UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

N.C. STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. N.C. STATE BD. OF ELECTIONS, *et al.*, Defendants.	No. 1:16-cv-1274-LCB-JLW

PLAINTIFFS' CONSOLIDATED OPPOSITION TO

COUNTY DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutory Authorities

Rules and Regulations

INTRODUCTION

Plaintiffs—the North Carolina State Conference of the NAACP ("NC NAACP"), Moore County Branch of the NAACP, and four affected voters—submit this consolidated opposition to the three largely overlapping motions to dismiss filed by the Beaufort, Cumberland, and Moore County Defendants (collectively "County Defendants"). Dkt. #56, 59, & 61. Plaintiffs have sued County Defendants because, in the run-up to the November 8, 2016 election, each county carried out systematic purges of hundreds of voters from their rolls in response to private-party challenges based on mailings that had been returned as undeliverable. Those voter purges violated, *inter alia*, the National Voter Registration Act ("NVRA"), which establishes strict limitations on when a voter may be removed from the voter rolls based on a possible change in address and protects against systematic voter purges in the 90 days before a federal election, 52 U.S.C. §20507(c)(2)(A), (d). On November 4, 2016, the Court entered a preliminary injunction requiring both County and State Defendants to, *inter alia*, ensure that voters improperly removed from the voter rolls be eligible to vote in the November 8 election. Dkt. #43.

County Defendants contend dismissal is appropriate because the defendants affiliated with the North Carolina State Board of Elections ("State Defendants") can order their compliance with any further relief or, alternatively, because the Court's preliminary injunction mooted the claims against them. But each county is a proper defendant, having carried out the voter purges that Plaintiffs allege violated federal law. As the masters of their complaint, Plaintiffs are entitled to seek judicial relief directly against

these defendants, regardless of whether State Defendants may *also* order them to comply with federal law. Nor did the preliminary injunction moot the claims against County Defendants. A preliminary injunction does not moot a complaint for *permanent* injunctive relief, and Plaintiffs may also seek attorney's fees against all defendants.

The Moore and Cumberland County Defendants additionally contend that no Plaintiff has standing to bring claims against them,[1] but in granting preliminary injunctive relief, the Court already concluded that Plaintiffs presented sufficient facts establishing NC NAACP's standing, both on its own behalf and as an association representing the interests of its members, to bring suit against *all* of the Defendants in this case. Prelim. Inj. Mem. Op. (Dkt. #42) at 22-23 & n.15. Although the Court need find only one plaintiff with standing in order to deny the motions to dismiss, Plaintiffs have also presented sufficient facts establishing Moore County NAACP's and Michael Brower's standing to assert claims against Moore County Defendants as well.

BACKGROUND

This case involves the implementation of North Carolina statutes that purportedly authorize challenges to voters' eligibility on certain specified grounds up to 25 days before any election. Under the North Carolina laws, challenges may be sustained on a number of grounds, including that a challenged voter is not a resident of the county or the precinct where he or she is registered to vote. N.C.G.S. §163-85(a), (c)(2), (c)(3); *id.*

[1] Beaufort County Defendants have not moved to dismiss for lack of standing.

§163-86; *id.* §163-90.2. Upon receiving challenges, county boards of elections ("BOEs") schedule hearings and determine whether to remove the challenged voter from the rolls. *See* N.C.G.S. §§163-85, 163-86.

Prior to the November 8, 2016 election, Plaintiffs learned that large-scale voter challenges and purges were occurring pursuant to these state laws, including in Beaufort, Moore, and Cumberland Counties. *See* Compl. (Dkt. #1) ¶¶48-69. A few individuals submitted *en masse* challenges, and county BOEs sustained most of those challenges, purging thousands of voters from the rolls, usually on the basis of a single piece of undeliverable mail purportedly sent to the challenged voter's home address. *Id.*

Plaintiffs filed suit on October 31, 2016, alleging Defendants violated the NVRA. Plaintiffs sought emergency injunctive relief to ensure that wrongfully disenfranchised voters would be able to vote in the November 8, 2016 election. After briefing, including the filing of a statement of interest by the United States in support of Plaintiffs, presentation of testimony by the Director of the Moore County BOE, and lengthy oral argument, the Court issued a preliminary injunction requiring State and County Defendants to undo the voter purges carried out in violation of the NVRA. *See* Dkt. #43. Immediately thereafter, State Defendants issued guidance to County Defendants, directing implementation of the preliminary injunction. *See* Dkt. #56-1.

On January 26, 2017, County Defendants filed motions to dismiss, claiming that (a) County Defendants are not necessary to obtain relief, (b) the case is moot, and (c) Plaintiffs lack standing as to Moore and Cumberland County. On February 16, 2017,

State Defendants filed an opposition to County Defendants' motions, arguing that the Counties are proper defendants because of their role in implementing the state statutes and the importance of their presence for discovery purposes.

LEGAL STANDARDS

Federal Rule of Civil Procedure 21 permits dismissal of a misjoined party "on just terms." Fed. R. Civ. P. 21. "Although [Rule] 21 does not contain a clear definition of misjoinder, federal courts have uniformly held that misjoinder occurs when a single party or multiple parties fail to satisfy the conditions for permissive joinder set forth in Federal Rule of Civil Procedure 20(a)." *John S. Clark Co. v. Travelers Indem. Co. of Ill.*, 359 F.Supp.2d 429, 437 (M.D.N.C. 2004). Rule 21 "thus applies when the claims asserted by or against the joined parties do not arise out of the same transaction or occurrence or do not present some common question of law or fact." *Id.* (quotation marks omitted). Under these rules, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). "Consistent with this policy, the transaction and common question requirements prescribed by Rule 20(a) are to be liberally construed in the interest of convenience and judicial economy." *King v. Ralston Purina Co.*, 97 F.R.D. 477, 479–80 (W.D.N.C. 1983).

Motions challenging standing are brought under Rule 12(b)(1) because they implicate a court's subject matter jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). A Rule 12(b)(1) attack "can be either

facial, confining the inquiry to allegations in the complaint, or factual, permitting the court to look beyond the complaint." *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). Where, as here, defendants make a factual, as opposed to a facial, challenge to subject matter jurisdiction, the Court may consider evidence beyond the complaint but must "resolve all disputes of fact in favor of the non-movant." *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1996); *see Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999) (court may grant Rule 12(b)(1) motion "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law"). Moreover, allegations in the complaint remain relevant evidence in resolving such a motion. *Evans*, 166 F.3d at 647.

ARGUMENT

I. County Defendants Are Proper Defendants.

A. County Defendants Implemented the Relevant Statutes and Are Appropriate Subjects of Injunctive Relief.

County Defendants claim they should be dismissed because State Defendants can order county boards of elections to comply with an injunction issued in this case. While State Defendants do in fact have that authority (and do not contest that, *see* State Defs' Opp. (Dkt. #65) at 6-7), it is not a valid basis for dismissal.

"In general, the plaintiff is the master of the complaint and has the option of naming ... those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties." *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) (quotation marks and citation omitted; second alteration in original). There can be little doubt that,

as the entities implementing the challenge hearings, County Defendants are appropriate subjects of preliminary and permanent relief.

For example, for Article III standing purposes—specifically the causation and redressability requirements—a party is a proper defendant so long as it has "some connection" to the implementation or enforcement of a challenged statute. *See Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006), *abrogated on other grounds*, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (state officials were proper defendants when they had "some connection with the enforcement" of relevant statute, even though "[o]ne may question whether enjoining these two state officers would fully redress Appellees' alleged injuries" (internal citation omitted)). The defendant need not be solely, or even primarily, responsible for its implementation or enforcement.

Thus, for example, in *Los Angeles Branch NAACP v. Los Angeles Unified School District*, 714 F.2d 946 (9th Cir. 1983), the court held that the plaintiffs had standing to sue certain state defendants for failing to take affirmative steps to desegregate public schools, over their objections that responsibility for desegregation rested at the local level, *id*. at 949, and that the plaintiffs had failed to allege any "intentional act" on their part that "proximately contributed to school segregation, or to suggest specific remedies which could be ordered against them." *Id.* at 948. Rejecting those arguments, the court held that "while it appears that the local school boards retain the primary responsibility for desegregation of the public schools, California law does allocate a role to each of the state defendants in achieving and maintaining desegregated schools." *Id.* at 949.

Similarly, under the liberal standards governing permissive joinder, it matters not that Plaintiffs could have chosen to seek relief against only one defendant or set of defendants for the related unlawful conduct: "Persons ... may be joined in one action as defendants if [] any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and [] any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). "[A] defendant need [not] be interested in ... defending against all the relief demanded." Fed. R. Civ. P. 20(a)(3). "[T]he decision whether to join a permissive defendant is left solely in the hands of plaintiffs." *Barkhordar v. Cent. Park Place Condo. Ass'n*, 2016 Wl 4367226, at *4 (C.D. Cal. Aug. 8, 2016); *Hefley v. Textron, Inc.*, 713 F.2d 1487, 1499 (10th Cir. 1983) ("[J]oinder of defendants under rule 20 is a right belonging to plaintiffs ….").

"Although the inclusion of permissive parties is not absolutely essential to the resolution of [a] plaintiff's claim, neither do defendants have a right to demand their dismissal." *Lyon v. Centimark Corp.*, 805 F.Supp. 333, 335 (E.D.N.C. 1992); *Guider v. Hertz Corp., Rent-A-Car Div.*, 2004 WL 1497611, at *6 (M.D.N.C. June 28, 2004) (same); *Metrakos v. N.Y. Cent. R. Co.*, 12 F.R.D. 177, 178 (N.D. Ohio 1951) ("Plaintiff is entitled to join in one action all persons against whom he asserts a right jointly, severally, or in the alternative. Rule 20. One properly joined as a defendant may gain his dismissal only by showing that as a matter of law, upon facts concerning which there is no genuine issue, plaintiff may not recover from him. Rule 56.").

Under these authorities, County Defendants are proper parties to this litigation, and Plaintiffs were entitled to name them as defendants. County Defendants' suggestion that Plaintiffs could have chosen to proceed against a more limited set of defendants is no grounds for dismissing them from this case.[2]

The two cases primarily relied upon by County Defendants do not suggest otherwise. *Brown v. North Carolina State Board of Elections*, 394 F.Supp. 359 (W.D.N.C. 1975), involved a challenge to a candidate's filing fee that was to be submitted (along with a notice of candidacy) to the state board of elections. *Id.* at 360 & n.1. The county board of elections that had been sued "ha[d] no authority to accept or reject such applications." *Id.* Unlike here, the county board was essentially a stranger to the dispute and not the proper subject of any remedial order—in short, it lacked "some connection" to the enforcement or implementation of the relevant statutes. In *Republican Party of North Carolina v. Martin*, 682 F.Supp. 834 (M.D.N.C. 1988), similarly, the plaintiffs challenged the method for electing certain judges. Candidates for judicial positions filed for candidacy with the state board, and counties had no discretion either to

[2] Cumberland County Defendants further suggest that their individual board members are improper parties because "only the county board of elections has the statutory authority to conduct challenge hearings and cancel the registrations of voters for whom the board has upheld a challenge." Cumberland Mot. at 15. But the individual board members collectively constitute the Board and are proper defendants for purposes of affording complete relief. *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Utils. Comm'n*, 342 F.3d 242, 253-54 (3d Cir. 2003) (commissioner who had not participated in the allegedly unlawful proceedings was nevertheless a proper individual defendant for purposes of a prospective remedy).

place them on or remove them from the ballot. *Id.* at 835. County boards thus acted in a purely "ministerial capacity" with respect to such elections. *Id.*

Here, by contrast, County Defendants processed challenges, scheduled and held hearings, evaluated evidence, and made final determinations regarding whether particular individuals would remain registered to vote—all of which required them to exercise discretion and authority. *See* Compl. ¶¶46-69. As State Defendants point out, Dkt. #65 at 7, the statutes at issue give county BOEs the authority to take these actions, *see, e.g.*, N.C.G.S. §163-85 ("Challenges Shall Be Made to the County Board of Elections."), and the counties' decisions are not directly reviewable by the State Board but are instead heard in the superior courts, N.C.G.S. §163-90.2(d). In short, County Defendants played far more than a ministerial role, and remain proper subjects of prospective injunctive relief, as well as an attorney's fee award, should Plaintiffs prevail. *See* 42 U.S.C. §1988.

B. Plaintiffs' Claims Are Not Moot as to County Defendants.

County Defendants' next argument—that issuance of the preliminary injunction rendered moot Plaintiffs' claims against them—is also wrong as a matter of law.

A claim is moot only when "a court is unable to grant *any* 'effectual relief' to the prevailing party." *United States v. Under Seal*, __ F.3d __, 2017 WL 1244855, at *10 (4th Cir. Apr. 5, 2017) (emphasis added). For obvious reasons, a preliminary injunction does not grant *permanent* injunctive relief and so cannot moot claims under this standard. *See LaPeer Cty. Med. Care Facility v. Mich.*, 1992 WL 220917, at *7 (W.D. Mich. Feb. 4, 1992) ("[A preliminary injunction] remains in effect only for the duration of the

proceedings in order to maintain the status quo. A ruling on a preliminary injunction is not a decision on the merits."). As discussed below, the defendants disagree about whether the preliminary injunction's terms extend beyond the November 8 election, but, regardless, it is plainly not a final adjudication.[3]

While apparently conceding this general rule, County Defendants argue this case is unusual because, in response to the injunction, the State Board issued a directive ("Numbered Memo 2016-23"), which they claim restrains their conduct going forward. *See*, *e.g.*, Beaufort Mot. at 12.[4] But State Defendants' position is that "Numbered Memo

[3] County Defendants' suggestion that the preliminary injunction provided Plaintiffs "all the relief they have requested from the County Defendants," Moore Mot. at 8, is flatly wrong. Even aside from its preliminary nature, the injunction did not grant all relief requested by Plaintiffs: it required the restoration of voters unlawfully purged within 90 days of the November 8, 2016 election, while the Complaint seeks restoration of *all* voters unlawfully purged without time limit, and the evidence shows that County Defendants purged thousands of other voters prior to that 90-day period. *See* Dkt. #1 (Complaint), Prayer for Relief ¶3; *compare*, *e.g.*, Dkt. #5, Exh. E at 1 (approximately 4,000 challenges filed in Cumberland County in August and September 2016), *with* Dkt. #39-1 ¶8 (Cumberland purged 5,577 voters based on challenges in prior 24 months).

[4] County Defendants also invoke the "voluntary cessation" doctrine, suggesting they have mooted the case by voluntarily refraining from the conduct challenged by Plaintiffs. In fact, they ceased only in response to the preliminary injunction and resulting State Board directive. *See LaPeer Cty. Med. Care Facility*, 1992 WL 220917, at *7 ("Compliance with the provisions of a preliminary injunction order ... does not render moot the underlying claims."); *cf.* Aff. of Kelle H. Hopkins (Dkt. #56-2) ¶4 (stating only that Beaufort will comply "with any order of this Court and the resultant direction and directives of the State Board of Elections"). As indicated by Moore County Defendants' earlier motion to dismiss, Dkt. #32, and County Defendants' arguments at the preliminary injunction hearing, they would not have stopped the unlawful conduct absent a court order. Indeed, County Defendants continue to assert the challenged conduct is lawful. *See*, *e.g.*, Beaufort County Defendants' Answer ¶¶39, 42 & Prayer; *see LaPeer Cty. Med. Care Facility*, 1992 WL 220917, at *6 ("Voluntary discontinuation of the challenged

2016-23 [does not] continue[] to bar voter challenges based on residency under N.C. Gen. Stat. §§163-85 and 163-86." State Defendants Opp. at 4-6.[5] Thus, regardless of whether State Defendants have properly construed the preliminary injunction's scope, they plainly do not believe that they have compelled County Defendants to refrain from the conduct challenged by Plaintiffs after the 2016 election. Moreover, that the various defendants cannot even agree on the the effect of the preliminary injunction and the meaning of Numbered Memo 2016-23 highlights the importance of retaining all parties in the litigation, so that they will all be bound by any further order of the Court.

II. Plaintiffs Have Standing as to the Moore and Cumberland County Defendants.

A. The NC NAACP Has Standing as to All Defendants.

Membership organizations may have two types of standing to sue in federal court: first, organizational standing based on an injury to the organization itself; and second,

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conduct does not render moot a dispute where defendant persists in maintaining the legality of the conduct and remains free to resume it absent judicial restraint.").

If County Defendants were correct that the voluntary cessation doctrine applied, every federal case would be mooted by compliance with a preliminary injunction. Moreover, as the emergency circumstances underlying this litigation indicate, even if the doctrine applied, the case would still be reviewable under the "capable of repetition, yet avoiding review" exception to mootness, because it is reasonable to expect that the challenged statutes will be invoked in the future. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-63 (2007); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 n.4 (9th Cir. 2003) (noting "[e]lection cases often fall within" this exception, "because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits") (quotation marks and citation omitted; alterations in original).

[5] Although arguably ambiguous, Numbered Memo 2016-23's instructions are generally framed with reference to "Election Day." *See, e.g.*, Dkt. #56-1 ("No future residency challenges may be heard under G.S. §§163-85 and 163-86 prior to Election Day.").

associational standing to enforce the rights of its members. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342-43 (1977). In granting preliminary injunctive relief, this Court found that Plaintiff NC NAACP has both. Prelim. Inj. Mem. Op. at 22-23 & n.15. The Court's prior ruling is amply supported by the undisputed allegations in Plaintiffs' complaint and the detailed declarations of NAACP's officers, which establish Plaintiff NC NAACP's organizational and representational standing to assert claims against all Defendants.

1. Plaintiffs' Allegations Establish the NC NAACP's Organizational Standing to Assert Claims on Its Own Behalf.

The Supreme Court has "recognized that organizations are entitled to sue on their own behalf for injuries they have sustained." *Havens Realty*, 455 U.S. at 379 n.19 (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). To do so, an organization must meet the same standing requirements that apply to individuals, *i.e.*, injury-in-fact, causal connection, and redressability. *Id.* at 378-79. When a "defendant's practices have hampered an organization's stated objectives causing the organization to divert its resources as a result, then 'there can be no question that the organization has suffered injury in fact,'" for "such a 'drain on [an] organization's resources [] constitutes far more than simply a setback to [its] abstract social interests.'" *Action NC v. Strach*, __ F.Supp.3d __, 2016 WL 6304731, *7 (M.D.N.C. Oct. 27, 2016) (quoting *Havens Realty*, 455 U.S. at 379); *see Pac. Legal Found. v. Goyan*, 664 F.2d 1221, 1224 (4th Cir. 1981)

(organization alleged sufficient injury due to increased time and expense required to monitor FDA activities under challenged agency regulation).[6]

Here, Plaintiff NC NAACP has alleged and shown injury-in-fact in that it was "forced to divert its valuable and limited resources away from its core mission and planned voter-mobilization, voter-protection, and voter-education activities" to counteract the actual and threatened effects of Defendants' processing the *en masse* challenges. Compl. ¶89; *see also id.* ¶¶9-10, 70-75, 88; Decl. of Rev. Dr. William J. Barber II in Support of Application for Temporary Restraining Order (Dkt. #5, "Barber TRO Decl.") ¶¶6-16. The injury was particularly acute because Defendants' unlawful conduct forced Plaintiff NC NAACP to divert its finite and limited resources away from planned election activities during the critical final weeks leading up to Election Day. Compl. ¶¶87-89; Barber TRO Decl. ¶31. Although Cumberland County Defendants argue that the NC NAACP has not shown a sufficient diversion of resources traceable to their actions, *see* Cumberland Mot. at 11-12, NC NAACP President Rev. Dr. William J. Barber II's declarations describe NC NAACP's planned election activities and the ways that it was forced to divert resources specifically to counteract the mass purges occurring

[6] *See also, e.g., Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (organization has standing to sue on its own behalf if "defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350-51 (11th Cir. 2009) (same).

in Cumberland, Moore, and Beaufort Counties. *See* Barber TRO Decl. ¶¶4-32; Supp. Decl. of Rev. Dr. William J. Barber II ("Barber Supp. Decl.") ¶¶3-6.

As set forth in those declarations, expanding voter registration and participation is one of the NC NAACP's key priorities. Barber TRO Decl. ¶¶6-7, 9; *see* Compl. ¶¶9-10. Activities to this end were extensive during the 2016 election cycle,[7] but the *en masse* challenges and purges in Cumberland, Moore, and Beaufort Counties forced the NC NAACP to divert valuable personnel and time away from them in order to counteract Defendants' unlawful conduct and assist those at immediate risk of disenfranchisement.

After learning of mass challenges in Moore County on or around October 8, 2016, and soon thereafter of similar mass challenges in Beaufort and Cumberland Counties, the NC NAACP launched an immediate investigation, which included interviews, reviews of publicly available information, and requests for further information from individuals with first-hand knowledge of the challenges. Barber TRO Decl. ¶¶10, 12-16. Rev. Dr. Barber sent the North Carolina State Board of Elections multiple letters protesting the removal of the challenged voters in Cumberland, Moore, and Beaufort Counties as violating the NVRA and state law. *Id.* ¶¶16-17, 19-21.

[7] During this time period, the NC NAACP carried out a statewide registration and GOTV campaign that involved voter education, voter registration, voter mobilization, and voter protection efforts. Barber TRO Decl. ¶9. During the final weeks leading up to the 2016 election, in particular, the organization's campaign was focused on voter registration, a robust rides-to-the-polls program at the county level, "Moral Marches to the Polls," and rallies held in over 50 locations encouraging North Carolinians to vote. *Id.*

In addition to the time and personnel resources spent "researching and investigating the challenges and purges, including requesting information from County Boards of Elections, requesting and providing information from and to the State Board, providing public information about the challenges, and attending relevant proceedings," the NC NAACP's "staff and volunteer members … [also] spent time answering communications from individuals who were challenged, or who were concerned they had been or might be purged," including calls requesting assistance from Cumberland County voters. Barber TRO Decl. ¶30; *see* Barber Supp. Decl. ¶¶3-6; Decl. of O'Linda D. Watkins in Support of Application for Temporary Restraining Order (Dkt. #7, "Watkins TRO Decl.") ¶¶8-19, 23-24. The time and resources spent answering these calls and assisting concerned voters is additional "time that would have been spent on [the organization's] core *Our Time! Our Vote!* voter education and mobilization support work instead." Barber TRO Decl. ¶30; *see id.* ¶¶31-32 (explaining continuing harm the organization will suffer in absence of injunctive relief); Barber Supp. Decl. ¶¶3-6.

Numerous courts, including this one, have found similar resource diversions sufficient to confer organizational standing, including in voting rights cases brought by other State Conferences of the NAACP. *See Action NC*, __ F.Supp.3d __, 2016 WL 6304731, at *7-9 (finding organizational standing based on comparable allegations of resource diversion); *Browning*, 522 F.3d at 1165-66 (Florida State Conference of NAACP and other organization had standing because they "reasonably anticipate that they will have to divert personnel and time to educating volunteers and voters on

compliance" with new voting requirements, resources which "would otherwise be spent on registration drives and election-day education and monitoring"); *Common Cause/ Georgia*, 554 F.3d at 1350 (Georgia State Conference of NAACP had organizational standing to challenge voter ID requirement because organization "is actively involved in voting activities and would divert resources from its regular activities to educate and assist voters in complying" with the challenged statute); *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (Louisiana State Conference of NAACP had organizational standing because one of its officials devoted time to voter-registration drives to counteract defendants' NVRA noncompliance, even if no NAACP money was spent).[8]

Plaintiffs' declarations go well beyond asserting simple harm to Plaintiffs' abstract organizational interests and goals; rather, they describe in detail the activities to and from which the NC NAACP has been forced to divert resources in counteracting the mass challenges and purges that occurred and are likely to occur again in Cumberland, Moore,

[8] *See also, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040-41 (9th Cir. 2015) (finding standing where NAACP chapters and other organizations alleged that NVRA noncompliance forced them to modify resource allocation); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014) (finding organizational standing where plaintiffs "expended resources to locate and assist the members to ensure that they were able to vote," to counteract defendant's alleged NVRA violations); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008) (finding organizational standing where party would be compelled "to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the [challenged] law from bothering to vote"); *Nat'l Coal. for Students with Disabilities Educ. & Legal Fund v. Scales*, 150 F.Supp.2d 845, 849-50 (D. Md. 2001) (finding organizational standing where state's actions required plaintiff to divert resources to voter registration efforts that otherwise would have been spent on other institutional goals).

and Beaufort Counties. As this Court already found in granting preliminary injunctive relief, "[s]uch a diversion of resources in response to Defendants' alleged noncompliance with the NVRA 'perceptibly impair[s]' the NAACP's ability to mobilize, educate and protect voters …, a key piece of its mission," and "the NAACP would have to continue to divert resources in the absence of relief." Prelim. Inj. Mem. Op. at 23 & n.15. This diversion of resources, which is directly attributable to all of the Defendants' conduct, is sufficient to establish Plaintiff NC NAACP's organizational standing to assert claims against *all* of the Defendants, including Moore and Cumberland County Defendants.[9]

2. Plaintiffs' Allegations Establish Plaintiff NC NAACP's Associational Standing to Assert Claims on Behalf of Its Members.

Because Plaintiff NC NAACP has organizational standing, the Court need not decide whether it also has standing in its representative capacity. *See Havens Realty*, 455 U.S. at 378; *Common Cause/Georgia*, 554 F.3d at 1351. Nonetheless, as this Court

[9] Cumberland County Defendants contend that the NAACP Plaintiffs cannot establish injury-in-fact unless they identify a specific individual who they personally helped register to vote and whose registration was subsequently canceled due to Defendants' unlawful conduct (*see* Cumberland Mot. at 10-11), but cite no support for this contention, which is contrary to well-established case law that an organization can establish standing based solely on diversion of its resources to counteract the challenged conduct. *See, e.g.*, *Browning*, 522 F.3d at 1166 (rejecting same argument as "find[ing] no support in the law"). Defendants also protest that if diversion of resources is sufficient to confer organizational standing, other voter-protection organizations may have standing to challenge their unlawful conduct as well. Cumberland Mot. at 11. That other plaintiffs may also have standing, of course, is no basis for finding standing lacking here.

previously found, Plaintiffs' allegations and supporting evidence establish that it does. *See* Prelim. Inj. Mem. Op. at 23 n.15.

An association has associational standing (also known as "representational standing") to bring suit on behalf of its members when "(1) at least one member would otherwise have individual standing, (2) the interests at stake in the litigation are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty., Md.*, 268 F.3d 255, 262 (4th Cir. 2001) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) and *Warth*, 422 U.S. at 511); *see also Hunt*, 432 U.S. at 342-43. "Associational standing may exist even when just one of the association's members would have standing." *Retail Ind. Leaders Ass'n v. Fielder*, 475 F.3d 180, 186 (4th Cir. 2007) (citing *Warth*, 422 U.S. at 511); *see, e.g., Ohio Valley Envt'l Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 n.10 (4th Cir. 2009). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice …, for on a motion to dismiss the court presumes that general allegations embrace those specific facts that are necessary to support the claim." *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 329 (4th Cir. 2008) (internal quotation marks, citation, and brackets omitted).

Here, Plaintiff NC NAACP has set forth facts establishing all of the associational standing requirements. Moore and Cumberland County Defendants do not dispute that the voting interests the NC NAACP seeks to protect in this action are germane to the

organization's mission, which includes "protect[ing] and expand[ing] hard-won voting rights." *See* Barber TRO Decl. ¶6; *see id.* ¶¶7-9; Compl ¶¶9-11. Nor do they dispute that, because Plaintiffs seek declaratory and injunctive relief, participation of its individual members is not required. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (individual participation of an organization's members is "not normally necessary when an association seeks prospective … relief for its members"); *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 99 (4th Cir. 2011); *Arcia*, 772 F.3d at 1342; *Browning*, 522 F.3d at 1160.

Defendants' only argument against associational standing is that Plaintiffs did not identify specific members who were actually purged or prevented from voting in the 2016 election. *See* Moore Mot. at 17-19; Cumberland Mot. at 7-8, 13. This argument fails for two reasons.

First, a voter need not actually have been purged from the rolls or prevented from voting to have been harmed by Defendants' wrongful conduct, and Plaintiffs *have* identified at least one NC NAACP member, Plaintiff Brower, who was injured by Defendants' processing of the mass challenges in the weeks before the 2016 general election. *See* Supp. Decl. of James Michael Brower ("Brower Supp. Decl.") ¶¶2-3; Barber Supp. Decl. ¶2. Many courts, including this one, have rejected the argument that a voter must have been purged from the rolls or prevented from voting to have standing under the NVRA. *See e.g.*, *Arcia*, 772 F.3d at 1341 (plaintiffs wrongly identified as non-citizens by defendants' systematic voter-removal program had standing to bring NVRA

claims, "[e]ven though they were ultimately not prevented from voting"); *Common Cause/Georgia*, 554 F.3d at 1351-52 (requirement to produce photo identification to vote was injury sufficient to confer standing, even though right to vote was not "wholly denied"); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (plaintiff deprived of opportunity to vote in home precinct due to defendant's NVRA violation suffered sufficient injury for standing); *Action NC*, __ F.Supp.3d __, 2016 WL 6304731 at *6. As this Court observed in *Action NC*, "[a] plaintiff need not have the franchise wholly denied to suffer injury. Any concrete[,] particularized, non-hypothetical injury to a legally protected right is sufficient." __ F.Supp.3d __, 2016 WL 6304731, at *6 (quoting *Charles H. Wesley*, 408 F.3d at 1352); *cf. Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 497-98 (7th Cir. 2005) (where governmental defendant erects unlawful barrier to obtaining a benefit, the barrier itself is the injury, and the plaintiff need not allege that he necessarily would have obtained the benefit but for the barrier).

Plaintiff Brower and others who were wrongfully challenged suffered just such an injury, which was directly caused by Defendants' conduct in processing *en masse* challenges in violation of the NVRA and other laws. By finding probable cause for cancellation based solely on an undelivered mass mailing and setting formal cancellation hearings on these mass challenges, Defendants both unreasonably burdened the right to vote of these challenged individuals and caused them psychological harm, particularly for African American voters, whose right to vote has been repeatedly attacked. *See* Compl.

¶¶13, 85; Brower TRO Decl. ¶¶6-12; Barber TRO Decl. ¶25-27. Although Mr. Brower ultimately defeated the challenge and prevented Moore County Defendants from canceling his registration, this was only because he happened to learn from a friend that his registration was at risk and went to the Moore County BOE in person to explain that he remained a Moore County resident eligible to vote. Compl. ¶64; Brower TRO Decl. ¶¶8-9; Aff. of Glenda M. Clendenin (Dkt. #61-1, "Clendenin Aff.") ¶20. Were it not for the intervention of a third-party informant, he would in all likelihood have been wrongfully purged from the voter rolls by Moore County Defendants, as were the other nearly 400 challenged voters. Compl. ¶¶63-64; Brower TRO Decl. ¶12; Watkins TRO Decl. ¶¶14-16; Clendenin Aff. ¶24. Moreover, even though Mr. Brower was not ultimately purged, he was psychologically harmed by knowledge that his sacred right to vote had been placed in peril. Brower TRO Decl. ¶12. That an individual fortuitously learns of an unlawful challenge and is able to defeat it in no way eliminates the injury inflicted by County Defendants' processing of the mass challenge in the first place.

Second, the NC NAACP has plausibly alleged that all of its members are likely to suffer future harm if Defendants' unlawful conduct is not enjoined, and that allegation is independently sufficient for associational standing. When an organizational plaintiff seeks to prevent prospective harm to its members, an allegation of "probabilistic harm is enough," *Arcia*, 772 F.3d at 1341; courts do not require that the organization "name names because every member faces a probability of harm," *Browning*, 522 F.3d at 1161. *See also Cegavske*, 800 F.3d at 1041 ("Where it is relatively clear, rather than merely

speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured."); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (association had representative standing despite "understandable" failure to identify specific injured members because "a voter cannot know in advance that his or her name will be dropped from the rolls"). Here, because Plaintiffs have already identified a specific member who was injured by Defendants' conduct, Plaintiffs have plausibly pled that if Defendants are not permanently enjoined from processing mass voter challenges that violate the NVRA, "all of [its] members will remain at risk of being subject to future unlawful challenges and unlawful disenfranchisement," and will suffer accompanying psychological harms such as fear that they will be targeted for removal from the voter rolls and disenfranchised without them even knowing. Compl. ¶86; *see id.* ¶¶8, 80-81, 85; Barber TRO Decl. ¶26; Brower TRO Decl. ¶12; *cf. S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (finding no associational standing where organization did not allege that any member had been harmed or would be harmed).

Indeed, given that thousands of voters were unlawfully purged in Cumberland and Moore Counties in the weeks before the 2016 election, there is a "realistic danger" (*Arcia*, 772 F.3d at 1342) that at least one of NC NAACP's more than 20,000 members,

which include registered voters in each of the three Defendant Counties, will face wrongful registration challenge or cancellation by County Defendants in the future, in the absence of permanent injunctive relief. *See* Compl. ¶¶8, 80-81, 86; Barber TRO Decl. ¶¶5, 32; *Browning*, 522 F.3d at 1163 (1% error rate in state's voter registration-verification process made it "highly unlikely" that none of Florida NAACP's 20,000 members would not be adversely affected). Plaintiffs' allegations of actual injury to at least one member and probable future harm to all its members are sufficient to invoke associational standing.[10]

B. Plaintiffs Brower and Moore County NAACP Also Have Standing to Assert Claims Against the Moore County Defendants.

Because only one plaintiff with standing is needed to grant the declaratory and injunctive relief sought, the Court may deny the motions to dismiss without addressing the standing of the other plaintiffs. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014); *Crawford*, 472 F.3d at 951. Nonetheless, Plaintiffs' allegations and supporting

[10] Because Plaintiff Brower is African American and NC NAACP is an organization that serves the African-American community and is comprised mostly of African-American members, Plaintiffs have, contrary to Defendants' suggestion (*see* Moore Mot. at 18-19; Cumberland Mot. at 9-10), adequately pled standing to assert their claims of discriminatory results under Section 2 of the Voting Rights Act. *See* Compl. ¶13. Whether or not the Cumberland and Moore County Defendants' actions in fact violated the Voting Rights Act is a merits question not relevant to a Rule 12(b)(1) motion. *See White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460-61 (4th Cir. 2005) (district court erred in finding a lack of standing based on a merits analysis; "[t]he standing doctrine, of course, depends not upon the merits").

declarations further establish that Plaintiffs Brower and Moore County NAACP also have standing to assert their claims against Moore County Defendants.

1. Plaintiff Brower Has Individual Standing to Sue the Moore County Defendants.

Because Plaintiff Brower's injury is sufficient to confer associational standing on NC NAACP, of which he is a member, *a fortiori* he has individual standing to sue in his own right. *See supra* at 19-21. Mr. Brower is an active, registered, African-American voter in Moore County whose voter registration was challenged as part of an *en masse* challenge process overseen and executed by Moore County Defendants. Compl. ¶¶13, 61-64; Brower TRO Decl. ¶¶2, 4-8; Watkins TRO Decl. ¶¶8, 10-13 & Ex. A. Moore County Defendants set a formal hearing on the challenge to Mr. Brower's registration just weeks before the November 8 election. Compl. ¶62; Clendenin Aff. ¶19 & Ex. 3. Although he ultimately was able to defeat the challenge, Moore County Defendants' actions in finding probable cause to cancel Mr. Brower's registration and in setting the challenge for hearing caused him significant psychological harm and unreasonably burdened his right to vote. *See supra* at 20-21. These allegations and evidence establish that Plaintiff Brower suffered an injury-in-fact fairly traceable to the unlawful conduct of Moore County Defendants, and thus he has standing. *See* Compl. ¶¶91-135.

2. Plaintiff Moore County NAACP Has Both Organizational and Representational Standing to Sue.

Plaintiff Moore County NAACP also has standing to assert claims against Moore County Defendants, on behalf of both itself and its injured members. For the reasons

discussed, *supra* at 17-23, the Moore County NAACP has pled sufficient facts making it plausible that a member has suffered or is at imminent risk of suffering injury, conferring associational standing. *See* Watkins TRO Decl. ¶20. In addition, upon learning of the mass challenges, the Moore County NAACP was forced in the critical weeks before the elction to divert substantial staff time and resources away from its planned voter-protection and education efforts and towards counteracting Defendants' unlawful purging activities. Compl. ¶¶66, 70, 76-78, 88, 90; Watkins TRO Decl. ¶¶8-19, 23-24. Specifically,

> the time staff members spent researching and investigating the purges, requesting information from … and writing letters to the [Moore County Board of Elections], is time that the Moore County NAACP Branch would have spent instead on disseminating information about Early Voting opportunities, publicizing the Moore County NAACP Branch's Rides-to-the-Polls program, and recruiting and training volunteer drivers for the Rides-to-the-Polls program and Election Day poll monitoring program, among other get-out-the-vote efforts. In addition, time spent reviewing the challenge lists, searching for eligible voters who may have been erroneously challenged in order to hel[p] them protect their right to vote, and attending challenge hearings is also time that the Moore County NAACP Branch would instead have spent on get-out-the-vote efforts.

Watkins TRO Decl. ¶24. These allegations establish Plaintiff Moore County NAACP's organizational standing. *See supra* at 12-13, 15-17, and cases cited therein.[11]

CONCLUSION

For all these reasons and those stated in State Defendants' opposition, the Court should deny County Defendants' motions to dismiss.

[11] To the extent the Court finds any deficiencies in Plaintiffs' showing of standing, Plaintiffs respectfully request leave to amend their complaint.

Dated: April 14, 2017

Respectfully submitted,

/s/ Stacey M. Leyton

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CERTIFICATE OF SERVICE

I, Stacey M. Leyton, hereby certify that on April 14, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using the CM/ECF.

By: /s/ Stacey M. Leyton
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

N.C. STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. N.C. STATE BD. OF ELECTIONS, *et al.*, Defendants.	No. 1:16-CV-1274-LCB-JLW

SUPPLEMENTAL DECLARATION OF REV. DR. WILLIAM J. BARBER II

SUPPLEMENTAL DECLARATION OF REV. DR. WILLIAM J. BARBER II

I, Rev. Dr. William J. Barber II, hereby declare as follows:

1. I am the elected President of the North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP"), a position I have held since 2005. I have personal knowledge of the matters set forth in this supplemental declaration, except for those matters identified as based on information and belief, and if called upon to do so, could and would competently testify thereto.

2. The NC NAACP is a conference of all the NAACP branches located within North Carolina. As a result, all members of the local NAACP branches are also members of the North Carolina State Conference of the NAACP.

3. In addition, because the NC NAACP, which is a volunteer-based organization, is a conference of all the NAACP branches located within North Carolina, all staff and volunteers of NC NAACP branches are also considered staff and volunteers of the NC NAACP and regularly perform activities, including election-related activities, at the direction of the NC NAACP. Thus, the time that staff and volunteers of the branch units – including the branches located in Moore, Beaufort, Cumberland Counties – have spent on investigating and responding to the mass purges occurring in those counties is time that NC NAACP staff and volunteers otherwise would have spent on our

organization's primary mission and activities, including our core *Our Time! Our Vote!* voter education and mobilization support work during the election season.

4. During the weeks leading up to the November 2016 general election, the NC NAACP, through its branch located in Cumberland County, received requests for assistance and assisted voters from Cumberland County who were concerned that they may have been wrongfully removed from the voter registration rolls. NC NAACP staff and volunteers assisted concerned voters by providing the voters with information about the challenges.

5. The time that the staff and volunteer members of NC NAACP and its branch in Cumberland County spent answering communications from individuals who were challenged, or who were concerned they had been or might be purged, was time that instead would have been spent on our organization's primary mission and activities, including our core *Our Time! Our Vote!* voter education and mobilization support work during the election season.

6. Likewise, the time and resources that the staff and volunteer members of NC NAACP and its branch in Moore County spent investigating and responding to the mass challenges and purges in Moore County, which are described in the Declaration of O'Linda D. Watkins in Support of Application for Temporary Restraining Order in this action, are time and resources that instead would have been spent on our organization's

primary mission and activities, including our core *Our Time! Our Vote!* voter education and mobilization support work during the election season. NC NAACP staff and volunteers in Moore County diverted valuable time, personnel, and other resources to requesting information related to the challenges from the Moore County board of elections, reviewing the challenge lists in Moore County, looking for eligible voters who had been erroneously challenged, including James Michael Brower, to help them protect their right to vote, and attending the challenge hearings, during a time when our planned election activities were most critical.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge. Executed on April 13, 2017, at Raleigh, North Carolina.

Rev. Dr. William J. Barber II

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

N.C. STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. N.C. STATE BD. OF ELECTIONS, *et al.*, Defendants.	No. 1:16-CV-1274-LCB-JLW

SUPPLEMENTAL DECLARATION OF JAMES MICHAEL BROWER

SUPPLEMENTAL DECLARATION OF JAMES MICHAEL BROWER

I, James Michael Brower, hereby declare as follows:

1. I am over the age of 18 and otherwise competent to testify. I have personal knowledge of the matters stated herein, except those matters that I identify as based on information and belief, and if called upon to do so could and would testify thereto.

2. I first joined the Moore County Branch of the NAACP and became a member of the North Carolina NAACP some years ago. When I realized my membership lapsed recently, I sought to renew my North Carolina NAACP membership. Sometime in or around January 2017, I submitted my payment and application to restart my NAACP membership to the Sheffield Branch of the NAACP, which is located in Moore County, North Carolina.

3. Sometime afterward, I officially became a member of the NAACP, and began the process of establishing a lifetime NAACP membership, which requires payment of $75 annual dues for ten years.

4. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge. Executed on April 4, 2017, at Carthage, North Carolina.

James Michael Brower

James Michael Brower