, 947 F.2d 1169, 1171 (4th Cir. 1991) (explaining that "a [R]ule 12(b)(6) motion should be granted only in very limited circumstances"). "A dismissal under Rule 12(b)(6) is appropriate only when the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Action NC*, 216 F. Supp. 3d at 612. "Where, as here, the motion to dismiss involves a civil rights complaint, [courts] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged." *Rios v. Veale*, 648 F. App'x 369, 370 (4th Cir. 2016).

Defendants' motion to dismiss under Rule 12(b)(6) should be denied because Plaintiffs have adequately alleged that the Strict Liability Voting Law (1) is void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment; and (2) violates the Equal Protection Clause of the Fourteenth Amendment.

A. Plaintiffs have adequately alleged that the Strict Liability Voting Law is void for vagueness in violation of the Due Process Clause.

Defendants incorrectly suggest that courts may only consider facial void-for-vagueness challenges to criminal statutes that implicate First Amendment rights. Dkt. 19 at 22 n.6. Prior to the Supreme Court's decision in *Johnson v. U.S.*, 576 U.S. 591 (2015), the Fourth Circuit had instructed that "[f]acial vagueness challenges to criminal statutes are allowed only when the statute implicates First Amendment rights." *U.S. v. Larson*, 747 F. App'x 927, 929 (4th Cir. 2018). But the *Johnson* Court held that the residual clause of the Armed Career Criminal Act was facially unconstitutional even though the statute did not raise First Amendment concerns. The Fourth Circuit has since recognized that plaintiffs may bring facial challenges to criminal statutes that do not implicate the First Amendment. See *Larson*, 747 F. App'x at 930 ("After *Johnson*, at least, we know that a statute that doesn't raise First Amendment problems may nevertheless be impermissibly vague on due process grounds.")

Defendants' also erroneously rely on *Lambert v. California*, 355 U.S. 225 (1957), which did not concern a void-for-vagueness challenge. Here, Plaintiffs contend that the absence of a scienter requirement heightens the clarity demanded by the Due Process Clause. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (explaining that "the constitutionality of a vague statutory standard is closely related to whether the standard incorporates a requirement of *mens rea*," and finding a strict liability criminal statute unconstitutionally vague because it acted as "little more than a trap for those who act in

good faith"); *cf. Jones v. Governor of Florida*, 975 F.3d 1016, 1047-48 (11th Cir. 2020) (en banc) (finding the scienter requirement dispositive in rejecting a vagueness challenge to Florida laws criminalizing registering to vote and voting before felony sentence completion, and reasoning that "no felon who honestly believes he has completed the terms of his sentence commits a crime by registering and voting").

Plaintiffs have adequately alleged that the Strict Liability Voting Law—a criminal statute with no scienter requirement punishable by up to two years in prison—is unconstitutionally vague by any standard. While the law criminalizes voting before an individual has "been restored to the right of citizenship," Plaintiffs allege that the law provides no guidance on when an individual regains his or her citizenship rights. Complaint ¶ 61. The Strict Liability Voting Law instead implicitly incorporates by reference N.C.G.S. § 13-1, which in turn provides that citizenship is restored upon an individual's "unconditional discharge." *Id. See generally Manning v. Caldwell for City of Roanoke,* 930 F.3d 264, 273, 276-77 (4th Cir. 2019) (finding a criminal statute unconstitutionally vague based on the vagueness of a term incorporated by reference). Plaintiffs allege that nowhere in the State's statutes or the case law is the term "unconditional discharge" expressly defined. Complaint ¶ 63. Plaintiffs further allege that because the Strict Liability Voting Law carries serious criminal penalties even for inadvertent violations, it inevitably chills the constitutionally-protected act of voting by eligible individuals with criminal convictions. *Id.* ¶¶ 78, 104.

In their Motion to Dismiss, Defendants do not and could not contend that the statutory scheme includes a definition of the term "unconditional discharge." Instead, Defendants argue that the term "unconditional discharge" is "obvious" from the face of the statute. Dkt. 19 at 21. To arrive at this purportedly-obvious definition, Defendants had to cobble together three separate subsections of N.C.G.S. § 13-1, a law that is not expressly referenced in the Strict Liability Voting Law. *Id.* Defendants claim that N.C.G.S. § 13-1 provides a "comprehensible standard" by requiring "ordinary person[s]" to "ask themselves…whether they continue to be supervised by the state for [the relevant] conviction." *Id.* That Defendants had to combine different sections of the statute alone demonstrates that this invented "standard" appears nowhere in the Strict Liability Voting Law or N.C.G.S. § 13-1. Moreover, if laypersons were to follow the step-by-step test for determining voting eligibility set forth in Defendants' papers, then individuals on *unsupervised* probation would erroneously believe they are eligible to vote. Defendants' spurious arguments confirm that Plaintiffs have adequately alleged that the Strict Liability Voting Law is hopelessly void-for-vagueness.

B. Defendants Do Not Move to Dismiss Plaintiffs' Equal Protection Claim

Defendants do not assert that the Strict Liability Voting Law satisfies the Equal Protection Clause. Defendants do not move to dismiss this claim and could not reasonably do so, as Plaintiffs have adequately alleged each of the elements of an equal protection claim challenging a law originally enacted with racially discriminatory intent under the standard set forth in *Hunter v. Underwood*, 471 U.S. 222 (1985).

Hunter holds that such a law violates the Equal Protection Clause if (i) the law was never purged of its original discriminatory taint, and (ii) the law continues to have present-day disproportionate effects. *Id.* at 233. Plaintiffs' allegations satisfy each of *Hunter*'s prongs.

First, Plaintiffs allege that the Strict Liability Voting Law was originally enacted in 1877 and reenacted in 1899 with a specific intent to disenfranchise Black voters. Complaint ¶ 109. Plaintiffs further allege that while the General Assembly reenacted the Strict Liability Voting Law with minor modifications in 1931, that reenactment left the substance of the law intact. *Id.* ¶¶ 38-39.

Second, Plaintiffs allege that the Strict Liability Voting Law has never been purged of its original discriminatory taint because the key provisions of the Strict Liability Voting Law—strict felony-level liability for voting after a felony conviction before restoration to citizenship—have remained unchanged since 1899. *Id.* ¶ 110.

Third, Plaintiffs allege that the Strict Liability Voting Law bears more heavily on the Black community. *Id.* ¶ 111. Black individuals were disproportionately flagged by the NCSBE for violating the Strict Liability Voting Law in the 2016 election, and they have been disproportionately prosecuted for those violations. *Id.* This Court should therefore hold that Plaintiffs have adequately alleged that the Strict Liability Voting Law violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss as moot without prejudice to refiling, or, alternatively, deny Defendants' Motion to Dismiss in its entirety on the merits.

Dated: December 7, 2020

By: /s/ Mitchell D. Brown

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rules 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Response in Opposition to Defendants' Motion to Dismiss contains 6228 words (including headings and footnotes) as measured by Microsoft Word.

/s/ Mitchell D. Brown
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CERTIFICATE OF SERVICE

I certify that on the 7th day of December, 2020, the foregoing Response in Opposition to Defendants' Motion to Dismiss was served by electronic mail to Defendants' Counsel, Terence Steed, Special Deputy Attorney General, at the address tsteed@ncdoj.gov, with consent of counsel to accept service in this manner.

/s/ Mitchell D. Brown
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