UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:20-cv-876-LCB-JLW

NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, and ACTION, NC, Plaintiffs, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; et al., Defendants.	)	**DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S RECOMMENDATION**

NOW COME DA Defendants and State Board Defendants, through undersigned counsel, to file this response to Plaintiffs' Objections [DE 109] to the Magistrate Judge Joe Webster's Memorandum Opinion and Recommendation. [DE 107] The Court should adopt the Magistrate Judge's Recommendation in full and dismiss this lawsuit as moot.

INTRODUCTION

Plaintiffs, two organizations who brought this suit on behalf of themselves only, have consistently made clear the nature of their interest in this litigation – prospective voters in future elections. The passage of SB 747 entirely addresses Plaintiffs' facial constitutional challenge to N.C. Gen. Stat. § 163-275(5). For all elections after January 1, 2024, a voter can only violate § 163-275(5) "if he or she knows they are ineligible to vote, intentionally disregards the law, and casts a ballot." [DE 107, p. 19]. Plaintiffs can no longer

claim that the risk that prospective voters will be prosecuted on a strict-liability basis for voting unlawfully means that Plaintiffs must divert significant resources which would otherwise be used for other voter-education purposes.

Plaintiffs have now asserted a new "concrete interest" in this litigation: that is, if an individual who unlawfully voted in a prior election was investigated under the old Law, and if that investigation was referred to a District Attorney who decided to prosecute under the old Law, and if that prosecution garnered media attention, and if that media attention reached a potential felon voter, and if that voter became confused about their eligibility to vote because of the media attention, and if that voter became worried that he or she could be prosecuted for voting in a future election under a law that is no longer in effect, and if Plaintiffs engaged in get-out-the vote activities in a future election, and if Plaintiffs came into contact with that potential felon voter, then Plaintiffs will be required to divert significant resources from other get-out-the vote measures to educate that potential voter because of the chilling nature of the specter of prosecution from speculated wide publicity of such hypothetical prosecution under an old Law no longer in effect. [DE 109, pp. 15-16]

The Magistrate Judge correctly determined there is no relevant or reliable evidence in the record to support this new, speculative interest, and

that the highly speculative nature of this hypothetical chain of events, none of which have occurred, is insufficient to establish a concrete interest in this litigation, thereby mooting this lawsuit.

ARGUMENT

Plaintiffs assert three objections to the Magistrate Judge's Memorandum and Recommendation: (1) the Magistrate Judge applied the wrong legal standard and wrong burden of proof in analyzing the impact of SB 747 on this case; (2) the Magistrate Judge erroneously found that Plaintiffs do not retain a concrete interest in this matter; and (3) the Magistrate Judge should have reached the merits of the motion for summary judgment and granted their motion.

I. Standard of Review

The district court reviews *de novo* only those portions of a magistrate judge's memorandum and recommendation to which specific objections have been raised. 28 U.S.C. § 636(b)(1). When an objecting party raises only general or conclusory objections, or when the objection is essentially identical to an argument raised in a motion for summary judgment without further reference to the Memorandum and Recommendation, *de novo* review is not required. *See Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982); *Eaker v. Apfel*, 152 F. Supp. 2d 863, 864 (W.D.N.C. 1998), *aff'd,* 217 F.3d 838 (4th Cir. 2000).

II. The Magistrate Judge *sua sponte* dismissed this lawsuit for lack of subject matter jurisdiction.

Plaintiffs argue that the Magistrate Judge applied the wrong legal standard and wrong burden of proof when analyzing the impact of SB 747 on this case. [DE 109, pp. 2, 10-12] Plaintiffs attempt to draw an arbitrary bright line between standing and mootness, arguing that once standing is established, it may never be revisited. [DE 109, p. 11, n. 1] Plaintiffs further confuse the Magistrate Judge's *sua sponte* assessment of subject matter jurisdiction, with a motion brought by a defendant to dismiss a case for mootness.

A. The Magistrate Judge applied the correct legal standard.

Article III of the United States Constitution limits the power of federal courts to actual "cases and controversies." U.S. Const. art. III, § 2. From this requirement, courts have derived several doctrines—including standing and mootness—to ensure that courts do not stray beyond the limits of their constitutional authority. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "Article III of the Constitution restricts the federal courts to deciding only 'actual, ongoing controversies,'" *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 349 (D.C. Cir. 1997). To be justiciable, a controversy "must be definite and concrete . . . . a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the

law would be upon a hypothetical state of facts". *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). A court ruling based on a hypothetical scenario is an impermissible advisory opinion. *See Leifert v. Strach*, 404 F. Supp. 3d 973, 985 (M.D.N.C. 2019).

Mootness and standing are inextricably related. Mootness, like standing, is a jurisdictional doctrine originating in Article III's case or controversy language. Mootness usually results when a plaintiff who had standing at the beginning of a case but, due to intervening events, loses one of the elements of standing during litigation. *See Leifert*, 404 F. Supp. 3d at 980 ("a case can be mooted when any element of standing is lost during the litigation.") "Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 n. 22 (1997) (cleaned up). "[F]or a controversy to be moot, it must lack at least one of the three required elements of Article III standing: (1) injury in fact, (2) causation, or (3) redressability." *Townes v. Jarvis*, 577 F.3d 543, 546–47 (4th Cir. 2009). "When a case or controversy ceases to exist – either due to a change in the facts or the law – 'the litigation is moot, and the court's subject matter jurisdiction ceases to exist also.'" *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *S.C. Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475,

482 (4th Cir. 2015)). "[A] standing inquiry is concerned with the presence of injury, causation and redressability *at the time a complaint is filed*, while mootness inquiry scrutinizes the presence of these elements *after filing*, i.e., at the time of a court's decision." *Garcia v. U.S. Citizenship & Immigr. Servs.*, 168 F. Supp. 3d 50, 65 (D.D.C. 2016) (emphasis in original).

It is well-established that litigation challenging the facial constitutionality of a statute, seeking only prospective relief, is ordinarily rendered moot if during the pendency of the action the challenged statute is repealed or amended such that the provisions giving rise to the litigation cease to exist. *See U.S. Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto*, 477 U.S. 556, 559 (1986). Only where it appears likely that the legislature would enact similar legislation does a statutory challenge survive dismissal. *Doe v. Shalala*, 122 F. App'x 600, 602 (4th Cir. 2004) (*citing Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993)); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Contrary to Plaintiffs' objection, the Magistrate Judge did not "confuse mootness with standing." [DE 109, p. 6] The Magistrate Judge applied the correct legal standard when he reviewed the interests he previously determined were sufficient for standing at the commencement of the litigation, and analyzed whether those interests still remain after SB 747 was enacted on

January 1, 2024. [DE 107 pp. 19-24] As this Court previously noted, the Magistrate Judge "is intimately familiar with the case, the historical background, and the legal issues." [DE 102, p. 6] The Magistrate Judge correctly determined that this Court no longer possesses subject matter jurisdiction, because, after enactment of SB 747, not just one, but ***all*** of the elements of standing are lost. [DE 107, pp. 19-24]

Plaintiffs contend that the elements of standing are irrelevant to a determination of mootness, and that mootness ***only*** occurs "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." [DE 109, p. 7] Setting aside the erroneous nature of this contention, that is exactly what the Magistrate Judge determined – that Plaintiffs' claims of organizational injury are now too speculative to provide any effectual relief if they were to prevail. The Magistrate Judge stated "[i]t is entirely plausible that any declaration by the Court would have no effect on Plaintiffs' work because it is mere speculation that prosecutions under the old Law would cause confusion of such significance that Plaintiffs would be forced to substantially divert resources to address the confusion." [DE 107, pp. 22-23]

Plaintiffs also incorrectly assert that the Court assumed that no future prosecutions of individuals would occur under the old Law. Rather, the Court

correctly noted that there is no evidence in the record[1] to find that future prosecutions under the old Law are occurring, nor does the record contain sufficient evidence to support an allegation that such prosecutions will occur after the law has been fundamentally altered as it has, and, most importantly to this argument, the Magistrate Judge found that even if such prosecutions did occur, those are not injuries to Plaintiffs. [D.E. 107, pp. 20-21, n.10, and 23]. *See Horne v. Flores*, 557 U.S. 433, 445 (2009) (finding a party must establish "such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction" (emphasis in original)).

Moreover, the Magistrate Judge rejected Plaintiffs' strained argument that hypothetical future prosecutions under the old Law might confuse or harm future voters because those voters cannot be prosecuted for inadvertently voting while a felon. [D.E. 107, pp. 19-20]. In fact, the Magistrate Judge found that Plaintiffs' claimed injury of having to address confusion by voters was entirely speculative and that "[a]s long as felony disenfranchisement statutes

[1] Plaintiffs oversell the evidence in the record. Plaintiffs rely upon DE 97-1, to support their position, and characterize it as "undisputed." [DE 109, p. 17]. This "evidence" references data compiled by the State Board long before SB 747 was introduced or enacted, and therefore, is irrelevant to demonstrate the likelihood of a prosecution under the old Law after the new Law went into effect on January 1, 2024. Additionally, an entry on a spreadsheet is not adequate proof to establish what occurred in a criminal proceeding. *See Maryland Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1251 (4th Cir. 1991) (noting that "hearsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment").

are upheld as constitutional, there will necessarily be some level of confusion as to how they are applied." [DE 107, p. 23] Thus, Plaintiffs' argument that the Court failed to address their purported injury of having to divert resources to address voter confusion was not ignored. Rather, the Magistrate Judge squarely addressed and rejected it,

B. Plaintiffs bear the burden of establishing subject matter jurisdiction.

A federal court must satisfy itself as to its own jurisdiction. *See Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 F. App'x 566, 570 (4th Cir. 2007) ("mootness is a jurisdictional question that we are obliged, if necessary, to address *sua sponte*"); *see also Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002) 4th Cir. 2002 (noting mootness goes to the heart of Article III jurisdiction and may be raised *sua sponte*.) A court may (and must) dismiss a suit *sua sponte* for lack of subject matter jurisdiction at any stage of the proceeding. *See Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004); *see also* Fed. R. Civ. P. 12(h)(3). The Fourth Circuit has made clear that "standing concerns must be brought out by a court at any time during a proceeding, for without proper standing there would exist no case or controversy for a court to decide." *Allstate Ins. Co. v. Adkins*, No. 90-2321, 1991 U.S. App. LEXIS 9784, 1991 WL 77673, at *3 (4th Cir. May 15, 1991).

Plaintiffs incorrectly contend the Magistrate Judge erred because the burden of "proving this case has become moot" rests with Defendants. [DE 109, p. 8] When a Court addresses subject matter jurisdiction *sua sponte*, as the Magistrate Judge did here, the burden of proving jurisdiction continues to lie with the party attempting to assert jurisdiction. *See e.g. Wild Virginia v. Council on Env't Quality*, 56 F.4th 281, 293 (4th Cir. 2022) (while [the Court has] a burden to address Article III jurisdiction *sua sponte*, the burden remains on Plaintiffs to demonstrate that the claim is ripe). The Magistrate Judge correctly held Plaintiffs to their burden.

Here, the Magistrate Judge considered the issue of subject matter jurisdiction *sua sponte,* when he ordered the parties to file limited supplemental briefing regarding the impact of SB 747 on the claims "due to the possible implications for standing." [Text Order dated 10/27/2023, DE 107, p. 2] Plaintiffs recognize the Magistrate Judge considered the issue of subject matter jurisdiction *sua sponte*, noting that Defendants did not move for Summary Judgment on standing grounds. [DE 109, p. 6]

Plaintiffs cite several cases to support their assertion that Defendants bear the burden of persuasion on a *sua sponte* determination of mootness. Plaintiffs misapprehend the applicability of these cases to this litigation. The cited cases are distinguishable procedurally, factually, and legally from this litigation.

First, Plaintiffs cite *West Virginia v. EPA*, which involved the EPA's ability to regulate carbon emissions in the power sector. 597 U.S. 697 (2022). The EPA argued on appeal that no plaintiff had Article III standing to seek the review at the United States Supreme Court because the EPA had decided not to enforce the Clean Power Plan because it intended to promulgate a new rule. *Id*. at 719. The Supreme Court found the defendants' contention unpersuasive, discussing the heavy burden on the ***moving*** party where "the only conceivable basis for a finding of mootness is the respondents' voluntary conduct." *Id.*

This litigation is much different than *West Virginia*. *West Virginia* involved an assertion of mootness by the defendant at the appellate stage, and not a *sua sponte* consideration of subject matter jurisdiction before any decision on the merits. Additionally, because Defendants did not file a motion based on mootness, and the Magistrate Judge considered the issue of subject matter jurisdiction in this litigation *sua sponte*, there is no "moving party." Moreover, this litigation does not involve "voluntary cessation," an exception to the mootness doctrine,[2] but rather a legislative change that fully addressed the alleged unconstitutional features of the old Law.

[2] Plaintiffs attempt to characterize this case as fitting into the "voluntary cessation" exception to mootness, under a theory that DA Defendants have not stipulated that they will cease prosecuting individuals who violated the old Law. [DE 109, p. 17] However, Plaintiffs' claims are moot because of the legislative amendment to the old Law, not a voluntary cessation of prosecutions. Importantly, this litigation brings a facial challenge to the old Law and is not an as-applied challenge to any practice of the Defendants. Plaintiffs cannot claim the

Plaintiffs' reliance on *Mission Prod. Holdings, Inc.* is similarly misplaced. [DE 109, p. 7] In *Mission*, defendant Tempnology attempted to use its Chapter 11 bankruptcy filing as a means to terminate the rights of the trademark license to Mission. *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652 (2019). As in *West Virginia*, *Mission* involved a "moving party" asserting the case was moot, not a *sua sponte* assessment of subject matter jurisdiction by the court. Additionally, the Supreme Court found that Mission's suit only survived because a claim for monetary relief remained. *Id.* at 1660. In contrast, this case does not involve monetary relief, only injunctive relief.

Plaintiffs' objection concerning who has the burden of proof should be overruled because when the Magistrate Judge took up the issue of subject matter jurisdiction *sua sponte*, the burden remained with the party asserting jurisdiction, Plaintiffs, and did not shift to Defendants.

III. The Magistrate Judge correctly determined that Plaintiffs fail to retain a concrete interest in this litigation.

Similar to standing, avoiding mootness requires an "actual or imminent" and "concrete and particularized," redressable injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *see Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307–08 (2012) (noting that plaintiff must have a "concrete

interests of unidentified individuals who are not parties to this action, which has never been Plaintiffs' interest in challenging the old Law. [DE 109, pp. 19-20]

interest . . . in the outcome of the litigation" to avoid mootness). Just as standing cannot rest on a "conjectural" or "hypothetical" harm, *see Lujan*, 504 U.S. at 560, avoiding mootness cannot rest on "speculation" about some future potential event. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) (holding a live controversy is not maintained by speculation); *see also Herrera v. Finan*, 709 F. App'x 741 (4th Cir. 2017) (finding that last-minute speculation about future enforcement of a residency requirement cannot shield a case from mootness).

The Magistrate Judge correctly determined that Plaintiffs do not maintain a concrete interest in this litigation. The Magistrate Judge did not "misunderstand[] the impact of SB 747 on Plaintiffs' interests," as Plaintiffs contend in their objections. [DE 109, p. 15] Rather, the Magistrate Judge correctly determined that "[g]iven that an injury must be so substantial that it threatens their very operation as an organization, rather than merely impede their objective, Plaintiffs fail to establish a concrete interest in the litigation." [DE 107, p. 21] Plaintiffs' new alleged injury after enactment of SB 747 is that their voter organization efforts will be adversely impacted by hypothetical future prosecutions of felons who voted in prior elections under the old Law which are publicized in a way that reaches a prospective felon voter, causing the organization to significantly divert resources. But this injury can only occur *if* a future prosecution occurs, *if* it gains enough notoriety for a potential voter

to hear about it, *if* that future voter is confused by it, and *if* that future voter is identified by Plaintiffs. [D.E. 109, pp. 19-20 (discussing speculative sequence of events that is required)]. Only then would Plaintiffs have an ability to educate a voter that the law has changed. Even then, Plaintiffs would not have to expend significant resources to do so.

Importantly, as the Magistrate Judge pointed out, no future voter can inadvertently violate the law. [D.E. 107, pp. 19-20]. A voter who knows they are ineligible does not need education, and a voter who is confused cannot violate the new law, whether the old Law is enjoined or not. [DE 107, pp. 19-20]. The law has changed, and as long as voters believe they are eligible, they may vote without facing the potential for punishment under N.C. Gen. Stat. § 163-275(5). Thus, Plaintiffs could choose to do nothing, and no harm will occur under the new law because it has eliminated the alleged confusion that formed the basis of Plaintiffs' case.

Moreover, Plaintiffs' prior allegations and representations do not support their new assertions of a continued concrete interest in this action. This action is not brought on behalf of any prospective voter. Plaintiffs are not felons facing potential prosecution under pre-amendment § 163-275(5), associations whose membership includes such individuals, or organizations

whose core missions are focused on those individuals' interests.[3] Plaintiffs' new theory of injury is, in fact, the interest of these non-parties. That is an interest they may not now assert to establish this Court's jurisdiction.

This fallacy is evident when Plaintiffs contend that Defendants "must meet the formidable burden of demonstrating mootness based on voluntary cessation." [DE 109, p. 17]. Plaintiffs appear to assert that Defendants must demonstrate voluntary cessation of hypothetical prosecutions of unidentified individuals under the old Law who are not parties to this lawsuit. However, it is well-established that a state legislature's amendment of a challenged law is not voluntary cessation. *See Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006) (noting the voluntary cessation exception to mootness is inapplicable to a legislative amendment to a challenged statute). Importantly, this is not an as-applied challenge by an individual voter to a particular prosecution, but rather a facial challenge to the law itself. Plaintiffs' current arguments are far afield from the allegations contained in the Amended Complaint, do not demonstrate a concrete interest in this litigation, and should be rejected.

[3] Criminal defendants can raise any applicable constitutional challenge in their state-court criminal proceedings.

IV. The Magistrate Judge correctly denied Plaintiffs' motion for summary judgment as moot.

Finally, the Magistrate Judge found Plaintiffs' Motion for Summary Judgment was moot and, therefore, did not address the merits of the Plaintiffs' motion. [DE 107, p. 24] Accordingly, Plaintiffs' third "objection," a rehashing of the arguments they made in support of their motion for summary judgment, is not an objection anticipated by Federal Rule 72(b)(2). "It is well-settled in this Circuit that an objection that merely repeats the arguments made in the briefs before the magistrate judge is a general objection and is treated as a failure to object." *Deleston v. Nelsen*, 0:20-cv-717, 2021 U.S. Dist. LEXIS 18622, *15 (D.S.C. Feb. 1, 2021) (cleaned up). Accordingly, this "objection" is not entitled to *de novo* review. *See Orpiano*, 687 F.2d at 47 (finding *de novo* review not required "when a party makes general or conclusory objections that do not direct the court to a specific error in the magistrate judge's proposed findings and recommendations.")

V. Plaintiffs request to expedite a ruling on their objections is not properly before the Court.

Embedded in Plaintiffs' Objections is a request that the Court "rule on this Objection and Plaintiffs' motion for summary judgment as expeditiously as practicable." [DE 109, p. 8] This request for expedited consideration is not properly before the Court because it is not a separate motion supported by a brief. See LR 7.3(a), 7.3(e). To the extent the Court considers this request, it

should be denied for the same reasons their previous motion for preliminary injunction [DE 24, DE 34] and motion to expedite [DE 102] were denied. Plaintiffs fail to demonstrate good cause to expedite the Court's review of their objections.

CONCLUSION

For the reasons stated above, the DA Defendants and State Board Defendants respectfully request that the Court adopt the Magistrate Judge's Recommendation that this Court lacks subject matter jurisdiction and dismiss this litigation as moot.

Respectfully submitted this, the 30th day of January 2024.

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CERTIFICATE OF WORD COUNT

I hereby certify that pursuant to Local Rule 7.3(d)(1), the foregoing has a word count of less than 6,250 words, and less than ten pages as ordered by the Court, not including the caption, signature block, and certification of word count. This document was prepared in Microsoft Word, from which the word count is generated.

This the 30th day of January, 2024.

/s/ Elizabeth Curran O'Brien
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Special Deputy Attorney General