No. 24-2044

In the United States Court of Appeals
for the Fourth Circuit

REPUBLICAN NATIONAL COMMITTEE, et al.,

Plaintiffs-Appellees,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of North Carolina

DEFENDANTS-APPELLANTS' MOTION TO STAY PROCEEDINGS IN THE DISTRICT COURT, AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY PENDING RULING ON STAY MOTION (ACTION REQUESTED BEFORE OCTOBER 22, 2024)

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INTRODUCTION

Voting in North Carolina began one month ago, on September 20, 2024, when ballots were transmitted to uniformed and overseas civilian voters. Amid this ongoing voting, the Republican National Committee and North Carolina Republican Party filed suit in state court, seeking to remove en masse hundreds of thousands of voters from North Carolina's voter rolls. Plaintiffs alleged that these voters registered using an erroneous voter registration form that, contrary to the demands of the Help America Vote Act of 2002 ("HAVA"), did not clearly require registrants to provide their driver's license or social security number. And Plaintiffs contended that unless the State Board removed these voters immediately—in the middle of a general election—illegal voting would proliferate and the results of the State's election would be cast into doubt.

Specifically, Plaintiffs advanced two claims. First, they demanded a writ of mandamus compelling the State Board to come into compliance with (Plaintiffs' understanding of) HAVA and remove the targeted voters from the voter rolls. Second, they alleged an amorphous

claim under Article I, Section 19 of the North Carolina Constitution, similarly seeking to rectify the Board's alleged HAVA noncompliance.

The State Board removed this case pursuant to both 28 U.S.C. § 1441 and § 1443(2). Shortly thereafter, it filed a motion to dismiss, and Plaintiffs filed a motion to remand. Yesterday, on October 17, the district court granted the State Board's motion to dismiss in part and dismissed the first of Plaintiffs' two claims with prejudice. But the court remanded Plaintiffs' second claim to state court.

At yesterday's hearing, the State Board Defendants asked the district court to briefly stay its remand order, so they could appeal any adverse decision regarding remand. The court granted that motion, and the remand order is currently stayed until October 22, 2024.[1]

For the reasons set forth below, the State Board Defendants now ask this Court to extend the district court's stay through the pendency of their appeal to this Court, and for an immediate administrative stay pending a ruling on this stay motion.

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[1] The State Board Defendants understood this order to mean that any further stay requests should be directed to this Court. They therefore respectfully ask this Court to enter a stay pending resolution of the appeal.

STATEMENT[2]

Plaintiffs filed their two-count complaint in North Carolina superior court on August 23—less than 90 days before election day, and with even less time than that before early voting in North Carolina began. Compl. (ECF 1-3) (Exhibit 1) at 2.[3] They allege that the North Carolina State Board of Elections (State Board), its members, and its executive director committed "a plain violation of Section 303 of the Help America Vote Act" (HAVA), and further allege that "because of" that violation, North Carolina's voter rolls "potentially" include ineligible voters. *Id.* ¶ 3.

Count one, which has now been dismissed with prejudice, *see* Op. (ECF 58) (Exhibit 2) at 44, sought a writ of mandamus to address an alleged violation of North Carolina General Statutes § 163-82.11(c), which requires the State Board to maintain North Carolina's voter rolls in compliance with HAVA. Compl. ¶¶ 77-88. Count two (the subject of

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[2] The State Board Defendants and the DNC prepared a joint Statement for purposes of conserving the Court's time and resources. This Statement duplicates the one in the DNC's separate Emergency Motion to Stay remand order Pending Appeal and Request for an Immediate Administrative Stay in Case No. 20-2045.

[3] ECF citations refer to the district court's docket.

this appeal) seeks a mandatory injunction to redress an alleged violation of the North Carolina Constitution based on the same purported violation in count one (i.e., the State Board's supposed failure to comply with both HAVA and its implementing state statute). *Id.* ¶¶ 90-92. To remedy both counts, plaintiffs requested "a court-approved plan" under which "ineligible registrants" will be "remov[ed] … from the state's voter registration lists." *Id.* at 19. If "removal is not feasible," then plaintiffs seek a court order requiring "all individuals who failed to provide necessary HAVA identification information but were still registered to vote under the state's prior registration form, to cast a provisional ballot in the upcoming elections pending" the State Board's "receipt and confirmation of the required HAVA information." *Id.* at 19-20.

The DNC intervened in superior court and filed a motion to dismiss, answer, and affirmative defenses. ECF 1-18, 1-19. The State Board subsequently removed the case, ECF 1, and then moved to dismiss both counts of plaintiffs' complaint for failure to state a claim. ECF 30, 31. The DNC filed a response supporting dismissal. ECF 48.

More than a week after removal, plaintiffs filed an "emergency" motion to remand to the superior court, ECF 37, 38, which the State Board and DNC opposed, ECF 49, 51. On October 17—the day early voting began in North Carolina—the district court held a hearing on the motions to remand and dismiss, and issued an opinion later that day resolving the motions. Op. 44.

The district court rejected plaintiffs' argument that removal of both claims had been improper, concluding that it had original jurisdiction over count one and supplemental jurisdiction over count two, Op. 33, and thus denied plaintiffs' emergency remand motion in full, Op. 44. It also dismissed count one with prejudice, concluding that plaintiffs lacked a private right of action to for its claim that the State Board violated HAVA "by failing to collect" the driver's license or social security numbers HAVA requires and "refusing 'to maintain accurate voters rolls.'" Op. 19, 42-44 (quoting Compl. at 18-19). But having dismissed count one, the district court "decline[d] to exercise supplemental jurisdiction over Count Two," the state constitutional claim, and remanded that claim. Op. 44 (quotation marks omitted). Count two, the court ruled, "raised a 'novel' issue of North Carolina

law," namely, "whether the State's noncompliance with state and federal election law can give rise to state constitutional injury." Op. 43. In the court's view, it would disrupt the federal-state balance for the federal courts to resolve a claim about the state constitution.

ARGUMENT

The district court's remand order should be stayed pending appeal because (1) defendants are likely to succeed on appeal in reversing that order; (2) defendants will be irreparably injured absent a stay; (3) a stay would impose no substantial harm on plaintiffs; and (4) the public interest overwhelmingly favors a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (enumerating these four factors for a stay pending appeal); *see also Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970).

I. The State Board Defendants Are Likely to Succeed on the Merits of Their Appeal.

The State Board Defendants properly removed Plaintiffs' second claim under two separate federal statutes and will prove as much on appeal.

1. First, removal of Plaintiffs' second claim was proper under 28 U.S.C. § 1441(a). With a few exceptions not relevant here, § 1441(a) allows a defendant to remove any claim over which a federal district

court would have original jurisdiction. "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal state balance approved by Congress." *Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 280 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 87 (2022).

Applying that test here confirms that Plaintiffs' second claim was properly removed. Plaintiffs' "state-constitutional" claim is ill-defined, but appears to be premised on a vote-dilution theory. Plaintiffs allege that the State Board failed to "maintain the state's voter rolls in a manner compliant with Section 303(a) of HAVA" by refusing to remove voters who registered using a form that did not clearly require their driver's license or social security number. Compl. ¶¶ 90, 94. According to Plaintiffs, the State Board's failure to remove those voters means that hundreds of thousands of illegitimate voters remain on the State's rolls, diluting the power of Plaintiffs' voters. Compl. ¶¶ 92, 94.

The voters' inclusion on the rolls, however, is illegitimate only if Plaintiffs are correct that HAVA requires the State Board to remove them. And the State Board strongly disagrees that HAVA requires any

such thing. Count two thus involves a federal question that is both "necessarily raised" and "actually disputed." *Old Dominion Elec. Coop.*, 24 F.4th at 280; *see also* Op. 17 n.2 (confirming that "Defendants and the DNC persuasively argued that Count 2 involves the same disputed issues pertaining to HAVA as Count One.").

The federal question that count two implicates is also "substantial." How the courts resolve Plaintiffs' constitutional claim—which, again, turns entirely on whether the State Board is violating HAVA—will decide whether nearly a quarter-of-a-million North Carolinians can vote this fall. And it could also influence whether other States are required to remove voters from their rolls for similar reasons. An issue with such a wide-ranging impact on the fundamental rights of voters across the country is "substantial" under any conventional understanding of that word.

That leaves only the final factor: whether federal question jurisdiction over this claim would fundamentally disrupt "the federal-state balance." *Old Dominion*, 24 F.4th at 280. Because, as the court below found, "Congress intended for federal courts to resolve core questions of statutory interpretation" involving HAVA, it is remand, not

removal, that would disrespect Congress's intended division of labor between federal and state courts.

In short, for all the same reasons the district court found removal of Plaintiffs' first claim to be proper, the State Board Defendants are likely to establish on appeal that removal of count two was proper as well.

2. The State Board Defendants will also show that removal of count two was proper under 28 U.S.C. § 1443. When state officials are sued for their refusal to take an action, and their refusal is based on a "law providing for equal rights," § 1443(2) allows the officials to remove the suit to federal court. Here, Plaintiffs demand that the State Board remove hundreds of thousands of eligible voters from the State's voter rolls in the middle of a general election. The State Board has refused to do that, in part because the National Voter Registration Act prohibits the State Board from systematically removing registered voters fewer than 90 days before an election. *See* 52 U.S.C. § 20507(c)(2)(A). Under these circumstances, removal is appropriate under § 1443(2).

The district court denied removal under 28 U.S.C. § 1443(2) because it concluded that the NVRA's prohibition on systematic removal

shortly before an election was not a law providing for equal rights. That conclusion was mistaken.

For purposes of § 1443(2), a "law providing for equal rights" is a law that "concern[s] racial equality." *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 309 (4th Cir. 2021) (citing *Georgia v. Rachel*, 384 U.S. 780, 792 (1966)). The NVRA is indisputably that kind of law. Congress enacted the NVRA to eliminate "discriminatory and unfair registration laws and procedures" that "have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3); see also S. Rep. 103-6, S. Rep. No. 6, 103rd Cong., 1st Sess. 1993, 1993 WL 54278 at *3 (Leg. Hist.) (noting that the statute was necessary to combat "discriminatory and unfair practices" that persisted in election administration notwithstanding the Voting Rights Act of 1965). And Congress enacted the 90-day quiet period at issue here specifically to remedy the nation's unfortunate history of racially discriminatory voter purges. *Id.* at *18 (noting that the process of voter removal "must be scrutinized" and "structured to prevent abuse which has a disparate impact on minority communities" to address the

"long history of such list cleaning mechanisms [being] used to violate the basic rights of citizens."). Accordingly, the NVRA is a law providing for equal rights that is capable of supporting this case's removal.

The court below acknowledged that racial equality was one of the NVRA's purposes, but nevertheless rejected removal under § 1443(2). Instead, the court concluded that removal under § 1443(2) was available only if the specific provision the State Board based its refusal on was "stated in terms of racial equality." Op. 36. That cramped reading of § 1443(2) is not supported by law.

As long as the purpose of the relevant statute generally is to advance racial equality, § 1443(2) removal is available, even if the specific statutory provision that motivated a state official's refusal does not expressly discuss race. In *Whatley v. City of Vidalia*, for instance, the Fifth Circuit affirmed removal under § 1443 where the defendants invoked 52 U.S.C. § 10101(b), a provision of the Voting Rights Act that prohibits threats against anyone who is encouraging others to register and vote. 399 F.2d 521, 526 (5th Cir. 1968). Like Section 20507(c)(2)(A) (the 90-day quiet period provision relevant here), the text of Section 10101(b) makes no specific mention of racial equality. But the Fifth

Circuit found the provision was nevertheless within § 1443(2)'s ambit because it provided "a right under a law providing for equal civil rights." *Id.* at 524. In other words, because the Voting Rights Act itself was intended to promote racial equality, the rights that it confers, even when phrased in general terms, are rights concerning racial equality.

The district court's contrary rule would produce strange results. For example, the Voting Rights Act's prohibition on literacy tests itself is not "specifically stated in terms of racial equality," but rather is phrased in generally applicable terms. Under the district court's test, then, the Voting Rights Act's prohibition on literacy tests, a quintessential civil-rights law, would not be "a law concerning racial equality." Other courts that have considered the VRA's prohibition on literacy tests have, understandably, taken a different view. *See O'Keefe v. N.Y.C. Bd. of Elections*, 246 F. Supp. 978, 979-80 (S.D.N.Y. 1965) (permitting § 1443(2) removal where defendant refused to reinstate a literacy test because doing so would violate the Voting Rights Act).

Because the State Board is refusing to take the actions that Plaintiffs request based on the NVRA, a law concerning civil rights, the

district court was wrong to conclude that removal under 28 U.S.C. § 1443(2) was improper.

3. Finally, even if the district court were not required to exercise jurisdiction over Plaintiffs' second claim, given the near total overlap in substance between Plaintiffs' first and second claims, the district court should not have declined to exercise supplemental jurisdiction over the second count. With the election already ongoing, bringing this case to a prompt resolution is critically important. The fastest way to accomplish that resolution would be for the court that is already familiar with this case to resolve (and dismiss) the only remaining claim.

Because count two was properly removed along with Count One, the State Board Defendants have a substantial likelihood of success on the merits of their appeal of the remand order.

II. The State Board Defendants Will Be Irreparably Harmed Absent a Stay.

The State Board Defendants will also suffer irreparable harm if this Court does not issue a stay.

Where a pending appeal addresses remand of a case, "a stay [is] appropriate to prevent rendering the statutory right to appeal hollow."

Citibank, N.A. v. Jackson, No. 16-cv-712, 2017 U.S. Dist. LEXIS 167155, at *6 (W.D.N.C. Oct. 10, 2017); *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, No. 1:16-cv-534, 2016 U.S. Dist. LEXIS 78864, at *10 (E.D. Va. June 16, 2016) (quoting *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Grp., Inc.*, No. 05-0451, 2005 WL 2237598, at *1 (M.D. Tenn. Sept. 12, 2005)); *see also Raskas v. Johnson & Johnson*, No. 12-cv-2174, 2013 U.S. Dist. LEXIS 60531, at *4 (E.D. Mo. Apr. 29, 2013) (same).

If the remand takes effect while this appeal is pending, and this Court declines to expedite, it is conceivable that the state court reaches final judgment before the State Board Defendants' appeal is resolved. *Northrop Grumman*, 2016 U.S. Dist. LEXIS 78864, at *11. And in any event, the loss of appellate rights alone constitutes irreparable harm. *CWCapital Asset Mgmt., LLC v. Burcam Capital II, LLC*, 2013 U.S. Dist. LEXIS 91488, at *17 (E.D.N.C. June 26, 2013).

Moreover, even if the state court does not enter final judgment before the appeal is resolved, if this Court ultimately reverses, the district court and state court will need to sort out what to make of the state-court proceedings that have transpired in the meantime. *Northrop*

Grumman, 2016 U.S. Dist. LEXIS at *13-14. This would create a "rat's nest of comity and federalism issues" that federal courts should strive to avoid. *Id.*

The irreparable harm that an appellant can face absent stay of a remand order was put in stark relief in *Bryan v. BellSouth Commc'ns, Inc.* 492 F.3d 231 (4th Cir. 2007). There, a remanded case proceeded in state court, while appeal of the remand proceeded in this Circuit. *Id.* at 235. The defendants prevailed on their appeal of the remand order. *Id.* But it was a pyrrhic victory because this Court declined to vacate the proceedings in state court, holding that "when a case has moved from the federal to the state court system, significant issues of comity arise." *Id.* at 242. Invalidating state court proceedings that took place while the appeal was pending would "be giving the state court system less respect than it is due." *Id.* This Court should avoid having to navigate a similar quandary here.

A stay is also necessary to ensure that the State Board Defendants are permitted to avail themselves of their right to a federal forum under the civil-rights removal statute. When state officials exercise "the extraordinary right of seeking removal," "it would seem to

be a significant indication that they are forgoing their accustomed forum because the federal issue they seek to litigate is so substantial." *White v. Wellington*, 627 F.2d 582, 590 (2d Cir. 1980) (Kaufman, J., concurring). The State Board Defendants should be permitted to access the federal forum that federal law guarantees them.

A stay pending appeal would also forestall a potentially unnecessary waste of the State Board Defendants' limited resources. Absentee voting has been ongoing in North Carolina for nearly a month, and early voting began yesterday. State elections officials are working around the clock to administer this election, particularly in the wake of the devastation wrought by Hurricane Helene. Without a stay, the State Board Defendants will have to litigate this case in two different fora, at a time when they should be focused on ensuring all eligible voters across North Carolina can participate in the democratic process.

III. Plaintiffs Will Suffer No Harm If the Remand Is Stayed Pending Appeal.

By contrast, there is little reason to think that Plaintiffs will suffer much—if any—harm if this Court grants a stay pending appeal. A stay does not limit Plaintiffs' ability to seek resolution of their only remaining claim, whether in state or federal court. If this Court affirms,

the parties will resume litigating in state court. *Northrop Grumman*, 2016 U.S. Dist. LEXIS at *12 ("a stay would not permanently deprive . . . access to state court."). And if the State Board Defendants prevail, the parties can resume litigating in federal court. Either way, the only harm that Plaintiffs can point to is the *possibility* of a brief delay in the resolution of their remaining claim. But courts in this Circuit have rejected the argument that delay alone constitutes sufficient harm to deny a stay. *Citibank, N.A.*, 2017 U.S. Dist. LEXIS 167155, at *7.

That is especially true where, as here, the parties are seeking expedited review of their appeal. If granted, expedited review will "all but eliminate[]" any harm that Plaintiffs might theoretically suffer. *Id.*

Moreover, should the State Board Defendants prevail in this appeal, a stay would actually benefit Plaintiffs because it would avoid costly and potentially wasteful state-court litigation. It would also relieve both parties of having to simultaneously litigate in state and federal court. *Brinkman v. John Crane, Inc.*, No. 4:14-cv-142, 2015 U.S. Dist. LEXIS 190137, at *8 (E.D. Va. Dec. 11, 2015).

IV. The Public Interest Is Served by Granting the Stay.

Finally, the public interest is best served by this Court's granting a stay pending appeal. The public has a strong interest in conserving judicial resources and reducing duplicative litigation in state and federal court. *Citibank, N.A.*, 2017 U.S. Dist. LEXIS 167155, at *7-8; *see also Scott v. Family Dollar Stores, Inc.*, No. 08-cv-00540, 2016 U.S. Dist. LEXIS 106317, at *2 (W.D.N.C. Aug. 11, 2016) (same). Plaintiffs have lodged serious (though wholly meritless) allegations against the Board, and it is in the public's interest to have them resolved as soon as possible. That said, the resolution of Plaintiffs' only remaining claim will only be further delayed if this Court reverses the remand order, and the claim has to then be relitigated in the district court. *Citibank, N.A.*, 2017 U.S. Dist. LEXIS 167155, at *8. A stay, then, protects the public interest by preserving the status quo and conserving both the courts' and the parties' resources.

Moreover, the public interest lies in avoiding the complex legal questions that will arise after the State Board Defendants succeed on appeal. When the State Board Defendants prevail, and the state-court proceedings are forced to terminate, the district court will have to

confront grave comity and federalism issues when deciding what weight (if any) to give to proceedings and judgments that occurred by mistake. *Bryan*, 492 F.3d at 242; *Northrop Grumman*, 2016 U.S. Dist. LEXIS at *13-14. This Court can and should prevent that scenario. *Bryan*, 492 F.3d at 242.

CONCLUSION

For the foregoing reasons, State Board Defendants ask this Court to stay the remand order pending appeal and to issue an immediate administrative stay pending a ruling on the stay motion. Intervenor-Defendant consents to this motion and has filed its own parallel motion for a stay. State Board Defendants reached out to Plaintiffs' counsel at approximately noon today, but never received word of Plaintiffs' position regarding the requested stay.

This the 18th day of October, 2024.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this motion complies with Fed. R. App. P. 27(d)(2)(C), 32(a)(5), 32(g)(1), and Local Rule 27.

This the 18th day of October, 2024.

/s/ Sarah G. Boyce
Sarah G. Boyce
Deputy Attorney General and
General Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will automatically serve electronic copies on all counsel of record.

This the 18th day of October, 2024.

/s/ Sarah G. Boyce
Sarah G. Boyce
Deputy Attorney General and
General Counsel

EXHIBIT 1

EXHIBIT A

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 24CV026995-910

REPUBLICAN NATIONAL COMMITTEE; and NORTH CAROLINA REPUBLICAN PARTY,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY EGGERS IV, KEVIN N. LEWIS, and SIOBHAN O'DUFFY MILLEN, in their official capacities as members of the North Carolina State Board of Elections,

Defendants

VERIFIED COMPLAINT

NOW COMES Plaintiffs the Republican National Committee ("RNC") and the North Carolina Republican Party ("NCGOP"), by and through undersigned counsel and, pursuant to Rule 7 of the North Carolina Rules of Civil Procedure file this Verified Complaint seeking a Writ of Mandamus compelling the North Carolina State Board of Elections ("NCSBE") and its members, Alan Hirsch, Jeff Carmon, Siobhan Millen, Stacy Eggers IV, and Kevin Lewis in their respective official capacities, and the NCSBE's Executive Director Karen Brinson Bell (collectively "Defendants") to fulfill their duties set forth in N.C. Gen. Stat. § 163-82.11 *et seq.* In support, Plaintiffs allege as follows:

INTRODUCTION

1. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Purcell v. Gonzalez*, 549 U.S. 1, 4, 166 L. Ed. 2d 1, 7 (2006).

2. Free and fair elections are the bulwark of the citizenry's trust in their government. Ensuring that qualified voters—and only qualified voters—are able to vote in elections is the cornerstone of that compact between the state and its citizens. But trust must be earned.

3. The North Carolina State Board of Elections ("NCSBE") betrayed that trust when it allowed over 225,000 people to register to vote with registration forms that failed to collect certain required identification information before the registration forms were processed, a plain violation of Section 303 of the Help America Vote Act ("HAVA"). Because of these errors, the North Carolina voter rolls, which both HAVA and state law mandates that Defendants regularly maintain, are potentially replete with ineligible voters—including possible non-citizens—all of whom are now registered to vote.

4. By failing to collect certain statutorily required information prior to registering these applicants to vote, Defendants placed the integrity of the state's elections into jeopardy.

5. Defendants admit they violated HAVA and, as a result, state law. Yet, even when concerned citizens brought these issues to their attention, Defendants inexplicably refused to correct their wrongs. All Defendants offer as a solution is a half-hearted promise that those who were ineligible to register but were allowed to anyway will naturally filter themselves out from the state's voter rolls when they conduct other election-related activities.

6. This inaction misses the mark. Not only does this "solution" fail to remedy the ongoing violations of state and federal law or account for Defendants' responsibilities under the same, but it leaves North Carolinians to wonder how they can trust in the security of their elections, especially when those tasked with protecting their rights cannot be bothered to do what is required by law.

7. Even worse, this "solution" sends the message to the millions of duly qualified and registered voters in North Carolina that their chief elections officials will shirk their responsibilities and refuse to verify whether those who vote in the state's elections are entitled to do so in the first place.

8. This ominous message eviscerates confidence in North Carolina's elections and it ensures that *Purcell*'s warning of distrust and disenfranchisement may soon come true.

9. By failing to do the required work to determine if Defendants' violation of HAVA has resulted in the registration of ineligible voters, and thereby allowing unlawfully registered persons to vote in the state's elections, Defendants' actions further jeopardize the individual right to vote that is guaranteed to every qualified voter in North Carolina. *See,* N.C. Const. art. VI § I; *see also Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

10. With the November 2024 election fast approaching, North Carolinians cannot afford to simply wait and see. Defendants admit they violated federal law. Now, they must be required to remedy their actions before these failures impact the results of the 2024 elections.

PARTIES

11. The Republican National Committee is the national committee for the Republican Party; representing all registered Republicans across both the state and nation, as well as the values

they stand for. The RNC serves as the collective voice for the Republican Party's platform. It is the national committee of the Republican Party as defined by 52 U.S.C. § 30101(14) and a political party as defined by N.C. Gen. Stat. § 163-96. The RNC's principal place of business is 310 First Street SE, Washington, D.C.

12. The RNC's core mission involves organizing lawful voters and encouraging them to support Republican candidates at all levels of government, including throughout North Carolina. The RNC expends significant time and resources fighting for election security and voting integrity across the nation, including in North Carolina. These efforts are intended to ensure that the votes and voices of its members, its candidates, and the party are not silenced or diluted in any way. Recent rises in non-citizens and other unqualified persons voting or seeking to vote in elections has forced the RNC to divert its efforts and funds in order to hold elections officials accountable to what both federal and state laws require.

13. The North Carolina Republican Party is a state committee of the Republican Party, as defined by 52 U.S.C. § 30101(15), and a political party as defined by N.C. Gen. Stat. § 163-96. The NCGOP represents the interests of registered Republicans across North Carolina. Its headquarters and principal place of business is 1506 Hillsborough St, Raleigh, NC 27605. The NCGOP represents the interests of registered Republican voters, residing across all one hundred counties in the state. The NCGOP also advocates for the interests of tens of thousands of non-affiliated voters who align with various aspects of the Republican Party platform.

14. The NCGOP's mission and platform largely mirror that of the RNC, including an emphasis on election integrity and security. The NCGOP's core mission includes counseling interested voters and volunteers on election participation including hosting candidate and voter registration events, staffing voting protection hotlines, investigating reports of voter fraud and

disenfranchisement, and providing election day volunteers in all one hundred counties across North Carolina. The NCGOP spends tremendous time and effort advocating for its members throughout all levels of state government, working to make sure they are heard both at the ballot box and beyond.

15. Plaintiffs have organizational standing to bring this action. Defendants' actions and inaction directly impact Plaintiffs' core organizational missions of election security and providing services aimed at promoting Republican voter engagement and electing Republican candidates for office. Defendants' violations of HAVA and the subsequent refusal to remedy their wrongdoing, in accordance with what state law requires, has forced Plaintiffs to divert significantly more of their resources into combatting election fraud in North Carolina. Plaintiffs' organizational and voter outreach efforts have been and will continue to be significantly stymied due to Defendants' ongoing failures. As a result, Plaintiffs will have no choice but to expend increased amounts of time and money, beyond what they would have already spent, in order to combat this unwarranted interference with their central activities. For example, because of Defendants' violations of state law, Plaintiffs will need to commit added time and resources into monitoring North Carolina's voter rolls, voter activity, and responding to instances of potential voter fraud in upcoming elections, tasks required of Defendants under state and federal law.

16. Additionally, NCGOP has associational standing because its members have standing in their own right to challenge Defendants' actions here. NCGOP represents millions of registered Republican voters across the state of North Carolina, including at least one registered Republican voter in every one of the state's one hundred counties, which is a matter of public record. NCGOP's members are harmed by these inaccurate voter rolls as well as Defendants' ongoing HAVA and state law violations. These members' votes are undoubtedly diluted due to

ineligible voters participating in elections due to Defendants' statutory violations. Additionally, these members' rights to participate in a fair and secure electoral process, free from voter fraud, will be significantly hindered. Ensuring such freedom and security in all elections throughout North Carolina is germane to the NCGOP's organizational mission.

17. Plaintiffs are further harmed in their ability to effectively compete in elections across the state as Defendants' refusal to maintain accurate and updated voter rolls risks opening the door to potentially fraudulent votes and inaccurate election results. This harm is especially palpable considering North Carolina's party-based primary system which makes verifying the accuracy of each voter registration form that much more crucial.

18. The North Carolina State Board of Elections is the state agency tasked with "general supervision over primaries and elections of the state." *See* N.C. Gen. Stat. § 163-22. NCSBE is tasked with ensuring that elections in North Carolina comply with all relevant state and federal laws and, in NCSBE's own words, "ensur[ing] that elections are conducted lawfully and fairly."[1]

19. Karen Brinson Bell is the Executive Director of NCSBE and the state's "Chief Election Official" as defined by N.C. Gen. Stat. § 163-82.2. In this capacity, Ms. Brinson Bell oversees elections in all one hundred counties in North Carolina and administering all elections occurring therein. *See* N.C. Gen. Stat. § 163-27(d). Ms. Brinson Bell is sued in her official capacity.

20. Alan Hirsch is the Chair of NCSBE. He resides in Chapel Hill, North Carolina. Mr. Hirsch is sued in his official capacity.

21. Jeff Carmon is the Secretary of NCSBE. He resides in Snow Hill, North Carolina. Mr. Carmon is sued in his official capacity.

[1] https://www.ncsbe.gov/about

22. Stacy Eggers, IV is a member of NCSBE. He resides in Boone, North Carolina. Mr. Eggers, IV is sued in his official capacity.

23. Kevin N. Lewis is a member of NCSBE. He resides in Rocky Mount, North Carolina. Mr. Lewis is sued in his official capacity.

24. Siobhan O'Duffy Millen is a member of NCSBE. She resides in Raleigh, North Carolina. Ms. Millen is sued in her official capacity.

JURISDICTION AND VENUE

25. This Court has jurisdiction over the claims asserted herein pursuant to N.C. Gen. Stat. § 7A-245.

26. This Court has personal jurisdiction over NCSBE as it is a state agency in North Carolina.

27. This Court has personal jurisdiction over Executive Director Karen Brinson Bell, Chair Alan Hirsch, Secretary Jeff Carmon, Stacy Eggers IV, Kevin Lewis, and Siobhan O'Duffy Millen as each is sued in their official capacities as appointed officials in North Carolina. Each is a citizen of North Carolina and each resides in the state.

28. Venue is proper in this court pursuant to N.C. Gen. Stat. § 1-82.

FACTUAL ALLEGATIONS

29. Defendants are required to maintain accurate and updated statewide voter registration lists ("voter rolls"). N.C. Gen. Stat. § 163-82.11.

30. In addition to other standards, Defendants must ensure that the voter rolls are in full compliance with the requirements of Section 303 of HAVA. *Id.* at § 163-82.11(c) ("The State Board of Elections *shall* update the statewide computerized voter registration list and database to meet the requirements of section 303(a) of [HAVA].") (emphasis added).

31. Due to this express mandate that North Carolina's voter rolls must be maintained in a manner compliant with section 303(a) of HAVA, it is important to review what that section requires of Defendants. This, in turn, illustrates Defendants' failure to fulfill their statutory duties under state law.

32. Congress, through HAVA, set requirements for how states must implement and maintain their voter rolls. *See, e.g.*, 52 U.S.C. § 21081, 21082, and 21083.

33. Among other standards, HAVA mandates that states must implement computerized statewide voter rolls to serve as the "single system for storing and managing the official list of registered voters throughout the State." *Id.* at § 21083(a)(1)(A)(i).

34. HAVA goes on to require that the rolls will "be coordinated with other agency databases within the state" and that "[a]ll voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official." *Id.* at § 21083(a)(1)(A)(iv), (vi).

35. HAVA further provides that "[t]he computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State." *Id.* at (viii).

36. Once a state has established the computerized voter registration list required by HAVA, 52 U.S.C. § 21083(a)(2) provides certain actions the state must take to ensure the list is accurately maintained "on a regular basis." *Id.*

37. Importantly, these maintenance instructions include processes and procedures for removing the names of ineligible voters from the state's voter rolls. *Id.* at § 21083(a)(2)(A). HAVA also sets the standard of conduct for voter roll maintenance, requiring the state to ensure that: "(i) the name of each registered voter appears in the computerized list; (ii) only voters who are not

registered or who are not eligible to vote are removed from the computerized list; and (iii) duplicate names are eliminated from the computerized list." *Id.* at § 21083(a)(2)(B).

38. Next, HAVA mandates that states maintain the technological security of their voter rolls, requiring the states to implement provisions making "a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." *Id.* at § 21083(a)(3)(4).

39. In addition to setting the standards for establishing and maintaining accurate state voter rolls, HAVA has a clearly described process for verifying the identification of applicants registering to vote. *See id.* at § 21083(a)(5)(A)(i).

40. First, it requires that applicants provide either a driver's license number or the last four digits of their social security number. Providing this information is a necessary prerequisite **before** the registration form can be processed by the state. *Id.* at § 21083 (viii). In fact, § 21083(a)(5) prevents a state from accepting a voter registration form for an election for Federal office unless the form includes the listed information. *Id.*

41. Only if a registrant affirmatively confirms they do not have either form of identification, the state must "assign the applicant a number which will serve to identify the applicant for voter registration purposes . . . [which] shall be the unique identifying number assigned under the list." *Id.* at § 21083(a)(5)(A)(ii).

42. Prior to December 2023, NCSBE used voter registration forms that failed to collect this required information. Specifically, NCSBE collected, processed, and accepted voter registration applications that lacked **both** the driver's license number and social security number because NCSBE's form did not tell the voter the information was required.

43. As a result of these errors, voters did not utilize the catchall provision of § 21083(a)(5)(A)(ii) as the registration forms failed to make registrants aware that the driver's license or social security number identifying information was necessary for the application to be processed. Thus, any affirmative attestation regarding one's lack of those relevant documents was impossible.

44. Defendants ignored HAVA's requirement that the identifying information be collected before an application can be accepted and processed. As a result, NCSBE accepted hundreds of thousands of voter registration applications without applying the HAVA identifying information requirement, resulting in approximately 225,000 applicants being registered to vote in a manner out-of-compliance with HAVA.

I. ***Defendants Admit They Used Voter Registration Forms Which Were HAVA Non-Compliant***

45. In North Carolina, an individual must register to vote prior to voting. *See* N.C. Gen. Stat. §§163-54, 163-82.1(a); *see also* N.C. Const. art. VI § 3(1).

46. The state's registration form asks certain information, seeking to ascertain whether the applicant is qualified to vote under applicable state and federal laws. N.C. Gen. Stat. §163-82.4(e). In addition to the information on the form, an elections official may ask an applicant for other "information [that is] necessary to enable officials of the county where the person resides to satisfactorily process the application." *Id.* at § 163-82.4(a).

47. Despite the informational requirements mandated by both state and federal law—along with the processes and procedures under state law for obtaining the same information—Defendants wholly failed to uphold their statutory duties.

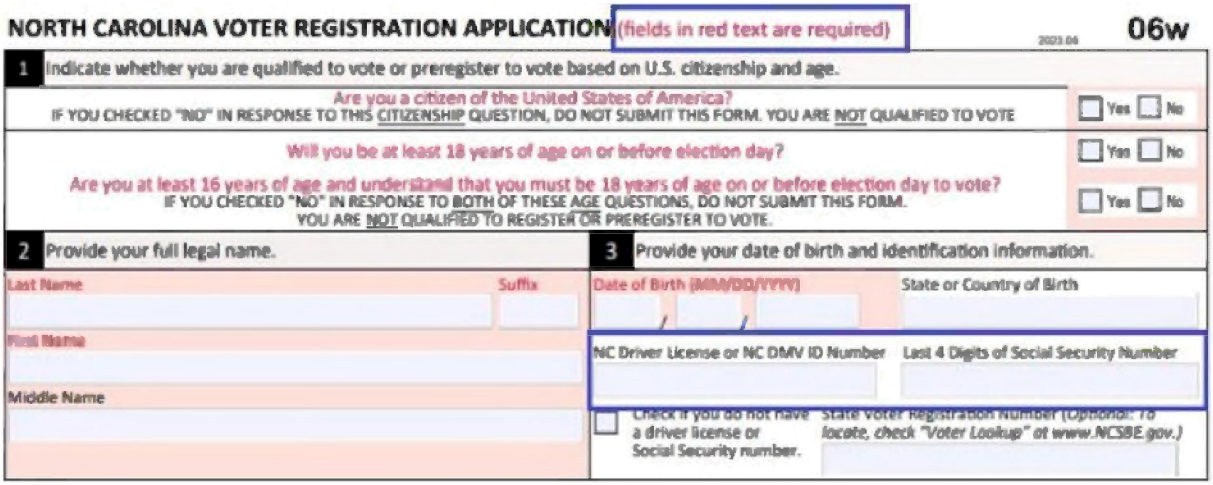
48. Defendants' noncompliance with HAVA was first raised when a concerned citizen, Carol Snow, filed a complaint with NCSBE on October 6, 2023. (hereinafter, "Snow Amended HAVA Complaint").[2]

49. In her complaint, Ms. Snow alleged that NCSBE's voter registration form, which was still in use at the time of her filing, failed to indicate that "the applicant's qualifying identification of the applicant's driver's license number or last 4 digits of the applicant's social security number, are required if one or the other have been issued to the applicant." *See* Snow Amended HAVA Complaint, p. 1.

50. As Ms. Snow's complaint pointed out, the relevant portion of NCSBE's voter registration form then in use identified certain categories of **required** information by denoting them in text blocks with red background. This is contrasted by the white background used for **optional** categories of information on the form. Despite HAVA requiring either a driver's license number or the last four digits of a social security number be provided by the applicant, the registration form had a white text box background for this information, not red. *See* Fig. 1, below; *see also* Snow Amended HAVA Complaint, p. 2. The applicant had no way to know from the form that the driver's license number or the social security number were required for their form to be accepted and processed by NCSBE.

[2] Publicly available at: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2023-11-28/Snow%20Amended%20HAVA%20Complaint.pdf

Fig. 1 – NCSBE Voter Registration Form Prior to NCSBE's December 6, 2023 Order



NORTH CAROLINA VOTER REGISTRATION APPLICATION (fields in red text are required) 2023.04 06w

1 Indicate whether you are qualified to vote or preregister to vote based on U.S. citizenship and age.

Are you a citizen of the United States of America? Yes No

IF YOU CHECKED "NO" IN RESPONSE TO THIS CITIZENSHIP QUESTION, DO NOT SUBMIT THIS FORM. YOU ARE NOT QUALIFIED TO VOTE

Will you be at least 18 years of age on or before election day? Yes No

Are you at least 16 years of age and understand that you must be 18 years of age on or before election day to vote? Yes No

IF YOU CHECKED "NO" IN RESPONSE TO BOTH OF THESE AGE QUESTIONS, DO NOT SUBMIT THIS FORM. YOU ARE NOT QUALIFIED TO REGISTER OR PREREGISTER TO VOTE.

2 Provide your full legal name.

Last Name Suffix

First Name

Middle Name

3 Provide your date of birth and identification information.

Date of Birth (MM/DD/YYYY) State or Country of Birth

NC Driver License or NC DMV ID Number Last 4 Digits of Social Security Number

Check if you do not have a driver license or Social Security number. State Voter Registration Number (Optional: To locate, check "Voter Lookup" at www.NCSBE.gov.)

51. At its meeting on November 28, 2023, NCSBE considered Ms. Snow's complaint. At the meeting[3] and in its December 6, 2023 Order,[4] NCSBE acknowledged that its voter registration forms did not sufficiently notify applicants that their driver's license number or last four digits of their social security number were required in order for their registration to be processed and accepted.

52. Defendants further acknowledged that they used the voter registration form which failed to comply with HAVA for approximately 225,000 voters throughout North Carolina.[5]

53. It follows then, that by failing to comply with HAVA, Defendants admittedly violated their duties under N.C. Gen. Stat. § 163-82.11(c).

54. Ultimately, Defendants granted Ms. Snow's request to change the voter registration form **moving forward**.

[3] Meeting documents and a recording of NCSBE's November 28, 2023 meeting is available here: dl.ncsbe.gov/?prefix=State_Board_Meeting_Docs/2023-11-28/

[4] The December 6, 2023 Order from NCSBE is available here: https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Other/2023%20HAVA%20Complaint%20-%20Snow.pdf

[5] Given that NCSBE could approximate the number of voters registered in this manner, Defendants, upon information and belief, have the ability to track which voters were registered using the non-compliant form and thus, can contact those voters and request the missing information from them.

55. In contrast, Defendants denied Ms. Snow's request to identify and contact voters whose registrations were improperly accepted due to their forms lacking the necessary identification information. Specifically, Defendants took the position that:

a. HAVA does not authorize NCSBE to contact registered voters (as opposed to applicants)[6]; and

b. Even if those registered voters did not provide the required identification information as part of their application, they would have to provide other identifying information in connection with other features of the voting process, such as requesting an absentee ballot.

56. Recognizing the inadequacy of Defendants'' "solution," Ms. Snow raised the need to actually remedy these improper registrations during NCSBE's March 11, 2024 and April 11, 2024 meetings. Both times NCSBE denied Ms. Snow's requests.

57. Under the plain text of HAVA, NCSBE should not have accepted or processed these registration forms since they lacked either the required identification or an affirmative attestation that the registrant did not have the necessary information. *See* 52 U.S.C. §21083(a)(5).

58. Similarly, Defendants should have taken immediate action to correct the accuracy of the state's voter rolls, a task mandated by HAVA and, in turn, state law. *See id.* at §21083(a)(2); *see also* N.C. Gen. Stat. § 163-82.11(c).

[6] Curiously, this position is not supported by the plain language of HAVA which provides, among other things, processes for identifying and removing the names of "ineligible **voters**" from the state's voter rolls. *See* 52 U.S.C. § 21083(a)(2)(A)(B). To the extent Defendants believe HAVA only allows them to notify applicants of issues with their registration forms, *see id.* at § 21083(4), Defendants failed to do so on the front end and instead, improperly processed and accepted their registration forms. Thus, NCSBE's logic is self-defeating; it cannot violate the statute by allowing these invalid applicants to become registered voters, only to then say they cannot contact them because those registrants are not "applicants."

59. Nevertheless, public records provided by Defendants reveal that 225,000 voter registrations were processed and accepted despite missing both the applicant's driver's license number and the last four digits of the registrant's social security number.

60. Thus, Defendants' refusal to correct their violations is unjustifiable.

61. Defendants' dismissal of Ms. Snow's straightforward solution is irreconcilable with their duties, and it damages lawfully-registered North Carolina voters and candidates, including Republican voters who are members of Plaintiffs, and Republican candidates whom Plaintiffs and their members support.

II. *Despite Their Errors, Defendants Refuse to Identify Unqualified Voters or Remove Them From The State's Voter Rolls*

62. HAVA places the burden on the state to "determine whether the information provided by an individual is sufficient to meet the requirements of [the statute]." *See* 52 U.S.C. § 21083(a)(5)(A)(iii). Similarly, N.C. Gen. Stat. § 163-82.11(c) mandates that the state maintain its voter rolls in accordance with what HAVA requires.

63. Through this affirmative directive—along with the other enumerated requirements throughout the statute—Defendants either knew or should have known that they were tasked with ensuring that only properly completed registration forms were accepted and processed. Even still, Defendants permitted hundreds of thousands of people to register without providing the basic information HAVA requires.

64. After this failure, Defendants should have immediately taken action to remedy this mistake, including confirming that ineligible voters were not on the state's voter rolls. *See* 52 U.S.C. § 21803(a)(2)(A)(B); *see also* N.C. Gen. Stat. § 163-82.11(c).

65. By declining to uphold their statutory duties, Defendants violated both state and federal law, irreparably damaged North Carolina voters, the NCGOP, the RNC, and their

organizational missions, and most importantly, their members. Defendants opened the door to insecure elections in North Carolina, marred by potentially fraudulent votes.

III. *By Failing to Correct Their HAVA Violations, Defendants Place Foundational Election Principles Into Jeopardy*

66. Many states, including North Carolina, have recently confronted issues relating to non-citizens and other ineligible persons attempting to register to vote. *See, e.g.,* N.C. Gen. Stat. § 163-82.14(c1).[7]

67. North Carolina's statutory requirements notwithstanding, Defendants' failure to require necessary HAVA identification information before processing and accepting hundreds of thousands of voter registration forms allowed untold numbers of ineligible voters to register. Now, those ineligible voters could vote in the upcoming November 5, 2024 election and beyond.

68. Upon information and belief, Defendants' violations of HAVA allowed non-citizens to register to vote in North Carolina, in direct contravention of both federal and state law. *See, e.g.,* N.C. Const. art. VI §I.

69. By allowing ineligible voters to register and then remain on the North Carolina voter rolls, Defendants have brought the security and validity of the state's elections into question.

70. Even worse, by refusing to correct their errors, Defendants are willfully ignoring their statutory responsibilities.

71. If Defendants do not remove ineligible voters from the state's voter rolls, then the legitimate votes of qualified voters will be diluted and disenfranchised in upcoming elections. This

[7] On Wednesday, August 21, 2024, Ohio announced that it had identified at least 597 non-citizens who registered and/or voted in recent elections. This finding was precipitated by a comprehensive statewide audit which identified 154,995 ineligible registrants on the state's voter rolls. *See* https://apnews.com/article/ohio-voters-citizenship-referrals-42799a379bdda8bca7201d6c42f99c65 [last accessed 08.22.2024].

reality will, in turn, have a substantial chilling effect on North Carolinians' right to vote in free and fair elections. *See* N.C. Const. art. I §10.

IV. ***Remedying These Errors Will Not Burden NCSBE***

72. Defendants already maintain processes for seeking out additional information from voters who fail to provide necessary information.

73. For example, the county boards of elections regularly contact voters who vote with a provisional ballot on election day, seeking additional identifying information from these voters as part of post-election day processes.

74. Notably, accurate voter roll maintenance, including removing the names of ineligible voters from voting rolls, is already required by HAVA and state law. *See* 52 U.S.C. § 21083(a)(2)(A)(B); N.C. Gen. Stat. § 163-82.11(c). Thus, any burden on Defendants in terms of time required to correct the state's voter rolls is mitigated by the fact that federal law mandates the same.

75. Unlike the minimal burden Defendants would face if required to correct the state's voter rolls in compliance with federal law, the burden placed on Plaintiffs is palpable. Absent immediate corrective action by Defendants, the significant harm faced by Plaintiffs will only increase. Not only will Plaintiffs' members be disenfranchised, but Plaintiffs' mission of advocating for Republican voters, causes, and candidates will be impeded by contrary votes of potentially ineligible voters.

76. With the November 5, 2024 election now three months away, early voting starting in less than two months, and ballots being mailed starting September 6, 2024, it is exceedingly important that Defendants take immediate actions to correct their wrongs, guaranteeing that qualified voters are able to vote, while preventing ineligible persons from trying to do the same.

CLAIMS FOR RELIEF

COUNT ONE: VIOLATION OF N.C.G.S. § 163-82.11(c) – WRIT OF MANDAMUS

77. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

78. North Carolina law unambiguously requires Defendants to maintain the state's voter rolls in a manner compliant with Section 303 of HAVA. N.C. Gen. Stat. § 163-82.11(c).

79. Section 303 of HAVA requires that North Carolina create a computerized statewide voter registration list containing the names and registration information of every legally registered voter. 52 U.S.C. § 21083(a)(1)(A).

80. HAVA similarly mandates that North Carolina verify the accuracy of a prospective voter's registration information, **prior** to accepting the registration. Specifically, the state must collect the registrant's driver's license number or last four digits of their social security number or, alternatively, the registrant must affirmatively attest that they have neither. *Id.* at § 21083(a)(5)(A).

81. HAVA also requires that Defendants regularly review and maintain the accuracy of the state's voter registration list, including, if applicable, removing ineligible persons from the voter roll. *Id.* at § 21083(a)(2)(4).

82. North Carolina law similarly mandates the collection of certain identification information from applicants, creating certain tools for verification of the same. *See* N.C. Gen. Stat. §§163-54, 163-82.1(a); 163-82.4 (a)(e).

83. Upon information and belief, Defendants failed to collect the statutorily required information from at least 225,000 registrants whose registrations were, in turn, processed and accepted despite lacking this necessary information.

84. Upon information and belief, even once this error was identified and corrected on a forward-looking basis, NCSBE refused, and continues to refuse, to contact these registrants or

verify if they have the necessary information in order to correct the accuracy of the state's voter registration list.

85. Not only does the language of N.C. Gen. Stat. § 163-82.11(c) create a duty for Defendants to maintain accurate voter rolls in compliance with HAVA, but Defendants have no discretion or permissible freedom to deviate from this mandate.

86. It is without dispute that, even when this was brought to their attention, Defendants failed to act. In fact, Defendants affirmatively refused to act and correct the accuracy of the state's voter rolls as to be compliant with HAVA.

87. Due to Defendants' unambiguous refusal to act, even after acknowledging their own violation of the law, Plaintiffs have no other adequate remedy than to seek relief from this Court.

88. Unless enjoined and ordered to comply with their statutory duties, Defendants will continue to violate state law by refusing to maintain accurate voter rolls and declining to remedy the 225,000 voter registrations that should have never been processed or accepted in the first place.

COUNT TWO: VIOLATION OF N.C. CONST. ART. I § 19 – MANDATORY INJUNCTION

89. The foregoing paragraphs are incorporated by reference as if fully set forth herein.

90. As described more fully above, Defendants have a non-discretionary, statutory duty to maintain the state's voter rolls in a manner compliant with Section 303(a) of HAVA.

91. N.C. Gen. Stat. § 163-82.11(c) is an affirmative command, creating a duty imposed by law.

92. Defendants admit they failed to uphold this duty when they accepted hundreds of thousands of voter registrations which were plainly non-compliant with Section 303(a) of HAVA.

93. Despite this admission, Defendants refuse to take any action to remedy their violations.

94. Defendants' actions directly interfere with North Carolinian's fundamental right to vote. By allowing potentially ineligible persons to vote in the state's elections and remain on the state's voter rolls, Defendants have ignored their statutory and constitutional duties while simultaneously opening the door to potential widespread dilution of legitimate votes in upcoming elections.

95. Defendants cannot offer any legitimate justification, let alone a compelling interest, for this dereliction of duty.

96. Defendants must be ordered to immediately and permanently rectify this harm in order to protect the integrity of North Carolina's elections.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a writ of mandamus and a mandatory injunction ordering Defendants to develop, implement, and enforce practices and policies to ensure compliance with HAVA and, in turn, N.C. Gen. Stat. § 163-82.11(c);
2. Direct Defendants, under a court-approved plan to be completed no later than September 6, 2024, including mandatory reporting and monitoring requirements, to take all actions necessary to remedy their violations of state law and HAVA, specifically, identifying all ineligible registrants and removing them from the state's voter registration lists in a manner consistent with state and federal law, and to the extent such removal is not feasible prior to the date set forth herein, then direct Defendants to require all individuals who failed to provide necessary HAVA identification information but were still registered to vote under

the state's prior registration form, to cast a provisional ballot in upcoming elections pending Defendants' receipt and confirmation of the required HAVA information;

3. Direct Defendants, under a court-approved plan including mandatory reporting and monitoring requirements, to take all actions necessary to ensure future compliance with state law and HAVA, specifically, registering only eligible, qualified voters in a manner consistent with both statutes and maintaining the state's voter registration lists in accordance therewith;
4. Award Plaintiffs their reasonable attorney's fees, litigation expenses, and associated costs incurred in connection with this action, as otherwise permitted by law;
5. Retain jurisdiction over this matter to ensure Defendants comply with any orders issued by this Court; and
6. Grant such additional relief deemed just and proper.

This, the 23rd day of August, 2024.

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VERIFICATION

I, Matthew Trudge, affirm under the penalty of perjury, that the foregoing representations in this Verified Complaint are true to my own knowledge, except as to matters stated upon information and belief, and as to those matters, I believe them to be true.

By: Matthew J. Trudge

Executive Director, NCGOP

Date: 08/23/2024

Wake County

STATE OF NORTH CAROLINA

Sworn and subscribed to me on this, the 23 day of August, 2024

BROOKE PETERSON NOTARY PUBLIC WAKE COUNTY, N.C. MY COMMISSION EXPIRES 7/19/2027

Brooke Peterson

Notary Public

My commission expires: 07-19-27

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

Case No. 5:24-CV-00547-M

REPUBLICAN NATIONAL COMMITTEE and NORTH CAROLINA REPUBLICAN PARTY,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,

Defendants,

and

DEMOCRATIC NATIONAL COMMITTEE,

Intervenor Defendant.

ORDER

This matter comes before the court on Defendants' motion to dismiss [DE 30] and Plaintiffs' emergency motion to remand [DE 37]. The court ordered an expedited briefing schedule on each motion. DE 36; DE 39. Plaintiffs responded to Defendants' motion and Defendants responded to Plaintiffs' motion. DE 50; DE 51. Intervenor Defendant Democratic National Committee (the "DNC") filed a response in support of Defendants' motion and a response in opposition to Plaintiffs' motion. DE 48; DE 49. Plaintiffs and Defendants also filed reply briefs. DE 52; DE 53. The court then held a hearing on both motions on October 17, 2024.

The court appreciates the parties' compliance with the expedited briefing order and commends them for the comprehensive arguments they presented on a compressed timeline. In

considering all the written submissions and the oral arguments made, the court does find that Count One of the Complaint raises a disputed and substantial issue of federal law. The court may therefore exercise subject matter jurisdiction over that claim (and supplemental jurisdiction over Count Two), and further finds that Count One fails on the merits because it provides no private right of action. Accordingly, the court dismisses Count One with prejudice, declines to exercise supplemental jurisdiction over Count Two, and remands that claim to state court.

I. CASE HISTORY

Plaintiffs initiated this action in North Carolina state court on August 23, 2024. *See* DE 1-3 at 23. The Complaint contends that Defendants violated state law that requires the North Carolina State Board of Elections ("NCSBE") to comply with Section 303(a) of the Help America Vote Act ("HAVA"). *Id.* at 3, 10-11, 18-19; N.C.G.S. § 163-82.11(c). One relevant provision of HAVA obligates states to collect, in connection with a voter's registration, either the applicant's driver's license number or the last 4 digits of the applicant's social security number (or an affirmation that the applicant has neither). 52 U.S.C. § 21083(a)(5)(A).

Notwithstanding HAVA's dictates, the Complaint alleges that Defendants' voter registration form made optional the fields on the form where applicants would provide either their driver's license number or the last 4 digits of their social security number. DE 1-3 at 12. The Complaint further alleges that, as a result, applicants would "ha[ve] no way to know from the form that the driver's license number or the social security number were required for their form to be accepted and processed by [Defendants]." *Id.* A concerned citizen realized this flaw on the form and filed an administrative complaint with Defendants. *Id.* According to the Complaint, Defendants acknowledged that the voter registration form created the risk of HAVA violations, modified the form prospectively so that it would fully comply with federal law, but declined the

citizen's request that they "identify and contact voters whose registrations were improperly accepted." *Id.* at 13-14.

Defendant's alleged noncompliance with HAVA has resulted in "NCSBE accept[ing] hundreds of thousands of voter registration applications without applying the HAVA identifying information requirement." *Id.* at 11. Citing concerns about the potential for voter fraud and vote dilution, Plaintiffs brought this action, raising two claims for relief. *Id.* at 18-20. First, Plaintiffs bring a state law claim under N.C.G.S. § 163-82.11(c), which requires the state to maintain its voter registration list in compliance with Section 303(a) of HAVA. *Id.* at 18-19. Second, Plaintiffs raise a direct claim under the North Carolina Constitution, alleging that "Defendants' actions directly interfere with North Carolinian's fundamental right to vote." *Id.* at 19-20. Plaintiffs seek a court order that Defendants remedy their prior noncompliance with HAVA, including by either removing any ineligible voters from voter registration lists or by requiring registered voters who did not provide HAVA identification information at the time of their application to cast a provisional ballot. *Id.* at 20-21.

While this action was pending in state court, the DNC moved to intervene. DE 1-16 at 2. That motion was granted on September 10. DE 1-18 at 3. Approximately two weeks later, Defendants removed the action to this court. DE 1 at 1-3. Once in federal court, the North Carolina State Conference of the NAACP and two individual voters also sought to intervene. DE 19. The court denied that motion. DE 29.

Plaintiffs now seek remand to state court. DE 37. They argue that remand is warranted because their "complaint raises no federal question." DE 38 at 4. They further assert that removal under 28 U.S.C. § 1443(2) was improper because Defendants have not refused to enforce any discriminatory state law. *Id.* at 9-10.

Defendants oppose remand and argue for dismissal of Plaintiffs' complaint. DE 30; DE 51. In support of dismissal, Defendants contend that the doctrine of laches bars Plaintiffs' claims. DE 31 at 12. They also assert that the Complaint fails to state a claim upon which relief may be granted. *Id.* at 16-25. The DNC raised several arguments in support of dismissal and in opposition to remand. DE 48; DE 49. These matters are ripe and ready for decision.

II. LEGAL PRINCIPLES

There exist two possible paths to establishing subject matter jurisdiction in this action. First, the claims could raise a federal question under 28 U.S.C. § 1331, which would permit removal under 28 U.S.C. § 1441(a). Second, the action could implicate a federal law providing for equal rights in terms of racial equality, which would authorize removal under 28 U.S.C. § 1443(2). The court discusses each in turn.

a. Federal Question Jurisdiction: 28 U.S.C. §§ 1331, 1441(a)

"Federal courts are courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A federal district court is authorized to exercise subject matter jurisdiction over a "civil action brought in a State court" and removed to federal court, but only if the court would have had "original jurisdiction" if the action were brought in federal court in the first instance. 28 U.S.C. § 1441(a); *Sonoco Prod. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 370 (4th Cir. 2003) ("Typically, an action initiated in a state court can be removed to federal court only if it might have been brought in federal court originally.") (internal brackets and quotation mark omitted). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

Subject matter jurisdiction "involves a court's power to hear a case" and "can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Consequently, this court "ha[s] an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). This obligation "must be policed" because it keeps the court "within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

This court's subject matter jurisdiction extends "to all Cases, in Law and Equity, arising under th[e United States] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2. "That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal-question jurisdiction." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 807 (1986). As currently codified, the federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. That statute, like any that confers jurisdiction on an Article III court, is to be strictly construed, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941), and "[i]t is to be presumed that a cause lies outside this limited jurisdiction," *Kokkonen*, 511 U.S. at 377. The burden of overcoming that presumption rests with the party invoking the court's subject matter jurisdiction. *Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148, 151 (4th Cir. 1994); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

"[T]he vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Merrell Dow*, 478 U.S.

at 808. "There is, however, another longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction[;] in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Phrased another way, a state law cause of action may present a federal question "where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 9 (1983).[1]

But the full scope of federal question jurisdiction over state law claims that present a federal issue has not always been a model of clarity. *See Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting) (characterizing this "litigation-provoking problem" as "the degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote"); *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (describing this area of jurisprudence as "[u]nfortunately" not "a blank canvas" but rather one "that Jackson Pollock got to first"). Over a century ago, in *American Well Works*, Justice Holmes straightforwardly declared that state law claims that raise a federal issue were beyond the reach of federal courts, because "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916). Thus, a state law defamation claim predicated on a defendant's statement that the plaintiff's product infringed the defendant's patent did not confer federal question jurisdiction, and any inquiry into the patent was "merely a piece of evidence." *Id.* at 259-260.

[1] In an attempt to distinguish between phrases that sound practically identical, the court will refer to a federal "question" to connote the existence of federal subject matter jurisdiction, and otherwise refer to federal "law" or a federal "issue" to connote the presence of a dispute that requires consideration of federal law but that may not necessarily raise a federal "question," that is, a federal court's subject matter jurisdiction.

The Supreme Court almost immediately retreated from that position, clarifying that federal question jurisdiction exists "where an appropriate statement of the plaintiff's cause of action . . . discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress." *Hopkins v. Walker*, 244 U.S. 486, 489 (1917). Several years later, in the seminal *Smith* case, the Court acknowledged federal question jurisdiction where a plaintiff shareholder sued a defendant corporation under Missouri law to enjoin the corporation from purchasing United States Government bonds on the basis that the issuance of those bonds was unconstitutional. *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 195 (1921). Even though state law supplied the cause of action, because it was "apparent that the controversy concern[ed] the constitutional validity of an act of Congress," *id.* at 245-46, the *Smith* Court found that the action raised a federal question. More recently, it has been "settled that Justice Holmes' test [in *American Well Works*] is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." *Franchise Tax Bd.*, 463 U.S. at 9; *see also T. B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) ("Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended.").

In the years that followed, however, "[t]he *Smith* statement [was] subject to some trimming." *Grable*, 545 U.S. at 313. In *Gully*, the Court explained that "[n]ot every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." *Gully v. First Nat. Bank*, 299 U.S. 109, 115 (1936). Rather, in departing significantly from Justice Holmes' test but stressing a degree of nuance absent from *Smith*, Justice Cardozo emphasized that "[w]hat is needed" to determine whether an action presents a federal question "is something of that common-sense accommodation of judgment to kaleidoscopic situations which" involve a federal issue. *Id.*

at 117. This involves "a selective process which picks the substantial causes out of the web and lays [aside] the other ones." *Id.* at 118. Decades later, the Court made the understated concession that the phrase "arising under" in Section 1331 "has resisted all attempts to frame a single, precise definition" and "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Franchise Tax Bd.*, 463 U.S. at 8; *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (acknowledging that Section 1331 must be "continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from [that statute's] function as a provision in the mosaic of federal judiciary legislation").

The current boundaries of Section 1331, as applied to state law claims that present an issue of federal law, have been outlined by a (somewhat recent) quartet of Supreme Court cases. First, in *Franchise Tax Board*, the Court articulated that a state cause of action confers federal question jurisdiction only if the "right to relief . . . requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax Bd.*, 463 U.S. at 13. If "federal law becomes relevant only by way of a defense," then federal question jurisdiction is lacking. *Id.* Likewise, even a "state declaratory judgment claim[]" that "rais[es] questions of federal law" does not provide a federal court with "original jurisdiction." *Id.* at 18-19.

Then, in *Merrell Dow*, the Court held that a state law products liability claim did not present a federal question, even though the plaintiffs were entitled to a rebuttable presumption of negligence if they could establish that the defendant misbranded the product in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). *Merrell Dow*, 478 U.S. at 805. Critical to the Court's analysis there was its assumption that "that there is no federal cause of action for FDCA

violations." *Id.* at 811. The "significance" of that "assumption" could not "be overstated," because it would "flout, or at least undermine, congressional intent to conclude that the federal courts might [] exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is" an element of a state law cause of action. *Id.* at 812. In other words, "the congressional determination that there should be no federal remedy for the violation of [the FDCA] is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently substantial to confer federal-question jurisdiction." *Id.* at 814. *Merrell Dow* thus underscores that judicial determinations about the substantiality of a federal issue take place in context, and require "sensitive judgments about congressional intent, judicial power, and the federal system." *Id.* at 810.

By implication, *Merrell Dow* left open the question of whether a state law claim that presents a federal issue only confers federal question jurisdiction if federal law independently supplies a cause of action, and a circuit split emerged. *Compare Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1283 (9th Cir. 1987) ("Under *Merrell Dow*, if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question."), *with Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996) (concluding that state law claim "arises under federal law within the meaning of 28 U.S.C. § 1331" where it "implicates a substantial federal interest," notwithstanding that "the cause of action is not federally created to arise under federal law"). The Supreme Court sought to answer that question in *Grable*.

Grable involved a state law quiet title action. *Grable*, 545 U.S. at 310. The Internal Revenue Service ("IRS") seized the petitioner's property to satisfy a tax delinquency, and prior to

the seizure provided the petitioner with notice by certified mail. *Id.* The IRS then sold the property to the respondent. *Id.* The petitioner later brought an action to quiet title to the property, in which he alleged that the respondent's title was invalid because the IRS failed to personally serve him with notice of the seizure in violation of federal law. *Id.* at 310–11.

In considering whether the petitioner's state law claim presented a federal question, the Court noted that there was no "federal cause of action to try claims of title to land obtained at a federal tax sale." *Id.* at 310. Even so, the Court concluded that the "case warrants federal jurisdiction" because an "essential element" of the state law claim, perhaps "the only legal or factual issue contested in the case," involved "an important issue of federal law that sensibly belongs in a federal court." *Id.* at 314-15.

The *Grable* Court stressed further that *Merrell Dow* should not be read as adopting any "bright-line rule" that "make[s] a federal right of action mandatory." *Id.* at 317. Instead, that case "specifically retained" the "contextual enquiry" a court must make into "congressional intent." *Id.* *Grable* and *Merrell Dow* can therefore be interpreted as reaching different conclusions due to case-specific concerns regarding federalism. On the one hand, "because it will be the rare state title case that raises a contested matter of federal law [such as in *Grable*], federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor." *Id.* at 315. On the other, "exercising federal jurisdiction over a state misbranding action [such as in *Merrell Dow*] would have attracted a horde of original filings and removal cases raising other state claims with embedded federal issues." *Id.* at 318. Accordingly, those cases instruct that, when making a "sensitive judgment[] about congressional intent, judicial power, and the federal system," *Merrell Dow*, 478 U.S. at 810, a federal court must

consider the impact of its judgment on "the normal currents of litigation." *Grable*, 545 U.S. at 319.

Since *Grable*, the Court has indicated that state law causes of action that raise a sufficiently substantial federal issue so as to confer federal question jurisdiction represent a "special and small category." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). Several years later, the Court in *Gunn* ultimately "outlin[ed] the contours of this slim category," and in so doing "condensed [its] prior cases into a [four-element] inquiry," where "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. *Gunn's* four-factor test remains the yardstick against which the propriety of extending federal question jurisdiction to state law causes of action is measured. *E.g.*, *Burrell v. Bayer Corp.*, 918 F.3d 372, 379 (4th Cir. 2019) (finding that North Carolina tort claims did not necessarily raise question of federal law).

b. Private Rights of Action

The presence or absence of a private right of action is, at a minimum, "relevant to" the substantiality inquiry, *Grable*, 545 U.S. at 318, and at times its absence may be "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction," *Merrell Dow*, 478 U.S. at 814. Although typically, "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998), here it does because of its bearing on the court's substantiality analysis under *Merrell Dow*, *Grable*, and *Gunn*.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Sometimes, Congress does so expressly. *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 166 (2008). Other times, a right of action may be "implicit in a statute." *Cort v. Ash*, 422 U.S. 66, 78 (1975). The ultimate "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 286. The absence of that dual intent is dispositive because "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring).

"[S]everal factors are relevant" in this inquiry, including (1) whether the plaintiff is "one of the class for whose especial benefit the statute was enacted," (2) whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," (3) whether an implied right of action would be "consistent with the underlying purposes of the legislative scheme," and (4) whether "the cause of action [is] one traditionally relegated to state law." *Cort*, 422 U.S. at 78. Although these several factors are all relevant, the determination "must ultimately rest on congressional intent to provide a private remedy." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991); *see also Alexander*, 532 U.S. at 286 ("Statutory intent . . . is determinative."); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) (emphasizing that the focus "in any case involving the implication of a right of action[] is on the intent of Congress"). After all, "the Legislature is in the better position" than the judicial branch "to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017) (internal quotation marks omitted).

As it relates to private causes of action, North Carolina law is at least as restrictive as federal law. Although in theory a state "statute may authorize a private right of action either explicitly or implicitly," *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 338, 828 S.E.2d 467, 474 (2019), typically "a statute allows for a private cause of action *only* where the legislature has expressly provided a private cause of action within the statute," *Time Warner Ent. Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516, 747 S.E.2d 610, 615 (2013) (emphasis added); *see also United Daughters of the Confederacy v. City of Winston-Salem by & through Joines*, 383 N.C. 612, 637, 881 S.E.2d 32, 52 (2022) (observing that state Supreme Court "has not addressed the circumstances in which a statute *implicitly* authorizes a private cause of action") (emphasis in original).

Notwithstanding the lack of guidance from the North Carolina Supreme Court, several state Court of Appeals decisions have recognized an implicit right of action in a statute where the statute directs one party to take some discrete action for the benefit of an identified group, and the party directed to act "has failed to comply with the statutory mandate." *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 356, 673 S.E.2d 667, 673 (2009). For example, in *Williams v. Alexander County*, the Court of Appeals concluded that a statute requiring school boards to pay specific sums to teachers participating in a particular training program created an implied right of action for those teachers to recover for nonpayment in violation of the statute. *Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 604, 495 S.E.2d 406, 409 (1998). And in *Sugar Creek*, the Court of Appeals held that a statute directing county school boards to pay fixed amounts to local charter schools based on their enrollment impliedly created a right of action for charter schools "when they allege [a] violation of the mandatory provisions of this statute." *Sugar Creek*, 195 N.C. App. at 357, 673 S.E.2d at 674.

But where a state statute "do[es] not enunciate an explicit or implicit intent on the part of the General Assembly to create a statutory protection for" a particular group, a court is not free to fashion an implied right of action. *Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003). And where a statute provides for an administrative enforcement regime, there is "no legislative implication" that the statute "allow[s] for enforcement by a private party." *Sykes*, 372 N.C. at 338, 828 S.E.2d at 474–75; *see also Cobb v. Pennsylvania Life Ins. Co.*, 215 N.C. App. 268, 281, 715 S.E.2d 541, 552 (2011). Like federal jurisprudence on implied rights of action, North Carolina law recognizes that "[t]he regulation of access to the courts is largely a legislative task and one that courts should hesitate to undertake. For this reason, implied rights of action are disfavored and will not be found in the absence of clear legislative intent." *Long v. State Dep't of Hum. Res.*, 145 N.C. App. 186, 188, 548 S.E.2d 832, 834 (2001).

c. Removal Jurisdiction Under 28 U.S.C. § 1443(2)

Removal is independently authorized for any civil action that involves an "act under color of authority derived from any law providing for equal rights," or the refusal "to do any act on the ground that it would be inconsistent with such law." 28 U.S.C. § 1443(2). The second portion of that provision is relevant here, known as the refusal clause. *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 785 (E.D.N.C. 2001) (explaining that refusal clause "provides that state officers can remove to federal court if sued for refusing to do any act on the ground that it would be inconsistent with any law providing for civil rights") (internal brackets and quotation marks omitted).

Although the plain terms of Section 1443(2) appear to capture any number of recognized civil rights, "[t]he Supreme Court has limited the meaning of a 'law providing for equal rights' in § 1443 to only those concerning racial equality." *Vlaming v. W. Point Sch. Bd.*, 10 F.4th 300, 309 (4th Cir. 2021). In *Rachel*, the Supreme Court concluded that the statutory language "must be

construed to mean any law providing for specific civil rights *stated in terms of racial equality*." *State of Ga. v. Rachel*, 384 U.S. 780, 792 (1966) (emphasis added). On the other hand, laws that "are phrased in terms of general application available to all persons or citizens," and not in "specific language of racial equality," do not grant removal jurisdiction under Section 1443. *Id.* Although "the plain text of the statute suggests a broader interpretation," this court "must take the Supreme Court at its word and faithfully apply its precedent." *Vlaming*, 10 F.4th at 310.

d. Motions to Dismiss

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint; "it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N. Carolina v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). As a result, the court accepts the complaint's factual allegations as true, and construes them in the light most favorable to the plaintiff. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009).

Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," the "allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). And importantly, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Likewise, "[l]abels, conclusions, recitation of a claim's elements, and naked assertions devoid of further factual enhancement will not suffice." *ACA Fin. Guar. Corp. v. City of Buena Vista*, Virginia, 917 F.3d 206, 211 (4th Cir. 2019). Ultimately, when considering a motion to dismiss, the court must "draw

on its judicial experience and common sense" to determine whether the complaint "states a plausible claim for relief." *Iqbal*, 556 U.S. at 679.

III. ANALYSIS

a. Motion to Remand

The court's analysis must begin with Plaintiffs motion to remand because that motion challenges the court's subject matter jurisdiction. DE 37. Without subject matter jurisdiction, the court has no power to hear the case and cannot reach the merits of Defendants' motion. *Cotton*, 535 U.S. at 630.

As previously detailed, this court's subject matter jurisdiction extends to any civil action "arising under" the laws of the United States. 28 U.S.C. § 1331. For federal jurisdiction to lie over the state law claims presented here, those claims must "(1) necessarily raise[]" an issue of federal law, and that issue of federal law must be "(2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. Defendants, the parties invoking the court's subject matter jurisdiction, bear the burden of establishing that these four factors are met. *Mulcahey*, 29 F.3d at 151. If any factor is not met, "the case shall be remanded." 28 U.S.C. § 1447(c).

First, the court will consider whether Count Two raises a federal question, because the analysis of that claim is more straightforward and Defendants have not convincingly argued that it does. *See* DE 51 at 12 (suggesting that "Plaintiffs' ill-defined state-constitutional claim would also seem to depend on a construction of HAVA"), 16-17 (discussing fourth prong of *Grable-Gunn* test as applied to Count One, but not Count Two); DE 49 at 8 (DNC brief discussing federal-state balance without mention of state interest in adjudication of state constitutional claim). After concluding that original jurisdiction is lacking as to Count Two, the court will then evaluate

whether Count One raises a federal question. That claim does, so the court may exercise original jurisdiction over it, as well as supplemental jurisdiction over Count Two. 28 U.S.C. §1367(a).

After completing its federal question analysis, the court will next consider whether Section 1443(2) independently supplies removal jurisdiction. The court concludes it does not. That jurisdictional posture partially informs resolution of Defendants' motion to dismiss, which the court considers last.

i. Count Two – State Constitutional Claim

Plaintiffs allege that Defendants denied North Carolinians equal protection of the laws in violation of the North Carolina Constitution, in that Defendants' failure to comply with state law and HAVA has interfered with citizens' "fundamental right to vote." DE 1-3 at 20. The court will assume without deciding that this claim necessarily raises a disputed and substantial issue of federal law.[2] Nonetheless, finding federal question jurisdiction over this claim would fundamentally disrupt "the federal-state balance," *Gunn*, 568 U.S. at 258, precluding the exercise of original jurisdiction.

"It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Since the founding of our constitutional republic, it has been settled that "the powers of the states depend upon their own constitutions," and that "the people of every state ha[ve] the right to modify and restrain them, according to their own views of the policy or principle." *Martin v. Hunter's Lessee*, 14 U.S. 304, 325 (1816). Usurping that role from the state would "disregard[] principles of federalism" and "denigrate[] the state's authority to fashion independent constitutional law." *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 367 (5th Cir. 1995) (finding that state

[2] At the October 17 hearing, Defendants and the DNC persuasively argued that Count 2 involves the same disputed issues pertaining to HAVA as Count One.

constitutional claim did not present federal question and reversing denial of motion to remand); *accord Lynchburg Range & Training v. Northam*, 455 F. Supp. 3d 238, 246 (W.D. Va. 2020) ("recogniz[ing] the paramount importance of state judiciaries in interpreting their respective constitutions" and remanding state constitutional claim to state court).

For that matter, it is of no moment that the North Carolina Supreme Court's "analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). Regardless of that general practice, the North Carolina Supreme Court "is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States." *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984); *see also Cooper v. State of Cal.*, 386 U.S. 58, 62 (1967) (acknowledging "State's power to impose higher standards [for analogous state constitutional provisions] than [those] required by the Federal Constitution if it chooses to do so"). And the North Carolina Supreme Court's "independent authority to interpret state constitutional provisions reflects the unique role of state constitutions and state courts within our system of federalism." *State v. Kelliher*, 381 N.C. 558, 580, 873 S.E.2d 366, 383 (2022).

Declaring the existence of federal question jurisdiction over a state constitutional claim, even where that claim raises an issue of federal law, would contort "the interrelation of federal and state authority," and upend "the proper management of the federal judicial system." *Franchise Tax Bd.*, 463 U.S. at 8. The "disruptive portent in exercising federal jurisdiction" would create the risk of "a horde of original filings and removal cases" involving state constitutional claims. *Grable*, 545 U.S. at 314, 318. That would leave federal judges as the arbiters of state constitutional rights and turn our system of federalism on its head. That is not what Congress could have intended

when it granted federal courts subject matter jurisdiction over "civil actions arising under" the "laws . . . of the United States." 28 U.S.C. § 1331. The court finds it has no original jurisdiction over Count Two in the Complaint.

ii. Count One - N.C.G.S. 163-82.11(c)

Count One raises a violation of state law that requires the NCSBE to "update the statewide computerized voter registration list and database to meet the requirements of section 303(a) of the Help America Vote Act of 2002." N.C.G.S. § 163-82.11(c). Per the Complaint, Defendants violated HAVA, and therefore this statute, by failing to collect either a driver's license number or the last 4 digits of a social security number in connection with hundreds of thousands of voter registrations, and by refusing to "to maintain accurate voter rolls." DE 1-3 at 18-19.

1. *Necessarily Raised*

This claim necessarily raises an issue of federal law. "To prevail on [the] claim," Plaintiffs "must show that" Defendants failed to comply with Section 303(a) of HAVA. *Gunn*, 568 U.S. at 259. "That will necessarily require application of [HAVA] to the facts of [Plaintiffs'] case." *Id.* In other words, whether Defendants violated HAVA is "an essential element" of Plaintiffs' state law claim. *Grable*, 545 U.S. at 315; *see also* N.C.G.S. § 163-82.11(c). And "the claim's very success depends on giving effect to a federal requirement." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 384 (2016). The court finds the first factor is met.

2. *Disputed*

Plaintiffs argue that any issue of federal law necessarily raised by Count One is not disputed, because Defendants admitted in a meeting and through a written order that they formerly did not use a voter registration form that complied with Section 303(a) of HAVA. DE 38 at 5-6. The court has independently considered that evidence, as it is permitted to do when its subject

matter jurisdiction is in question. *Arbaugh*, 546 U.S. at 514; *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991); *Wild v. Gaskins*, 30 F. Supp. 3d 458, 461 (E.D. Va. 2014).[3] After review of the recording of the NCSBE meeting,[4] as well as the order issued, the court finds that Defendants effectively conceded a violation of 52 U.S.C. § 21083(a)(5)(a), so any issue involving that specific provision of HAVA is undisputed.

That narrow finding, however, does not resolve whether Count One raises disputed issues of federal law. Section 163-82.11 employs broad language and requires Defendants to "*update* the statewide computerized voter registration *list and database* to meet the requirements of section 303(a) of the Help America Vote Act of 2002." N.C.G.S. § 163-82.11(c) (emphasis added). By its plain terms, Section 163-82.11 does not concern only the initial act of voter registration, the requirements for which are found at 52 U.S.C. § 21083(a)(5)(A). The state statute also governs "update[s]" to the "list and database," N.C.G.S. § 163-82.11(c), which corresponds to 52 U.S.C. § 21083(a)(2)(A), a separate sub-provision that also falls under Section 303(a) of HAVA.

Section 21083(a)(2) obligates state officials to "perform list maintenance with respect to" the state's voter registration list. 52 U.S.C. § 21083(a)(2)(A). In conducting regular list maintenance, a state official may *only* remove a registered voter from a registration list in accordance with certain "provisions of the National Voter Registration Act of 1993." 52 U.S.C. § 21083(a)(2)(A)(i). The National Voter Registration Act ("NVRA"), in turn, circumscribes the

[3] These materials were also incorporated into the Complaint by reference, and the court may take judicial notice of them. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). Alternatively, to the extent this extrinsic evidence is also partially relevant to the merits of Plaintiffs' claim, implicating the right to trial by jury, *see Arbaugh*, 546 U.S. at 514 (noting that "the jury is the proper trier of contested facts" related to an "essential element of a claim for relief"), the court would still be free to consider it because there would have been no constitutional right to trial by jury for claims addressing North Carolina's compliance with HAVA, a law passed in 2002, "at the time the [State] Constitution of 1868 was adopted." *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 490 (1989).

[4] A recording of the meeting is available at https://dl.ncsbe.gov/State_Board_Meeting_Docs/2023-11-28/Part%201%20-%20State%20Board%20of%20Elections%20Meeting-20231128.mp4. The vote on the concerned citizen's complaint occurs at 1:26:42. The full discussion begins at 1:09:08. A copy of the NSCBE order is available at https://dl.ncsbe.gov/State_Board_Meeting_Docs/Orders/Other/2023%20HAVA%20Complaint%20-%20Snow.pdf.

circumstances under which a state official may remove a registered voter from a registration list. 52 U.S.C. § 20507(a). Those circumstances include removal (1) "at the request of the registrant," (2) due to a "criminal conviction or mental incapacity" that mandates removal by operation of state law, (3) by reason of "the death of the registrant," or (4) because of "a change in the residence of the registrant," where the state uses "change-of-address information supplied by the Postal Service," and either confirms the change of address with the registrant, or provides notice to the registrant that the state has received information indicating that the registrant has changed addresses, and the registrant fails to respond and "has not voted or appeared to vote in 2 or more consecutive general elections for Federal office." 52 U.S.C. §§ 20507(a)(3)(A), (a)(3)(B), (a)(4)(A), (a)(4)(B), (b)(2)(A), (b)(2)(B), (c)(1)(A), (c)(1)(B), (d)(1)(A), & (d)(1)(B).

Notably, those defined circumstances do not include a voter's failure to initially register to vote in compliance with Section 21083(a)(5)(A)(i) of HAVA. *See generally* 52 U.S.C. § 20507. Accordingly, the issue of federal law presented by the claim in Count One is whether Defendants failed to "update . . . the voter registration list and database," N.C.G.S. § 163-82.11(c), when they "perform[ed] list maintenance," 52 U.S.C. § 21083(a)(2)(A), and (as Plaintiffs allege) did not "remov[e] ineligible persons from the voter roll," DE 1-3 at 18, when Defendants based their removal decisions on specified "provisions of the National Voter Registration Act of 1993," 52 U.S.C. § 21083(a)(2)(A)(i), and not an initial failure to register in a manner consistent with 52 U.S.C. § 21083(a)(5)(A)(i).[5]

[5] The court has also considered whether this disputed issue of federal law is necessarily raised, considering that Defendants effectively conceded the old voter registration form violated Section 21083(a)(5)(A) of HAVA. To be sure, if a plaintiff pleads alternative theories to relief, and only one of those theories necessarily raises a disputed issue of federal law, federal question jurisdiction is lacking. *Burrell*, 918 F.3d at 383. As a result, Plaintiffs in theory could have attempted to articulate a violation of Section 163-82.11(c) that rested *solely* on Defendants' registration of voters in a manner out of compliance with HAVA. But Plaintiffs are the masters of their Complaint and that is not the theory that they alleged. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Rather, their theory captures a singular course of conduct where Defendants violated state law by registering voters without collecting information required by HAVA and then by refusing to consider removal of those improperly-registered voters; under a fair reading of the

That is the issue of federal law, and it is disputed. Plaintiffs say Defendants are required to remove these voters. *See* DE 1-3 at 18-19. Defendants say they cannot do so. *See* DE 31 at 7-8. The court expresses no view on the strength of either position, but observes that, if Defendants' argument prevails, then they will not have violated their duty to "update the statewide computerized voter registration list and database to meet the requirements of section 303(a) of the Help America Vote Act of 2002," meaning that Count One would likely fail on the merits. N.C.G.S. § 163-82.11(c). On the other hand, if Plaintiffs' position prevails (i.e., that the NVRA's restrictions on removals only applies to valid registrants, and individuals who registered to vote in a manner inconsistent with HAVA are not valid registrants), then they could prevail on their claim that Defendants failed to update the voter registration list to meet the requirements of HAVA.

Like in *Grable*, the meaning of "section 303(a)" of HAVA is "an essential element" of Plaintiffs' claim under Section 163-82.11. *Grable*, 545 U.S. at 315. This question of federal law "requires resolution," *Franchise Tax Bd.*, 463 U.S. at 13, and "is the central point of dispute," *Gunn*, 568 U.S. at 259. Because Plaintiffs' state law claim "really . . . involves a dispute"

Complaint, the court cannot dissect and accentuate the allegations related to registration and overlook those related to list maintenance. *See, e.g.*, DE 1-3 at 9 (describing as "[i]mportant[]" HAVA's "processes and procedures for *removing* the names of ineligible voters from the state's voter rolls"), 14 (alleging that Defendants must "identify and contact voters whose registrations were improperly accepted"), 14 (contending that Section 163-82.11(c) mandates that Defendants "take[] immediate action to *correct* the accuracy of the state's voter rolls"), 15 (asserting that "Defendants should have immediately taken action to remedy" situation of improperly-registered voters), 16 ("By allowing ineligible voters to register *and then remain* on the North Carolina voter rolls, Defendants have brought the security and validity of the state's elections into question."), 16 ("If Defendants do not *remove* ineligible voters from the state's voter rolls, then the legitimate votes of qualified voters will be diluted and disenfranchised in upcoming elections."), 17 (contending that Section 163-82.11(c) requires "remov[al of] the names of ineligible voters from voting rolls"), 18 ("HAVA also requires that Defendants . . . remov[e] ineligible persons from the voter roll.") (emphases added). As the foregoing excerpts demonstrate, the theory Plaintiffs articulated in their Complaint necessarily raises the HAVA and NVRA issues related to removal of voters from registration lists that the court has just highlighted. Plaintiffs have attempted to reframe their Section 163-82.11 theory through briefing to avoid disputed issues of federal law, DE 38 at 5-6, particularly their Reply brief in support of remand, DE 52 at 4-6, but "[i]t is well-established that parties cannot amend their complaints through briefing or oral advocacy," *Southern Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013).

concerning the "construction, or effect," of a federal law, *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912), the court finds the second factor met.

3. *Substantial*

The court turns next to consideration of whether the HAVA (and, by extension, NVRA) issues presented by Plaintiffs' claim involves a substantial question of federal law. As noted previously, there is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow*, 478 U.S. at 813. Rather, the court seeks to adhere to Justice Cardozo's instruction that courts should apply a "common-sense accommodation of judgment" in what is assuredly "a selective process which picks the substantial causes out of the web and lays [aside] the other ones." *Gully*, 299 U.S. at 115.

On balance, the court finds that Count One falls into that "special and small category" of state law claims that present a substantial question of federal law. *Empire Healthchoice*, 547 U.S. at 699. Distilled to its essence, this case concerns whether or not a state may, or in fact must, remove a registered voter from a voting roll shortly before a national election or require that voter to cast a provisional ballot because that voter (through no apparent fault of their own) was initially registered to vote in a manner inconsistent with federal law. From Plaintiffs' perspective, this case is about public confidence in the integrity of an election and the importance of removing improperly-registered voters from voting rolls as a potential means to prevent voting fraud and voter disenfranchisement or dilution. From Defendants' perspective, the act of removing voters who were improperly registered but who are nonetheless eligible to vote would result in another form of the very disenfranchisement that Plaintiffs ostensibly seek to avoid. There is a substantial federal interest in protecting the right to vote *and* in ensuring the integrity of elections. From

whichever perspective the court views the question presented, it discerns a substantial question of federal law.

"It is beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (emphasis omitted). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). This fundamental right is "secured by the Equal Protection Clause of the Fourteenth Amendment," *Schilling v. Washburne*, 592 F. Supp. 3d 492, 497 (W.D. Va. 2022), and the significance of voting to our constitutional structure is reflected in the NVRA. 52 U.S.C. § 20501(a).

At the same time, the court recognizes that each state also has "a compelling interest in preserving the integrity of its election process," and that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Weighing the respective federal and state interests in the electoral context represents a delicate endeavor because both sovereigns share constitutional authority over this field. U.S. CONST. Art. I, § 4, cl. 1. HAVA attempts to reflect this balance, by granting the states substantial discretion in implementing their own "methods" for "complying with the requirements" of HAVA. 52 U.S.C. § 21085. North Carolina's General Assembly has exercised that discretion in part by enacting Section 163-82.11.

Ultimately, though, this third factor does not call for a balancing test. Rather, the inquiry turns on whether the federal issue is substantial. A state law claim involves a substantial issue of federal law when it entails "construction of a federal statute" and is important "to the federal system as a whole." *Burrell*, 918 F.3d at 385.

With the relevant inquiry so framed, the court concludes that "[t]he meaning of federal [election statutes] is an important issue of federal law that sensibly belongs in a federal court." *Grable*, 545 U.S. 315. This is not a case where "a question of federal law is [merely] lurking in the background." *Gully*, 299 U.S. at 117. Rather, determination of a state's continuing obligations under HAVA and the NVRA for registered voters who were initially registered improperly would have "real-world result[s]" and implications for a forthcoming national election. *Gunn*, 568 U.S. at 261. Where those implications include an individual's capability to cast a vote, a fundamental right secured by the Fourteenth Amendment, the federal interest is near its zenith.

Cases evaluating the extent to which a state law claim presents a substantial question of federal law emphasize that the question must be important to more than just the "particular parties in the immediate suit." *Burrell*, 918 F.3d at 385. The question must be important "to the federal system as a whole." *Gunn*, 568 U.S. at 260. The questions of federal law embedded in Count One meet that standard; the answers to those questions will "affect non-parties to this case," *Burrell*, 918 F.3d at 386, and the federal "Government has a strong interest in" states' compliance with federal election law, *Grable*, 545 U.S. 315. Likewise, "[s]tate by state variations of interpretation about" the scope of a state's obligations under HAVA and the NVRA creates the risk of horizontal disuniformity and would "thereby undermine the very device[s] that Congress created" to ensure a uniform national system of voter registration and election administration. *Ormet Corp.*, 98 F.3d at 807. This case presents a substantial federal question.

a. Neither Section 21083(a)(2)(A) nor Section 21083(a)(5)(A)(i) confer a private right of action.

As part of its analysis of this third factor, the court has considered whether the provisions of HAVA relevant here independently supply a private cause of action.[6] The absence of a private right of action under the FDCA was dispositive in *Merrell Dow*, and *Grable* instructs that the presence or absence of a private cause of action is at least relevant to the substantiality inquiry. *Merrell Dow*, 478 U.S. at 814; *Grable*, 545 U.S. at 318.

"HAVA by its terms does not create a private right of action." *Colon-Marrero v. Velez*, 813 F.3d 1, 15 (1st Cir. 2016). In the absence of an express private right of action, the court should presume "one does not exist." *Ormet Corp.*, 98 F.3d at 805. That said, a right of action may still be "implicit in a statute." *Cort*, 422 U.S. at 78. As a result, this court's task is to interpret the relevant provisions of HAVA "to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 286.

The court's analysis does not take place on an entirely blank slate. In *Brunner*, a one-paragraph per curiam opinion, the Supreme Court vacated a temporary restraining order issued by a district court and held that the plaintiffs were "not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce § 303 [of HAVA] in an action brought by a private litigant to justify the issuance of a TRO." *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008). That holding is not dispositive in this case, though, for two reasons. First, a finding that the plaintiffs were not "sufficiently likely to prevail" in order "to justify the issuance of a TRO" is not tantamount to a conclusion that a private right of action is entirely foreclosed by the statute. *Id.* And second, although the *Brunner* Court referred broadly to Section 303 of HAVA,

[6] At the October 17 hearing, all parties appeared in agreement that HAVA does not provide a private cause of action. But given its bearing on the court's subject matter jurisdiction, the court nevertheless undertakes this inquiry notwithstanding the agreement of the parties.

the specific provision at issue in *Brunner* was Section 21083(a)(5)(B)(i), not Section 21083(a)(5)(A)(i) or Section 21083(a)(2)(A). *See id.* at 6 n.*.

Accordingly, since *Brunner*, two courts of appeals have found an implied private right of action (enforceable through 42 U.S.C. § 1983) under certain provisions of Section 303 of HAVA. *See Colon-Marrero*, 813 F.3d at 17–18 (finding implied private of action under Section 21083(a)(4)(A) for registrants who were improperly removed from voter rolls); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) ("Individual enforcement of [HAVA's provision permitting casting of provisional ballot] under § 1983 is not precluded"). Other courts have come to contrary conclusions. *Bellitto v. Snipes*, 935 F.3d 1192, 1202 (11th Cir. 2019) ("HAVA creates no private cause of action."); *American C.R. Union v. Philadelphia City Commissioners*, 872 F.3d 175, 184–85 (3d Cir. 2017) ("HAVA only allows enforcement via attorney general suits or administrative complaint."); *Crowley v. Nevada ex rel. Nevada Sec'y of State*, 678 F.3d 730, 736 n.4 (9th Cir. 2012) (district court's assumption that HAVA creates a private right of action was "doubt[ful]"). In the absence of authoritative guidance from the Fourth Circuit, and in recognition of the fact that "courts have disagreed as to whether HAVA provides a private right of action," *Voto Latino v. Hirsch*, 712 F. Supp. 3d 637, 662 (M.D.N.C. 2024), this court's analysis remains guided by the *Cort* factors, *Cort*, 422 U.S. at 78, although the determination "must ultimately rest on congressional intent to provide a private remedy," *Virginia Bankshares*, 501 U.S. at 1102.

Section 21083(a)(2)(A) provides that "[t]he appropriate State or local election official shall perform list maintenance with respect to" that state's voter registration list in a manner consistent with the NVRA. 52 U.S.C. § 21083(a)(2)(A). Section 21083(a)(5)(A)(i) mandates that, prior to

processing a voter's registration, "a State" must collect the applicant's "driver's license number" or "the last 4 digits of the applicant's social security number." 52 U.S.C. § 21083(a)(5)(A)(i).

The court finds the first *Cort* factor, whether Plaintiffs are within the class for whose "especial benefit" these provisions were intended, weighs heavily against implying a private right of action. *Cort*, 422 U.S. at 78. These provisions of HAVA "are designed only to guide the State in structuring its systemwide efforts at" voter registration and voter list maintenance. *Blessing v. Freestone*, 520 U.S. 329, 344 (1997). Statutory provisions such as these "that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons." *Alexander*, 532 U.S. at 289 (internal quotation mark omitted).

Although at some level these provisions of HAVA are aimed at ensuring the proper administration and integrity of elections, which in turn benefits all voters, it's not enough that "the plaintiff falls within" some "general zone of interest that the statute is intended to protect." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). "[S]uch a definition of 'especial' beneficiary" would "make[] this factor meaningless." *California v. Sierra Club*, 451 U.S. 287, 294 (1981). Rather, something more "is required for a statute to create rights enforceable directly from the statute itself under an implied private right of action." *Gonzaga*, 536 U.S. at 283. The statute must manifest "an unmistakable focus on the benefited class." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691 (1979)

Put another way, "[t]he question is not simply who would benefit from" these provisions of HAVA, but rather "whether Congress intended to confer federal rights upon those beneficiaries." *Sierra Club*, 451 U.S. at 294. These provisions of HAVA do not "unmistakabl[y] focus" on Plaintiffs or the voters they represent; the provisions do not mention them at all. *Cannon*, 441 U.S. at 691. The court thus finds that these provisions do not "create[] an individually

enforceable right in the class of beneficiaries to which [Plaintiffs] belong." *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 120 (2005).

The court's conclusion on this first factor is supported by *Brunner*. Although that case dealt with a separate provision of Section 303(a) of HAVA, the provision at issue there directed "[t]he chief State election official and the official responsible for the State motor vehicle authority of a State" to enter into an information sharing agreement. *Brunner*, 555 U.S. at 6 n.*. That provision is structurally indistinguishable from those at issue in this case. They all are designed to "guide the State" and its officials. *Blessing*, 520 U.S. at 344. They focus "on the person regulated," *Alexander*, 532 U.S. at 289, and there is no focus, much less an "unmistakable" one, *Cannon*, 441 U.S. at 691, on any identifiable class of beneficiaries or the Plaintiffs.

As to the second *Cort* factor, the court finds that Section 21083(a)(2)(A) and Section 21083(a)(5)(A)(i) contain no indication of legislative intent to imply a private remedy. This inquiry involves resort to legislative history, *Cort*, 422 U.S. at 80, an inherently perilous exercise akin to "looking over a crowd and picking out your friends," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)). But here, the relevant legislative history "is entirely silent on the question whether a private right of action . . . should or should not be available," and "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979); *see also* H.R. Rep. 107–329 (2001). If anything, "[t]his silence on the remedy question serves to confirm that in enacting [HAVA], Congress was concerned not with private rights but with" states' compliance with minimum standards of election administration. *Sierra Club*, 451 U.S. at 296.

Third, the court finds that implying a private right of action under these provisions of HAVA would not be consistent with the underlying purposes of the legislative scheme. *Cort*, 422, U.S. at 78. To the contrary, consideration of the legislative scheme as a whole leads the court to discern a legislative intent to deny a private remedy. On that point, HAVA contains "separate . . . enforcement mechanisms." *Indiana Prot. & Advoc. Servs. v. Indiana Fam. & Soc. Servs. Admin.*, 603 F.3d 365, 379 (7th Cir. 2010). Specifically, "[t]he Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court" to remedy violations of Section "21083 of this title." 52 U.S.C. § 21111. In addition, states that receive federal funding must "establish and maintain State-based administrative complaint procedures." 52 U.S.C.A. § 21112(a)(1). North Carolina has done so, N.C.G.S. § 163-91(a), and the concerned citizen took advantage of this complaint procedure, DE 1-3 at 12-14.

"The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290; *see also Gonzaga*, 536 U.S. at 290 (finding that an express provision authorizing administrative enforcement "counsel[s] against [] finding a congressional intent to create individually enforceable private rights"). "After all, when Congress wants to create a private cause of action, it knows how to do so expressly." *Carey v. Throwe*, 957 F.3d 468, 479 (4th Cir. 2020). Congress's decision in HAVA to expressly create enforcement remedies other than a private right of action strongly suggests that it intended not to impliedly create a private right of action under the provisions at issue here.

The final *Cort* factor, whether "the cause of action [is] one traditionally relegated to state law," has no bearing in this case. *Cort*, 422 U.S. at 78. Although *Cort* identified several factors that could be relevant, it "did not decide that each of these factors is entitled to equal weight," and "[t]he central inquiry remains whether Congress intended to create, either expressly or by

implication, a private cause of action." *Touche Ross*, 442 U.S. at 575. Cases since *Cort* have similarly emphasized that the court's conclusion "must ultimately rest on congressional intent," *Virginia Bankshare*, 501 U.S. at 1102, that "[s]tatutory intent . . . is determinative," *Alexander*, 532 U.S. at 286, and that the dispositive factor is "the intent of Congress," *Texas Industries*, 451 U.S. at 639. The court adheres to those cases and finds that no implied right of action is available to these Plaintiffs under Section 21083(a)(2)(A) and Section 21083(a)(5)(A)(i) of HAVA. To the extent a remedy *should* be available to certain private parties, "the Legislature is in the better position" than a federal court "to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar*, 582 U.S. at 136.

b. HAVA does evince congressional intent that federal courts would resolve disputes over its interpretation.

The conclusion that neither of the HAVA provisions at issue here provide a private right of action is relevant to the question of whether Count One presents a substantial federal question, but it is not dispositive. *Merrell Dow*, 478 U.S. at 814; *Grable*, 545 U.S. at 318. And the court finds that the absence of a private cause of action is at least partially counterbalanced by Section 21111, which authorizes "[t]he Attorney General [to] bring a civil action against any State or jurisdiction in an appropriate United States District Court" to remedy violations of Section "21083 of this title." 52 U.S.C. § 21111. At a minimum, then, Congress contemplated that federal courts would be responsible for resolving questions of statutory interpretation, even if not in actions brought by these Plaintiffs.

At bottom, the court finds that Count One raises a substantial question of federal law: does a state contravene its obligation to maintain voter registration lists under HAVA when it declines to remove voters for a basis not enunciated in the NVRA? That question of federal law is "not collateral, peripheral or remote." *Textile Workers*, 353 U.S. at 470 (Frankfurter, J., dissenting). It

is front and center, and is the critical legal or factual issue contested in the case. *Grable*, 545 U.S. at 315. And where the answer to that question may implicate the right to vote for North Carolinians in an imminent national election, and that right is "of the most fundamental significance under our constitutional structure," *Burdick*, 504 U.S. at 433, the court concludes that the duty of answering that question "sensibly belongs in a federal court," *Grable*, 545 U.S. 315.

4. *Federal-State Balance*

Lastly, the court has considered whether finding federal question jurisdiction over Count One would "disrupt[] the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. This is a practical, common-sense inquiry, which asks the court to project whether declaring the existence of subject matter jurisdiction over a particular state law claim will "attract[] a horde of original filings and removal cases raising other state claims" or "portend only a microscopic effect" on "the normal currents of litigation." *Grable*, 545 U.S. at 315, 318-19.

As far as the court can tell, no plaintiff has ever raised a direct claim under Section 163-82.11. According to a Westlaw search, the statute has only been cited in two previous court decisions, one of which was this court's order denying the North Carolina NAACP's motion to intervene. *Republican National Committee and North Carolina Republican Party v. North Carolina State Board of Elections et al.*, No. 5:24-CV-00547, 2024 WL 4349904 (E.D.N.C. Sept. 30, 2024). In the absence of evidence suggesting that plaintiffs are regularly bringing these sorts of claims in state court, the court suspects that its narrow holding (which applies only to this specific provision of North Carolina law) will "portend only a microscopic effect" on "the normal currents of litigation." *Grable*, 545 U.S. at 315, 319.

Moreover, the court finds that exercising subject matter jurisdiction over this claim would not disrupt any congressionally-contemplated allocation of authority between state and federal

courts. *See Gunn*, 568 U.S. at 258. Congress did grant states discretion in implementing HAVA. 52 U.S.C. § 21085. But implementation is distinct from interpretation, and consideration of the entire statutory scheme leads to the conclusion that Congress intended for federal courts to resolve core questions of statutory interpretation. *See* 52 U.S.C. § 21111. Although the court has no doubt that a state court could capably interpret the provisions of HAVA, there is no indication that Congress intended that outcome to the exclusion of federal court jurisdiction. "[I]f anything," then, "the removal [in this action] could best be said to have righted th[e] intended division" between state and federal courts. *Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 288 (4th Cir. 2022).

In sum, the court finds that Count One necessarily raises a disputed and substantial issue of federal law, and that its resolution in federal court would not disrupt the federal-state balance approved by Congress. *Gunn*, 568 U.S. at 258. The court may therefore exercise subject matter jurisdiction over Count One (and supplemental jurisdiction over Count Two). 28 U.S.C. § 1331; 28 U.S.C. § 1367. Accordingly, removal was proper, 28 U.S.C. § 1441(a), and the motion to remand is denied.

iii. Removal Jurisdiction under 28 U.S.C. § 1443(2)

Defendants also offer Section 1443(2) as an alternative basis for removal. *See* DE 1 at 2. As previously detailed, that provision permits removal for a civil action that involves "any act under color of authority derived from any law providing for equal rights," or the refusal "to do any act on the ground that it would be inconsistent with such law." 28 U.S.C. § 1443(2). Defendants proceed under the second portion of Section 1443(2), known as the refusal clause. *Stephenson*, 180 F. Supp. 2d at 785 (explaining that refusal clause "provides that state officers can remove to federal court if sued for refusing to do any act on the ground that it would be inconsistent with any

law providing for civil rights") (internal brackets and quotation marks omitted). According to Defendants, "[t]o the extent [they] have indeed refused to take certain actions, their refusal was based on their obligation to comply with 52 U.S.C. § 10101(a)(2) and 52 U.S.C. § 20507(c)(2)(A)." DE 1 at 2. This refusal applies to each of Counts 1 and 2, because Defendants' obligations under the NVRA constitute a defense to both claims.

Section 20507(c)(2)(A) requires that a state complete any systematic removal of ineligible voters "not later than 90 days prior to the date of a . . . general election." 52 U.S.C. § 20507(c)(2)(A). Section 10101(a)(2) has several sub-provisions but, relevant here, prohibits a state official from "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting," so long as that "error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Based on those provisions, the court understands Defendants' theory to be that, if they were to grant Plaintiffs the relief they seek, Defendants would violate certain provisions of the NVRA. *See* DE 1 at 2.

The problem with this theory is that the "[t]he Supreme Court has limited the meaning of a 'law providing for equal rights' in § 1443 to only those concerning racial equality." *Vlaming*, 10 F.4th at 309. The *Rachel* Court concluded that the statutory language "must be construed to mean any law providing for specific civil rights *stated in terms of racial equality*." *Rachel*, 384 U.S. at 792 (emphasis added). Laws "phrased in terms of general application available to all persons or citizens," and not in "specific language of racial equality," do not grant removal jurisdiction under Section 1443. *Id.* Although "the plain text of the statute suggests a broader interpretation," this court "must take the Supreme Court at its word and faithfully apply its precedent." *Vlaming*, 10 F.4th at 310.

Neither Section 20507(c)(2)(A) nor Section 10101(a)(2)(B) provide "for specific civil rights stated in terms of racial equality." *Rachel*, 384 U.S. at 792. Section 20507(c)(2)(A) makes no mention of race and is "phrased in terms of general application available to all persons." *Id.*; *see also* 52 U.S.C. § 20507(c)(2)(A). And, although Section 10101(a)(2)(B) is contained in a provision entitled "Race, color, or previous condition not to affect right to vote; uniform standards for voting qualifications; errors or omissions from papers," *see* 52 U.S.C. § 10101(a), only Section 10101(a)(1) provides "for specific civil rights stated in terms of racial equality," *Rachel*, 384 U.S. at 792. *See also* 52 U.S.C. § 10101(a)(1) (providing that "All citizens of the United States who are otherwise qualified by law to vote . . . shall be entitled and allowed to vote . . ., without distinction of race, color, or previous condition of servitude").

Section 10101(a)(2)(B), the provision on which Defendants based their refusal to act, does not mention race and is "phrased in terms of general application available to all persons." *Rachel*, 384 U.S. at 792; *see also* 52 U.S.C. § 10101(a)(2)(B). The inclusion of "Race" and "color" in the title of the provision does not alter the court's conclusion because the title of a statute cannot modify its plain text. *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). A statute's heading "is but a short-hand reference to the general subject matter involved." *Brotherhood of R. R. Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 528 (1947). And where, as here, the statute's title includes a series of semicolons, that use is intended to highlight "distinct" topics. *See Williams v. CDP, Inc.*, 474 F. App'x 316, 321 n.4 (4th Cir. 2012); *see also United States v. Waters*, 158 F.3d 933, 937 (6th Cir. 1998) (noting that semicolon in statute's title "strongly suggests" that provisions of statute address "separate areas"). Accordingly, the court must resort to the plain text to determine whether the relevant statutory provision mentions "specific civil rights stated in terms of racial equality." *Rachel*, 384 U.S. at 792. Section 10101(a)(2)(B) does not.

Defendants and the DNC argue that the NVRA "indisputably has as one of its purposes the promotion of racial equality." DE 51 at 19; *see also* DE 49 at 9 (asserting that NVRA provides for civil rights in terms of racial equality). And the court acknowledges that one of the (several) congressional findings in the first chapter of the NVRA indicates that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3). But Defendants' position and this general congressional finding, though true, would improperly reframe the pertinent test at too great a level of generality. The test is not whether Defendants refused to act on the basis of a provision of law that is contained within a larger statute that has several purposes, one of which being racial equality. The test is whether the refusal to act was based on a law that is "stated in terms of racial equality." *Rachel*, 384 U.S. at 792. Because Section 1443(2) "constitute[s] a congressionally authorized encroachment by the federal court upon the sovereignty of the state courts," it must "be strictly construed." *People of State of N.Y. v. Mitchell*, 637 F. Supp. 1100, 1102 (S.D.N.Y. 1986); *see also Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997) ("the jurisprudence" concerning Section 1443 "has made clear that Congress has crafted only a narrow exception to the rule that a state court action may be removed to a federal district court only if federal jurisdiction is evident on the face of the plaintiff's well-pleaded complaint").

A relevant analogue the court has identified in the case law involves attempted removal under Section 1443 where a defendant's counterclaim arises under the Fair Housing Act ("FHA"). The FHA does provide for civil rights expressed in terms of racial equality. *See* 42 U.S.C. § 3604(a). But FHA claims can also center on protected characteristics other than race. *See id.* And courts have routinely rejected removal of FHA counterclaims under Section 1443 when those

counterclaims do not implicate racial discrimination. *E.g.*, *Water's Edge Habitat, Inc. v. Pulipati*, 837 F. Supp. 501, 504–05 (E.D.N.Y. 1993) (citing *Rachel* and finding removal improper under Section 1443 because, although defendant cited to the FHA, a law providing for civil rights, the allegations supporting removal involved disparate treatment "based upon familial status"); *Henlopen Landing Homeowners Ass'n, Inc. v. Vester*, No. 12-CV-308, 2013 WL 1704889, at *5 (D. Del. Apr. 19, 2013) (for purposes of Section 1443, distinguishing between FHA "claim premised [] on acts of alleged race-based discrimination," which would support removal, and claims "premised on other forms of discrimination (such as that due to familial status or handicap)," which would not support removal), *recommendation adopted*, No. 12-CV-308, 2013 WL 10974212 (D. Del. May 14, 2013); *Sky Lake Gardens No. 3, Inc. v. Robinson*, No. 96-CV-1412, 1996 WL 944145, at *5 (S.D. Fla. July 24, 1996) (same).

Like the FHA, certain provisions of the NVRA are expressed in terms of racial equality. 52 U.S.C. § 10101(a)(1). But others are not. 52 U.S.C. § 10101(a)(2)(B); 52 U.S.C. § 20507(c)(2)(A). What the cases involving the FHA teach is that it is not enough for defendants to generally reference a law that provides for civil rights in terms of racial equality to establish removal jurisdiction under Section 1443. Rather, the defendants must show that their refusal to act would be inconsistent with a law providing for civil rights that is "stated in terms of racial equality." *Rachel*, 384 U.S. at 792; *see also* 28 U.S.C. § 1443(2); *cf. White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) (holding that Section 1443(2) "may be invoked when the removing defendants make a colorable claim that they are being sued for not acting" in a manner that "would produce or perpetuate a racially discriminatory result"). Put another way, the party seeking removal must cite a civil rights statute that deals in terms racial equality *and* make some showing that their refusal to act actually involves considerations of racial equality or discrimination. *See*

Davis, 107 F.3d at 1049 (explaining that removal under Section 1443 on the basis of 42 U.S.C. § 1985(3) "would be improper" if removing defendants were "using the vehicle of a § 1985 claim to protect their First Amendment rights," notwithstanding that Section 1985(3) also "protect[s] specifically against race-based discrimination").

Here, Defendants' refusal to act was not based on any provision of federal law that employs language concerning racial equality. Instead, Defendants base their refusal to act on 52 U.S.C. § 10101(a)(2) and 52 U.S.C. § 20507(c)(2)(A). DE 1 at 2. Those statutory provisions do not mention race and are "phrased in terms of general application available to all persons." *Rachel*, 384 U.S. at 792.

In short, Defendants' refusal to act does not have "anything to do with racial equality which is essential for removal under" Section 1443(2). *Shelly v. Com. of Pa.*, 451 F. Supp. 899, 900 (M.D. Pa. 1978). "[B]ecause [Defendants] ha[ve] not raised issues related to racial equality, the[y] cannot remove this case pursuant to § 1443(2)." *Vlaming v. W. Point Sch. Bd.*, 480 F. Supp. 3d 711, 724 (E.D. Va. 2020), *aff'd*, 10 F.4th 300 (4th Cir. 2021); *see also Arizona v. $8,025.00 in U.S. Currency*, No. 21-CV-01278, 2021 WL 5084187, at *4 (D. Ariz. Nov. 2, 2021) (explaining that district courts are "bound [by *Rachel*] to limit" Section 1443 "to removal proceedings where racial inequality is specifically at issue"); *Osborne v. Osborne*, 554 F. Supp. 566, 568 (D. Md. 1982) (reiterating that only allegations "based upon racial grounds merit § 1443 federal removal jurisdiction").

If the court were ruling on a blank slate, it might reach a different conclusion. In that regard, and like the Fourth Circuit, this court does not necessarily "endorse *Rachel's* reasoning or conclusion," but it is "bound to apply it." *Vlaming*, 10 F.4th at 311. And after according due weight to the principle that removal statutes are to be strictly construed, *Shamrock Oil*, 313 U.S.

at 109, the court adheres to *Rachel* and finds that Defendants have not met their burden in establishing removal jurisdiction under Section 1443(2) because their refusal to act has nothing to do with considerations of race. *See also Vlaming*, 10 F.4th at 309 (interpreting *Rachel* for proposition that "racial equality [i]s the sole subject" of Section 1443). The court thus concludes that it may only maintain subject matter jurisdiction over this action pursuant to Section 1331 and Section 1441(a). With that jurisdictional posture in mind, the court turns to the merits.

b. Motion to Dismiss

i. Count One

Defendants raise several arguments in support of dismissal of Count One. DE 31 at 12-21. They argue that the claim is barred by laches. *Id.* at 12-16. They also argue that Plaintiffs fail to state a claim for relief in part because Section 163-82.11 provides no private "cause of action." *Id.* at 16. This latter argument has merit, so the court does not need to reach the former. *See Warner v. Scotland Cnty. Soc. Servs.*, No. 1:22-CV-676, 2023 WL 2992423, at *1 (M.D.N.C. Mar. 22, 2023) ("A plaintiff fails to state a claim upon which relief may be granted when the complaint cites as its basis a [] statute that confers no private right of action."), *recommendation adopted*, No. 1:22-CV-676, 2023 WL 2990360 (M.D.N.C. Apr. 18, 2023); *see also Carey*, 957 F.3d at 483.

Although this private cause of action inquiry turns to a separate body of law than the court's analysis related to HAVA, *see supra* at 26-31, it reaches the same conclusion. Section 163-82.11 does not expressly provide a private cause of action, and typically "a statute allows for a private cause of action *only* where the legislature has expressly provided a private cause of action within the statute." *Time Warner*, 228 N.C. App. at 516, 747 S.E.2d at 615 (emphasis added). Sometimes a statute impliedly provides a private right of action, but state court decisions finding the existence of one have based their holdings on clear statutory language that directs one party to take some

action for the benefit of an identified group. *Sugar Creek*, 195 N.C. App. at 357, 673 S.E.2d at 674; *Williams*, 128 N.C. App. at 604, 495 S.E.2d at 409.

Unlike in *Sugar Creek* and *Williams*, here Section 163-82.11 does not express any intent to provide a benefit to a discrete group (such as charter schools in *Sugar Creek*, or teachers in *Williams*). The statute is devoid of reference to voters, registrants, or applicants; it simply directs the NCSBE to "update the statewide computerized voter registration list and database to meet the requirements of section 303(a) of the Help America Vote Act of 2002." N.C.G.S. § 163-82.11(c). The statute "do[es] not enunciate an explicit or implicit intent on the part of the General Assembly to create a statutory protection for" a particular group; therefore, the court is not free to fashion an implied right of action. *Lea*, 156 N.C. App. at 509, 577 S.E.2d at 416.

The conclusion that Section 163-82.11 does not confer a private right of action is further supported by an existing administrative enforcement regime made available under state law. North Carolina has enacted a HAVA complaint procedure, N.C.G.S. § 163-91(a), and the concerned citizen took advantage of this procedure, DE 1-3 at 12-14. The existence of this separate enforcement process indicates that there is "no legislative implication" that the statute "allow[s] for enforcement [in court] by a private party." *Sykes*, 372 N.C. at 338, 828 S.E.2d at 474–75; *see also Cobb*, 215 N.C. App. at 281, 715 S.E.2d at 552.

Under North Carolina law, "implied rights of action are disfavored and will not be found in the absence of clear legislative intent." *Long*, 145 N.C. App. at 188, 548 S.E.2d at 834. With regard to Section 163-82.11, that clear legislative intent is lacking, and the court acknowledges that "[t]he regulation of access to the courts is largely a legislative task and one that courts should hesitate to undertake." *Id.* Staying true to those principles, the court finds that Section 163-82.11 confers no private cause of action.

The court further finds that Plaintiffs' styling of Count One as a claim seeking a "writ of mandamus" cannot save the claim in the absence of a private right of action. A writ of mandamus is "an extraordinary court order" that will only issue where a plaintiff can demonstrate "a clear legal right" to relief. *Graham Cnty. Bd. of Elections v. Graham Cnty. Bd. of Comm'rs*, 212 N.C. App. 313, 322, 712 S.E.2d 372, 379 (2011). Where, as here, Section 163-82.11(c) does not confer a private right of action, Plaintiffs cannot show a clear legal right to relief. *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (emphasizing that "courts may only issue mandamus to enforce established rights, not to create new rights").

In addition, "mandamus is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction." *Warren v. Maxwell*, 223 N.C. 604, 608, 27 S.E.2d 721, 724 (1943). In the present case, the concerned citizen raised a complaint to the NCSBE in a manner contemplated by state law. DE 1-3 at 12-14; N.C.G.S. § 163-91(a). Defendants rendered a final decision in response to that complaint, and "[a]n action for mandamus may not be used as a substitute for an appeal." *Snow v. N. Carolina Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968).[7] To the extent "the statute provides no appeal-the proper method of review is by certiorari." *Warren*, 223 N.C. at 608, 27 S.E.2d at 724. The court thus finds that mandamus is unavailable to Plaintiffs under the circumstances.

Plaintiffs make two arguments in response, but neither is availing. First, they contend that mandamus is available, citing the recent North Carolina Supreme Court decision in *Committee to Elect Dan Forest v. Employees Political Action Committee*. DE 50 at 10-12. But the question presented in that case was whether the plaintiff had suffered an injury in fact sufficient to "have

[7] The court notes that Plaintiffs were not a party to the administrative complaint to the NCSBE. This creates a two-fold mandamus problem for Plaintiffs because, in essence, they are appealing a decision they did not solicit and are seeking a court order that Defendants do something that Plaintiffs never requested of them in the first instance.

standing to sue under the North Carolina Constitution." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 563, 853 S.E.2d 698, 704 (2021). There, unlike here, the statute in question "included a notable enforcement mechanism," which expressly granted a private right of action to certain parties. *Id.* at 560, 702-03 (citing N.C.G.S. § 163-278.39A(f)). Accordingly, the Court's discussion regarding writs of mandamus, along with the acknowledgement that such writs may be available to "vindicat[e] public rights common to all citizens," *Id.* at 575, 712, is irrelevant here because Section 163-82.11 does not grant (expressly or impliedly) a cause of action to private parties.[8]

Alternatively, Plaintiffs assert that *Pullman* abstention is warranted. DE 50 at 4-5. But that "extraordinary and narrow" doctrine of constitutional avoidance is inapposite. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 728 (1996). "To apply the *Pullman* doctrine, at a minimum it must appear that there is (1) an unclear issue of state law presented for decision" and that resolution of the state law issue (2) "may moot or present in a different posture the *federal* constitutional issue such that the state law issue is potentially dispositive." *Educational Servs., Inc. v. Maryland State Bd. for Higher Educ.*, 710 F.2d 170, 174 (4th Cir. 1983) (emphasis added).

Count One does not meet either prong of *Pullman*. Nothing in Section 163-82.11 is "unclear or ambiguous," *North Carolina State Conf. of NAACP v. Cooper*, 397 F. Supp. 3d 786, 795 (M.D.N.C. 2019), and "abstention is not indicated if the state law is clear on its face," 17A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 4242, at 331–32 (3d ed. 2007). *See also Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) ("Where there is no

[8] Contrary to Plaintiffs' position that *Committee to Elect Dan Forest* loosened the standards for obtaining mandamus relief in North Carolina state courts, the year after that decision the North Carolina Supreme Court reaffirmed that mandamus relief is only available where "the petitioner possesses a clear and established legal right to the act to be commanded." *State v. Diaz-Tomas*, 382 N.C. 640, 652, 888 S.E.2d 368, 378 (2022).

ambiguity in the state statute, the federal court should not abstain."). Moreover, there is no federal constitutional issue presented in this action. *Pullman* doesn't apply.

In reaching its conclusion that Count One fails on the merits, the court is not insensitive to Plaintiffs' concerns about election integrity and voter disenfranchisement. Nor is its decision in any way a stamp of approval on Defendants' conduct. But "[r]aising up causes of action where a statute has not created them" is "for common-law courts," not this "federal tribunal[]." *Lampf*, 501 U.S. at 365 (Scalia, J., concurring). In the absence of any indication that North Carolina's General Assembly intended for private litigants to enforce the provisions of Section 163-82.11, this court may not appoint itself as "oversee[r]" of "executive action," *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009), which "would significantly alter the allocation of power . . . away from a democratic form of government," *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Defendants' motion to dismiss is granted as to Count One in the Complaint.

ii. Count Two

Defendants also move to dismiss Count Two, which raises a direct claim under the North Carolina Constitution. DE 31 at 21-25. At this point, Count Two is the only remaining claim, so it "substantially predominates" in this action; the court "has dismissed all claims over which it ha[d] original jurisdiction." 28 U.S.C. § 1367(c)(1) & (c)(3). In addition, the claim raises a "novel" issue of North Carolina law (whether the State's noncompliance with state and federal election law can give rise to state constitutional injury). 28 U.S.C. § 1367(c)(2). The court further finds "compelling [federalism] reasons for declining" to exercise supplemental jurisdiction over Count Two, namely that state courts should decide the scope and extent of state constitutional rights. 28 U.S.C. § 1367(c)(4); *National Tea*, 309 U.S. at 557 (recognizing that "state courts" must

"be left free and unfettered by [federal courts] in interpreting their state constitutions"). Accordingly, the court declines to exercise supplemental jurisdiction over Count Two and remands that claim to state court, which will "best promote the values of economy, convenience, fairness, and comity." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353 (1988) (recognizing district court's "wide discretion" to remand previously-removed state law claims to state court after dismissal of federal claims); *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 617 (4th Cir. 2001) (affirming decision to remand where remaining state claims involved "complex" issues for which "there was no State precedent").

IV. CONCLUSION

Plaintiffs' emergency motion to remand [DE 37] is DENIED. Defendants' motion to dismiss [DE 30] is GRANTED IN PART. Count One is DISMISSED WITH PREJUDICE, and the court exercises its inherent authority to REMAND Count Two to state court. The court's remand order is STAYED until October 22, 2024, so that the parties may seek an appeal if they so choose.

SO ORDERED this 17th day of October, 2024.

Richard E Myers II

RICHARD E. MYERS II
CHIEF UNITED STATES DISTRICT JUDGE