IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:23-CV-878

DEMOCRACY NORTH CAROLINA; *et al.*,

Plaintiffs,

v.

FRANCIS X. DELUCA, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

Plaintiffs' Response [D.E. 137] (the "Response") lodges three arguments to avoid dismissal. First, Plaintiffs complain that, despite refusing to participate in other two cases challenging S.B. 747, that they were left out of the Consent Judgment[1] resolving those cases. But this complaint belies logic. Of course Plaintiffs would not participate in a resolution of cases that they spurned involvement with at every turn. Just because Plaintiffs were not included in the Consent Judgment's resolution of those cases, however, does not make their claims here any less moot.

Second, Plaintiffs complain that they were likewise left out of the drafting of Numbered Memo 2023-05 (the "Numbered Memo") and never consented to it. But the State Board of Elections does not exist to serve the interests of a few special interest groups, and it does not need Plaintiffs' consent to craft a legally adequate notice and cure process. Moreover, despite Plaintiffs now claiming an opposition to the Numbered Memo, they

[1] The Consent Judgment, [D.E. 125-1], is memorialized in *Voto Latino, et al. v. Hirsch, et al.*, Case No. 1:23-cv-861, at D.E. 101 (M.D.N.C. 2023) ("*Voto Latino*") and *Democratic National Committee, et al. v. Hirsch, et al.*, Case No. 1:23-cv-862, at D.E. 98 (M.D.N.C. 2023) ("*DNC*").

never amended their complaint to challenge the Numbered Memo while it was in effect, including during the 2024 primary and general elections. Nor would leave to amend now (Resp. p. 17 n.5) be effective. All parties agree that the Numbered Memo is expired (Resp. p.5). And now, portions of the Numbered Memo regarding the notice and cure process are already in effect through the Consent Judgment.

Third, Plaintiffs argue that their claims are "different" than those in *Voto Latino* and *DNC*. But novel labels aside, Plaintiffs' claims for relief are no different than those this Court has already resolved. Plaintiffs ultimately seek the same relief as plaintiffs in *Voto Latino* and *DNC*: a permanent injunction over the Undeliverable Mail Provision ("UMP") of Senate Bill 747 ("S.B.747"). N.C.G.S. §163-82.6B. That relief was granted—there is simply no practical additional relief that the Court can give. For these reasons, and the reasons stated in Legislative Defendants Opening Brief [D.E. 126], Plaintiffs' remaining two claims should be dismissed as moot.

RESPONSE TO PLAINTIFFS' STATEMENT OF FACTS

At the outset, Plaintiffs claim that their complaint is distinguishable from *Voto Latino* and *DNC* in two principal ways: (1) that Plaintiffs frame their claims as particularly focused on "youth" voters; and (2) that Plaintiffs' complaint actually reflects a broader challenge to all of section 10.(a) of S.B.747, beyond those in *Voto Latino* or *DNC*. But the mental gymnastics required to contort Plaintiffs' complaint into a new challenge undermines those claims entirely.

Contrary to their representations, Plaintiffs do not actually seek to enjoin all of section 10.(a) of S.B.747 (Resp. pp.3-4). In fact, such an injunction would enjoin North

Carolina from conducting Same Day Registration ("SDR"). *See generally* N.C.G.S. § 163-82.6B. Plaintiffs plainly do not seek such an injunction, nor do they actually want this Court to find that SDR is unconstitutional. Plaintiffs' complaint confirms as much.[2] Similarly, Plaintiffs' complaint does not challenge the photo identification or voter registration requirements of section 10.(a) in any way. *Id.* at §§ (b)(1)-(3). But Plaintiffs' Response would have the Court believe that these unchallenged and bedrock election law provisions should also be enjoined and declared unconstitutional. [Resp. pp.7-8, 15-16].

A plain reading of Plaintiffs' Response and the complaint reveals a much less contorted story—Plaintiffs' challenge here is to the UMP. N.C.G.S. §§ 163-82.6B(c)-(d).[3] In fact, the UMP or issues regarding undeliverable mail notices for SDR registrants are referenced over twenty times in Plaintiffs' complaint alone. [D.E. 1 ¶¶7, 20, 56, 58-61, 66, 69, 71, 74-75, 87].

Plaintiffs' Response attempts to shift the focus away from the UMP and instead claims that they are challenging other provisions of S.B.747, namely the HAVA document requirements. N.C.G.S. § 163-82.6B(e). Yet unlike the UMP, which is featured throughout Plaintiffs' complaint, sub-section (e) is only referenced twice in Plaintiffs' 118-paragraph complaint. [D.E. 1 ¶¶76-77]. In fact, these passing references are one fewer than the references to S.B.747's changes to the absentee ballots and voter challenges, provisions

[2] Plaintiffs' Complaint confirms their target is S.B.747's change to a single-mailer address verification; it repeatedly references the pre-S.B.747 two-mailer system and uses the change as the basis for their relief. [D.E. 1 ¶¶ 110, 116-118].

[3] The UMP is reflected in sub-section (c), but it is given teeth by the provisions of sub-section (d), which provides the mechanics of retrieval. N.C.G.S. §§ 163-82.6B(c)-(d). This provision is already permanently enjoined, through the Consent Judgment.

which are indisputably beyond the scope of Plaintiffs' claims because they were codified outside of section 10.(a). [*Id.* ¶¶ 78-80].

The allegations of Counts II and III underscore Plaintiffs' singular focus on the UMP. Plaintiffs specifically limit Count II's alleged burden to the UMP's change in address verification, claiming: "[t]he single-notice address verification process established for same-day registration in SB 747 imposes a severe burden on eligible North Carolina voters' right to vote." [*Id.* ¶110]. The paragraph goes on to allege that those who register and vote during early voting are subject to having their "vote disqualified" and that "all it takes is one piece of misdirected or returned *mail* to bar them from having their vote count. This denies those eligible voters of their right to vote—the severest of burdens—without giving them any notice, opportunity to be heard, or other recourse." [*Id.*] (emphasis added). Tellingly absent is any mention of the HAVA document provision of sub-section (e), let alone any other particularized burden.

Count III fares no better. By its own terms, this Count is limited to "SB 747 and, in particular, its same-day registration provision." [*Id.* ¶¶ 116-118]. As paragraph 118 clarifies, Plaintiffs' allegations target "the system by which ballots cast using same-day registration fail with one failed-to-deliver notice," which they claim denies otherwise eligible "young" voters "the ability to register and have their vote count in violation of the Twenty-Sixth Amendment." [*Id.* ¶ 118].

Plaintiffs chose to frame their complaint in a manner which specifically challenges the UMP and specifically how UMP affects "young" voters. Because the UMP is now

permanently enjoined, Plaintiffs' remaining claims for relief are satisfied and their complaint is moot.

ARGUMENT

"Federal courts are not comprised of philosopher-kings or legislative aides, and the Constitution forbids [them] from . . . merely giving advice about the potential legal deficiencies of a law or policy when no ongoing controversy exists with respect to that law or policy." *Incumaa v. Ozmint*, 507 F.3d 281, 289 (4th Cir. 2007). When subsequent intervening acts end a controversy by providing a plaintiff with the "precise relief" sought, the case should be dismissed as moot. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 338 (2020).[4]

Here, the precise relief Plaintiffs seek is a permanent injunction of the UMP and a declaration that it is unconstitutional. This Court granted permanent injunctive relief in the Consent Judgment, and no additional declaration regarding constitutionality changes that fact. Rather than recognizing that their claims have been satisfied, Plaintiffs ask this Court to opine on the merits of the broader SDR statutory scheme "when doing so would have 'no practical effect on the outcome of the matter.'" *Holloway v. City of Virginia Beach*, 42

[4] Notably, Plaintiffs' Response cites *N.Y. State Rifle* in support of their argument that, because the Consent Judgment does not enjoin the entirety of section 10.(a) of S.B.747, they have not received the "precise relief" their complaint seeks. [Resp. p. 9]. But *N.Y. State Rifle* does not stand for such a sweeping proposition. In *N.Y. State Rifle*, the plaintiffs sought the broad enjoinment of an entire statutory scheme. *See The N.Y. State Rifle & Pistol Ass'n, et al. v. City of New York*, 1:13-cv-02115, at Prayer for Relief ¶1 (S.D.N.Y. 2013). However, the Supreme Court found the case moot because New York amended the challenged statute to allow plaintiffs to do the specific act at the center of their claims. *Compare id. with N.Y. State Rifle & Pistol Ass'n*, 590 U.S. at 338-39; *see also N.Y. State Rifle*, 590 U.S. at 361 (Alito, J. dissenting). Much like the *N.Y. State Rifle* plaintiffs, Plaintiffs' complaint here reveals that they truly seek relief relating to a particular activity within a larger statutory provision—relief the Consent Judgment grants.

F.4th 266, 275 (4th Cir. 2022) (citation omitted). Well-settled precedent establishes that such requests are beyond the scope of Article III jurisdiction. *Id.* Plaintiffs' claims should accordingly be dismissed.

I. Plaintiffs' belated "objection" to the Numbered Memo does not save their claims from dismissal.

As the "master of [their] complaint," Plaintiffs chose the remedies they wished to pursue. *Johnson v. Charlotte-Mecklenburg Schs. Bd. of Educ.*, 20 F.4th 835, 844 (4th Cir. 2021). As such, the mootness inquiry "is predicated on the contents of [Plaintiffs'] federal complaint." *Id.* at 846. Here, the contents of that complaint feature a wholesale focus on the UMP and Plaintiffs' alleged grievances regarding the same.

Although Plaintiffs devote much of their Response to their belated issues with the Numbered Memo [Resp. pp.5-7], they fail to confront one simple fact: Plaintiffs never amended their complaint to challenge the Numbered Memo. As a result, any such arguments are beyond the scope of the complaint and irrelevant to this motion. *Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 Fed. Appx. 556, 563 (4th Cir. 2008); *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 617 (4th Cir. 2009); *see also Allegis Grp., Inc. v. Bero*, 689 F. Supp. 3d 81, 140-42 (D. Md. 2023) (declining to issue declaratory judgment where no actual controversy existed between the parties, and rejecting plaintiffs' attempt to reframe their claim as seeking relief under a legal theory not plead in their complaint); *Muhammad v. Arrett*, No. 1:19CV746 (LO/JFA), 2020 WL 7647635, at *6 (E.D. Va. Dec. 23, 2020) (declining to assess whether injunctive or declaratory relief was properly connected to plaintiff's claims because the request was moot by intervening

events). This reality forecloses Plaintiffs' arguments from the start. Nevertheless, even if Plaintiffs' eleventh-hour objections to the Numbered Memo could be considered, they are wholly without effect.

As Plaintiffs' Response recognizes, the Numbered Memo expired, and its notice and cure process was replaced by that of the Consent Judgment. [Resp. p.5]. Both the Numbered Memo and the Consent Judgment specifically provide the process Plaintiffs claim the UMP lacks. However, unlike the Numbered Memo, the Consent Judgment is a permanent and continuing obligation.[5] While Plaintiffs' choice not to challenge the Numbered Memo despite its use in the 2024 elections is questionable, it is the Consent Judgments' final resolution of Plaintiffs' challenges to the UMP that unequivocally satisfies their remaining claims. As such, Plaintiffs belated Complaints about the Numbered Memo is simply *ipse dixit.*

II. Plaintiffs' remaining claims are resolved by the Consent Judgment.

"Since mootness depends on the court's ability to grant effectual relief, it follows that mootness hinges on the type of relief sought." *Lancaster v. Sec'y of Navy*, 109 F.4th 283, 289 (4th Cir. 2024). As a practical matter, in the context of Plaintiffs' challenges, a declaration and a permanent injunction are different means to the same end: functionally invalidating part of a duly enacted statute. *Perez v. Ledesma*, 401 U.S. 82, 124-26 (1971)

[5] As this Court noted in its order denying Legislative Defendants' and State Board Defendants' initial motion to dismiss, the "preliminary nature" of the Numbered Memo precluded a mootness inquiry. [D.E. 63 p.8]. Now, the Consent Judgment is a permanent and continuing obligation, providing the finality the Court previously found lacking. [*Id.*] (citing *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 192 (4th Cir. 2018).

(Brennan, J., concurring in part). Here, there is no effective difference between Plaintiffs' request that the UMP be declared unlawful and the Consent Judgment's permanent enjoining of the statute's enforcement—both render the UMP inoperative. If anything, the Consent Judgment's injunction provides a broader and more enforceable remedy, as it actually compels a refrain from enforcement. *Poe v. Gerstein*, 417 U.S. 281, 281-82 (1974) (treating an injunction as the more aggressive discretionary remedy); *Perez*, 401 U.S. at 124-26 (Brennan, J., concurring in part) (explaining that while a declaratory judgment may influence enforcement and prompt legislative or policy change, it lacks the coercive force of an injunction and does not by itself prohibit future application of the challenged law). Further, because the UMP was permanently enjoined, any additional relief regarding its legality would be an additional and impermissible advisory opinion. This alone renders Plaintiffs' remaining claims moot.

To start, it is unclear how Plaintiffs can agree that the Consent Judgment satisfies their first claim for relief but not their second or third—especially when, as established, all three claims are premised upon the same challenged process contained within exact same statutory provision. Even still, the Consent Judgment's resolution of the UMP unequivocally and independently satisfies each of Plaintiffs' claims. Any remaining peripheral characterizations or allegations regarding the statute's history or purpose are immaterial to this conclusion.

a. Plaintiffs' Twenty-Sixth Amendment claim is resolved.

To state a claim under the Twenty-Sixth, Plaintiffs must demonstrate that the right to vote is denied or abridged—absent such a violation, no cause of action exists under the

Constitution. U.S. CONST. amend. XVI, §1; *Lee v. Virginia State Bd. of Elections,* 188 F. Supp. 3d. 577, 610 n.18 (E.D. Va.), *aff'd,* 843 F.3d 592 (4th Cir. 2016). Despite their reliance on their only unique claim, Plaintiffs' Response fails to address the fact that their Twenty-Sixth Amendment claim is based entirely on the UMP. [D.E. 1 ¶¶116, 118].

Plaintiffs have always at least tacitly agreed that portions of S.B.747 are legal, because a key element of their argument is that "young" voters "rely" on SDR. [D.E. 1 ¶17; D.E. 124 p.20]. Contrary to their Response's representations, Plaintiffs never sought to invalidate all of SDR; instead, they explicitly argued against the UMP [D.E. 1 ¶118], which the Consent Judgment enjoined. That the relief Plaintiffs sought was achieved on a different legal theory than their Twenty-Sixth Amendment claim is inconsequential, and any remaining comment as to the statute's alleged "discriminatory intent," would be little more than an advisory opinion "when no ongoing controversy exists[.]" *Incumaa,* 507 F.3d at 289. Moreover, Plaintiffs' demand for an additional declaration regarding constitutionality (Resp. p. 11) is misplaced. Courts regularly avoid constitutional questions when the issue can be decided via other means. *See Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 445-46 (1988) ("[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"); *Stuart v. Huff,* 834 F. Supp. 2d 424, 436 (2011), (holding that it was unnecessary to decide whether a statute was unconstitutionally vague because it had already enjoined the statute on First Amendment grounds).

b. Plaintiffs' Undue Burden claim is resolved.

Despite their efforts to now paint Count II with a broader brush, Plaintiffs' undue burden claim was couched in, as they put it, the alleged burden faced by an SDR registrant who could have their vote disqualified due to "one piece of misdirected or returned mail." [D.E. 1 ¶110]. The specific burden Plaintiffs alleged arose from that disqualification "without giving [the voter] any notice, opportunity to be heard, or other recourse." [*Id*.]. Put differently, the face of Plaintiffs' complaint makes clear that Count II challenges the UMP, just like Counts I and III.

Once more Plaintiffs attempt to pivot, now characterizing their undue burden claim as a sweeping challenge to North Carolina's entire SDR scheme. [Resp. pp.14-15]. In fact, Plaintiffs now appear to claim that SDR generally might constitute an undue burden. [*Id*. at pp. 16-17]. But Plaintiffs did not frame their complaint so broadly, and they cannot escape the fact that their claims focused on the UMP, which the Consent Judgment enjoined. Although Plaintiffs concede that the Consent Judgment provides the process their complaint sought, [*Id*. at p.14], they attempt to limit that satisfaction to Count I, arguing that Count II goes farther. But this makes no sense. Plaintiffs' complaint repeatedly hinges Count II on the change in the mail verification process codified in the UMP. As such, the overlap in Plaintiffs' claims is not only a feature of their own pleading choices, but it highlights how the Consent Judgment provides the relief Plaintiffs seek.

At its core, Plaintiffs' *ad hoc* reframing of Count II is, in effect, a request that the Court comment upon perceived deficiencies in SDR as a whole. Such an advisory opinion is foreclosed by Article III, and dismissal is warranted.[6] *Holloway*, 42 F.4th at 275.

CONCLUSION

For the reasons state herein, and those in Legislative Defendants' Memorandum in Support of their Motion to Dismiss [D.E. 126], Plaintiffs' remaining claims—Counts II and III—should be dismissed as moot.

Respectfully submitted this, the 6th day of June 2025.

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[6] Recognizing this reality, Plaintiffs ask for an opportunity to amend their complaint to try and distinguish their undue burden claim from those of *Voto Latino* and *DNC*. [Resp. p.17 n. 5]. But Plaintiffs had over 1.5 years to amend their complaint and chose not to. Instead, they focused their discovery efforts and subsequent pleadings on the UMP. Allowing a drastic amendment to completely reframe a claim at this late stage would be highly prejudicial to Legislative Defendants. *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509–10 (4th Cir. 1986).

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 2,914/3,125 words as counted by the word count feature of Microsoft word.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 6th day of June 2025, the foregoing was filed and served upon all counsel of record via the Court's CM/ECF system.

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