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

DEMOCRACY NORTH CAROLINA; *et al.*,

Plaintiffs,

vs.

ALAN HIRSCH, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS, *et al.,*

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

NOW COME Philip E. Berger in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore in his official capacity as Speaker of the North Carolina House of Representatives, and respectfully move to dismiss Plaintiffs' Complaint in its entirety under Fed. R. Civ. P. 12(b)(1) because Plaintiffs lack Article III and prudential standing, or alternatively, dismissed for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) because Plaintiffs fail to show a violation of procedural due process, fail to show an unconstitutional burden on the right to vote, and fail to show a violation of the Twenty-Sixth Amendment. The Motion to Dismiss should be granted for all the reasons stated in the Memorandum in Support of the Motion to Dismiss being filed contemporaneously with this Motion.

Respectfully, submitted this the 15th day of December 2023.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification to counsel of record.

This the 15th day of December, 2023.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Phillip J. Strach
Phillip J. Strach
N.C. State Bar No. 29456

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INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER

Intervenor-Defendants, Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, the "Legislative Defendants") submit this Memorandum in Support of their Motion to Dismiss. Plaintiffs' Complaint, D.E. 1, should be dismissed in its entirety under Fed. R. Civ. P. 12(b)(1) because Plaintiffs lack Article III and prudential standing. In the alternative, Plaintiffs' claims should be dismissed for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).

STATEMENT OF FACTS

Senate Bill 747 ("S.B. 747") was first introduced in the North Carolina Senate on June 1, 2023. The bill was designed to make various changes to election procedures to ensure that North Carolina elections are being conducted in a fair, and non-partisan

manner.[1] Over the next several months, the General Assembly held hearings and received feedback from constituents and election officials, including the North Carolina State Board of Elections ("NCSBE"), that ultimately resulted in several amendments to S.B. 747. Ultimately, the General Assembly passed S.B. 747 on August 18, 2023.

On August 24, 2023, Governor Cooper vetoed the bill. On October 10, 2023, the General Assembly overrode the Governor's veto making S.B. 747 law. N.C. Sess. Law 2023-140. One week later,[2] Democracy North Carolina, North Carolina Black Alliance, and League of Women Voters of North Carolina (collectively, the "Plaintiffs") filed suit against the NCSBE and its Members challenging alleged changes to North Carolina's same-day registration ("SDR") requirements.[3] [D.E. 1]. Specifically, Plaintiffs allege that, S.B. 747: (1) denies Plaintiffs' procedural due process rights under the 14th Amendment (Count I); (2) presents an undue burden on right to vote under the 1st and 14th Amendments (Count II); and (3) discriminates against young N.C. voters on basis of age under the 26th Amendment (Count III). All of these claims fail.

Under North Carolina law, citizens can register to vote in person, online, via mail, or even at the DMV up to 25 days prior to election day. N.C.G.S. § 163-82.6(d). For voters who miss this 340-day window, North Carolina provides an accommodation in the form of

[1] *See* Senate Bill Draft DRS45341-LU-143 (June 1, 2023), publicly available at https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S747v0.pdf.
[2] Two other sets of plaintiffs filed similar lawsuits challenging S.B. 747 within hours of the veto override. *See Voto Latino, et al. v. Hirsch, et al.*, M.D.N.C. No. 1:23-cv-861 at D.E. 1; *DNC v. NCSBE, et al.*, No. 1:23-cv-862 at D.E. 1.
[3] The other provisions of S.B. 747 remain unchallenged.

SDR during the early voting period, which runs for seventeen days beginning the third Thursday prior to election day and ends at 3:00 p.m. the Saturday before election day. N.C.G.S. § 163-227.2; S.B. 747 § 10.(a) (*modifying* §163-82.6B). North Carolina also allows no-excuse absentee voting for all registered voters, § 163-226(a), and voters may request an absentee ballot until 5:00 p.m. the Tuesday before election day. N.C.G.S. § 163-230.1. Finally, as an additional accommodation to all voters, North Carolina also allows everyone to cast a provisional ballot on election day or during in-person early voting. N.C.G.S. § 163-82.4(f). Under no circumstance is an election worker allowed to deny an individual the right to vote a provisional ballot. *See* N.C. Gen. Stat. § 163-166.11.

In relevant part, to this suit, S.B. 747 altered the SDR provisions in the following way:

- A SDR voter casts a "retrievable ballot" which is counted unless the county board of elections where the voter cast his/her ballot determines that they are not qualified to vote. S.B. 747 § 10(a). A retrievable ballot is a ballot with an identifier to allow for retrievability. N.C.G.S. § 163-227.5 Under N.C.G.S. § 163-227.5, a statute undisturbed by S.B. 747, the State Board "shall adopt" standards for retrievable ballots, which mandates that ballots have a number or equivalent identifier to allow for retrievability such as those for absentee ballots printed in accordance. *See* N.C.G.S. § 163-230.1.

- As part of the address verification process, the county boards of elections will retrieve any ballot if, before the close of canvass, the required address verification card is returned undeliverable. S.B. 747 § 10(a). This change was made at the request of the NCSBE because the time between early voting and the end of canvass did not allow sufficient time for the mailing and return of two verification cards.

Notably, S.B. 747 does nothing to alter several existing election laws pertaining to same-day registration and early/absentee voting, including:

- The requirement that individuals are notified if their voter registration application (which an SDR voter must complete) was rejected. This requirement, codified in N.C.G.S. § 163-82.7(b), requires that voters be notified of their denial of registration by certified mail within two days, and provides for appeals from the denial of registration. N.C.G.S. §163-82.18. Nothing alters this provision, and in fact the NCSBE's new numbered memo provides additional notification in the form of a challenge. Ex. 1[4].

On October 25, 2023, Legislative Defendants moved to intervene. [D.E. 19] Intervention was orally granted on November 15, 2023, during a status conference ordered by the Court.

STATEMENT OF QUESTION PRESENTED

1. Do Plaintiffs have Article III and prudential standing?

2. Even if Plaintiffs have standing, do Plaintiffs' allegations state a claim upon which relief can be granted?

ARGUMENT

I. Plaintiffs lack Article III standing and prudential standing.

Under Fed. R. Civ. P. 12(b)(1) a complaint must be dismissed for lack of subject matter jurisdiction when it "fails to allege facts upon which subject matter jurisdiction can be based." Even construing all the facts in the Complaint as true in a light most favorable to Plaintiffs, as required under the law, *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982), Plaintiffs fail to establish Article III or prudential standing and, therefore, the Complaint should be dismissed in its entirety.

A. Plaintiffs lack Article III standing to challenge S.B. 747.

[4] Attached as **Exhibit 1** is NCBSE's Numbered Memo 2023-05 (hereinafter "Ex. 1").

To establish Article III standing, Plaintiffs must show: (1) an "injury in fact[;]" (2) "a causal connection between the injury and the conduct complained of[;]" and (3) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations omitted). At the motion to dismiss stage, "the party invoking the jurisdiction of the court must include the necessary factual allegations in the pleading, or else the case must be dismissed for lack of standing." *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (internal citation omitted).

"[W]here the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert 'standing solely as the representative of its members.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2157 (2023) (citation omitted). Where an organization asserts standing on behalf of its members, it must "make specific allegations establishing that at least one identified member" would have standing in that member's own right. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). As organizations, Plaintiffs fail to meet this burden.

i. Plaintiffs have not suffered an injury in fact.

The "injury in fact" element of Article III standing requires a plaintiff to have a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). When an alleged harm amounts to a "generalized grievance shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant

exercise of jurisdiction." *Id.* at 499 (internal quotation omitted). Thus the "injury in fact" element is only met when an injury is both "concrete *and* particularized" to the defendant. *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 334 (2016) (quotation omitted) (emphasis in original). An injury is concrete when it is actual and specific, not speculative. *See Doe v. Va. Dept. of State Police*, 713 F.3d 745, 758 (4th Cir. 2013). An injury is particularized when it "affect[s] the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 339. While a plaintiff may generally challenge alleged statutory or constitutional violations prospectively, the plaintiff must show that "the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

Plaintiffs' allegations amount to nothing more than generalized grievances. Though Plaintiffs allege harm to young voters in North Carolina as the basis for Count III, the alleged harm throughout the Complaint is the same for all North Carolina citizens. [D.E. 1, ¶¶ 81, 102-04, 110, 112-113]. Furthermore, any alleged harm is speculative at best. Plaintiffs admit that they cannot point to any person, including young voters, whose registration has been denied. [*Id.* ¶20]. Particularly as to League of Women Voters' own members, Plaintiffs merely forecast that their "members will be harmed by SB 747's restrictions on early voting and same-day registration," *id.* ¶19, not that they belong to any protected class. The Fourth Circuit has found similar allegations of potential harm to be "merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .'" *Bishop,* 575 F.2d at 424 (quotation omitted)

(holding allegations of "potentially misleading language" on a ballot was insufficient harm to establish standing for plaintiffs' due process claims).

Furthermore, a general diversion of resources to inform and educate voters on a new law, as alleged, without a sufficient connection to an organization's mission, is not a concrete injury under binding Fourth Circuit precedent. *Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012). In *Lane*, the Court determined that a gun rights group lacked standing to challenge a new federal statute restricting the interstate transfer of handguns because mere allegations that a group's "resources [were] taxed by inquiries into the operation and consequences of interstate handgun transfer provisions" did not constitute a concrete injury. *Id.* In so holding, the Court specifically recognized that a general diversion of resources to "educat[e] members, respond[] to member inquiries, or undertak[e] litigation in response to legislation" are generalized grievances insufficient to establish standing.

As in *Lane*, this Court should find that Plaintiffs' assertions that they will be injured by mere budgetary concerns related to supporting and educating voters about the minimal changes brought by S.B. 747 do not establish a cognizable injury. Indeed, Plaintiffs' Complaint is rife with allegations that prior to the passage of S.B. 747, young voters already experienced "high rates of failed mail verification." [D.E. 1, ¶¶ 62-71].[5] As Plaintiffs have

[5] Plaintiffs' Complaint also alleges that "the protections in existing North Carolina law, prior to the passage of SB 747, adequately protect the electoral process and represent a reasonable compromise between securing elections and encouraging all voters to participate in this fundamental American right to cast a ballot in elections where the voter lives." [D.E. 1, ¶61; *see also id.* ¶92]. Thus, to the extent that Plaintiffs claim there is standing based on resources being diverted to challenge a lack of notice and cure process, as explained above, S.B. 747 does not alter N.C.G.S. § 163-82.18.

not shown how the minimal changes in S.B. 747 have subjected them to "operational costs beyond those normally expended to review, challenge, and educate the public" about voting laws, Plaintiffs fail to allege a cognizable injury. *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (holding the plaintiffs failed to show how the challenged legislation forced the organization "to expend resources in a manner that keep [the organization] from pursuing its true purpose").

Finally, Plaintiffs wholly fail to identify any members of their organizations that have been denied the right to vote or not had their ballot count as a result of S.B. 747. Nor do Plaintiffs offer anything other than speculation and conjecture that the law will have an actual impact on any of their members.

ii. Plaintiffs' alleged injuries are not fairly traceable to S.B. 747.

Even if the Court determines that Plaintiffs have suffered an injury in fact, Plaintiffs fail to plead facts sufficient to show injuries fairly traceable to S.B. 747. The causation, or fairly traceable, prong of the injury in fact test requires a plaintiff to "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Disability Rights S. Carolina v. McMaster*, 24 F.4th 893, 901 (4th Cir. 2022) (emphasis omitted). For example, Plaintiffs' Complaint includes conclusory allegations that S.B. 747 will "substantially impair the right to vote of eligible North Carolinians, especially young and student voters, while doing nothing to advance the goals of 'election integrity' or improve election administration." [D.E. 1, ¶81]. But Plaintiffs utterly fail to show how the minimal changes in S.B. 747 demonstrate an impending injury. *See Clapper v. Amnesty*

Intern. USA, 568 U.S. 398, 414 n. 5 (2013) (finding plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending.").

iii. Plaintiffs' alleged injuries are not adequately redressable through this litigation.

Lastly, Plaintiffs fail the redressability prong. "An injury is redressable if it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Doe*, 713 F.3d at 755. While this burden is not stringent, it is "problematic when third persons not parties to the litigation must act in order for an injury to arise or be cured." *Id.* In such situations, even when constitutional harm is alleged, the Fourth Circuit has refused to find standing when there "exists an unchallenged, independent rule, policy, or decision that would prevent relief even if the court were to render a favorable decision." *Id.* at 756 (holding that because plaintiff had not yet attempted to follow the statutory process for challenging the statute in question, the Court had no way of determining whether her constitutional rights would ultimately be infringed). Here, Plaintiffs are simply organizations. They cannot vote, and none of their members have attempted to use SDR under the new law.

Furthermore, Plaintiffs have failed to plead facts sufficient to show that, if the first verification card is returned as undeliverable, a second verification card sent to the same incorrect address would remedy the issue. Thus, any claims that S.B. 747 *may* harm anyone are specious at best, especially given the minor changes to the existing law.

B. Plaintiffs lack prudential standing to challenge S.B. 747.

Even if Plaintiffs could meet the Article III standing requirements, which they cannot, Plaintiffs also lack prudential standing. *See Doe*, 713 F.2d at 753. A "plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties[.]." *Bishop*, 575 F.3d at 423 (quoting *Warth*, 422 U.S. at 499 (additional citations omitted)). In limited circumstances, a plaintiff may assert the legal rights or interests of third parties. To do so, the burden is on the plaintiff to prove: (1) the named plaintiff was injured in fact; (2) the named plaintiff has a "close relationship" to the injured third party; and (3) there was some hinderance to the third parties in asserting their own rights. *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (internal quotation omitted). Typically, this requires some type of fiduciary duty or link between the plaintiff and the third party, such as a doctor suing on behalf of his or her patients. *See, e.g., Singleton v. Wulff*, 428 U.S. 106 (1976); *Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004). The Supreme Court looks upon third-party standing with disfavor. *Kowalski*, 543 U.S. at 130.

To the extent that Plaintiffs attempt to assert the rights of North Carolina voters, Plaintiffs fail to plead facts sufficient to show that a close relationship exists between those voters and Plaintiffs. Plaintiffs also fail to show that such voters would face some hinderance in asserting their own rights. *See Indiana Democratic Party v. Rokita*, 458 F.

Supp. 2d 775, 818 (S.D. Ind. 2006), *aff'd sub nom*. *Crawford v. Marion Cnty. Election Bd*., 472 F.3d 949 (7th Cir. 2007), *aff'd,* 553 U.S. 181, 128 S. Ct. 1610 (2008) (declining to permit an organization to assert third party standing). Moreover, Plaintiffs' desire to bring legal claims on behalf of individuals who *might* be harmed is entirely speculative and therefore insufficient to confer standing on the organizations themselves.

Plaintiffs also lack standing to challenge any alleged burden on the right to vote under Section 1983, which creates liability only "to the party injured." *See* 42 U.S.C. § 1983. Plaintiffs' challenge to S.B. 747 does not seek to vindicate their own rights, but those of all North Carolina voters. The plain language of Section 1983 does not permit this claim. *See, e.g., Vote.Org v. Callanen*, 39 F.4th 297, 304-05 (5th Cir. 2022) (finding Section 1983 "contains no exception that allows a plaintiff to invoke a third-party's rights and therefore [the plaintiff] lack[ed] statutory standing for want of an arguable cause of action.").

II. In the alternative, Plaintiffs' claims should be dismissed under 12(b)(6).

Alternatively, Plaintiffs fail to plead sufficient facts which, accepted as true, state a claim for relief. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While all well-pleaded factual allegations are presumed to be true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient. *Id.* at 678. And the court need not accept legal conclusions,

arguments, or unwarranted inferences. *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008).

A. Plaintiffs fail to show a violation of Procedural Due Process.

Legislative Defendants acknowledge that there is a circuit split as to the appropriate test for assessing 14th Amendment procedural due process claims challenging election regulations. *See Democratic Party of Va. v. Brink*, 599. F. Supp. 3d 346, 360-61 (E.D. Va. 2022). While the Fourth Circuit has not directly addressed the issue, Defendants submit that the correct standard is likely the burden-shifting framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *See Democratic Party of Va.,* 599 F. Supp. 3d at 360–61. That said, even under the more stringent procedural due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), Plaintiffs' claims fail.

Under *Mathews*, courts analyze three factors: (1) the private interest that will be affected by the official action; (2) the risk that the individual will be wrongly deprived of that interest under the existing procedure, as well as the value of additional procedures to safeguard against the loss of the interest; and (3) the governmental interest, including the function involved and the fiscal and administrative burdens that additional procedure would entail. *Id*. Plaintiffs cannot satisfy any of the three.

i. Plaintiffs' do not possess a private interest.

North Carolina citizens have an undeniable interest in the right to vote. However, the private interest at issue here is the statutory right to use SDR subject to the required

address verification process. For SDR registrants, there is no vested interest in a voters' registration until that voter is actually registered. *See Mathews*, 424 at 336–37 (discussing the state and federal statutory prerequisites that must be met before the actual entitlement to disability benefits is bestowed on a worker).

But Plaintiffs here are not North Carolina voters. Nor do Plaintiffs even argue the right to vote is a private interest they possess. Plaintiffs offer no argument beyond recounting the right to vote and alleging that their core mission of "encourage[ing] voter participation" will be frustrated if voters are "disenfranchised if their address verification notice fails to reach them." [D.E. 1, ¶102].[6] This connection is attenuated at best. On its face, S.B. 747 does not impact Plaintiffs' "encouragement" mission. For example, Plaintiffs may succeed in encouraging someone to vote, but it is difficult to see how that purpose is frustrated by the individual writing their address down incorrectly or failing to pick up their mail as instructed. By Plaintiffs' logic, their mission would be frustrated by "encouraging" a non-eligible individual, like a non-citizen, to vote. This makes no sense. But, even assuming Plaintiffs have a private interest that matters here, their procedural due process claims fail the other two *Mathews* prongs.

ii. Plaintiffs fail to show a risk of a wrongful deprivation of a privacy interest.

Plaintiffs' reading that S.B. 747 disenfranchises voters without an opportunity to receive notice and be heard is at odds with their position that the pre-S.B. 747 provisions

[6] Plaintiffs wholly ignore that the same potential for alleged disenfranchisement was present pre-S.B. 747 if the address verification failed to reach the voter.

were adequate and is an implausible reading of both versions of the statutes. [D.E. 1 ¶¶ 101-103]. Same-day registrants complete the same registration application as timely registrants. *See* S.B. 747 §10.(a); N.C.G.S. § 163-82.4. While it is true that individuals are allowed to vote immediately after same-day registration, the application is still subject to the same registration verification by the county boards of election as timely registration applications. In fact, recent NCSBE guidance suggests SDR voters could be entitled to additional notice. [Ex. 3]. If a same-day registrant's registration is denied, they are then entitled to the same due process as all other timely registrants including those set forth in N.C.G.S. § 163-82.7(b), § 163-82.18. This correct reading of the statute allows the statutory provisions to be read as a whole. *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021). Because same-day registrants are entitled to the same due process rights as timely registrants, the risk of erroneous deprivation is low.

Moreover, Plaintiffs entirely ignore that under North Carolina law all registrants are entitled to vote a provisional ballot. The State's provisional ballot statutes and processes were unaltered by S.B. 747. *See* N.C.G.S. § 163-82.4(f), § 163-166.11.

Furthermore, Plaintiffs make much ado about the fact that voters who fail mail verification do not receive notice, but the pre-S.B. 747 version of the law likewise provided no notice when a voter failed mail verification. And the statutory right to register and vote immediately has long been subject to a mail verification process. *See* 52 U.S.C. § 20507. Because Plaintiffs misinterpret the applicable statutory scheme, and identical due process is provided for registration denials of same-day registrants and timely registrants, the risk

of harm under S.B. 747 to a voter is minimal and no additional procedure is needed. *Mathews,* 424 U.S. at 334–35.

iii. S.B. 747 supports the government's interest in conducting fair elections and preserving the integrity of the election process.

It is well-established that "[s]tate legislatures are presumed to have acted within their constitutional power" in the first instance. *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961). Therefore, a statute regulating voter qualifications should not be set aside on Fourteenth Amendment grounds "if any state of facts reasonably may be conceived to justify it." *Id*.

Despite Plaintiff's fiery rhetoric, [D.E. 1, ¶¶32-41], S.B. 747 is a manifestation of the General Assembly's desire to expand opportunities to register and vote and to work hand-in-hand with the NCSBE to ensure votes are timely counted. This promotes at least two government interests: (1) preserving the integrity of the election process and (2) instilling confidence in the electorate. These clear interests have been protected by the Courts for decades. *See Crawford v. Marion Cnty. Election Bd.,* 553 U.S. 181, 197, (2008) (recognizing the need to protect confidence "in the integrity and legitimacy of representative government."); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 364, (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.").

S.B. 747 furthers these interests in several ways. First, it ensures that registrants live in the precinct where they vote. The importance of residency is fundamental to ensure that voters cast ballots to elect officials that represent their specific community needs.

Democracy N.C. v. NCSBE, 476 F. Supp. 3d 158, 208 (M.D.N.C. 2020) (proof of residency is a legitimate state interest).

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," *Purcell v. Gonzales,* 549 U.S. 1, 4 (2006), and is another compelling state interest here. To promote confidence in the election process, the General Assembly has an interest in setting deadlines that ensure election finality. An integral part of this is knowing which properly registered voters cast proper ballots in a timely fashion. S.B. 747 addresses the issue, raised by the NCSBE, that there was insufficient time for same-day registrants to be mailed two address verification cards in order to ensure the voter was properly registered and voted at the correct address. *See N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 449-455 (M.D.N.C. 2016) (discussing how SDR time limitations resulted in votes being counted despite voters failing mail verification), *reversed on other grounds*, 831 F.3d 204 (4th Cir. 2016), *cert. denied, N. Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017).

Plaintiffs' claims fail the *Mathews* test. They do not possess the right to vote, the wrongful risk of deprivation is minimal, and there are several compelling governmental interests, thus Plaintiffs' Procedural Due Process claims fail.

B. Plaintiffs "Unconditional Burden" Claim Fails.

Under the *Anderson/Burdick* test, a court must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that [Plaintiffs] seek[ ] to vindicate." *Anderson*, 460 U.S. at 789. Then, the

court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule" and weigh "the legitimacy and strength of each of those interests." *Id.* The court must also "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* However, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434.

i. The magnitude of the alleged constitutional violation is minimal.

Here, Plaintiffs challenge the single-notice address verification process in S.B. 747, alleging it imposes a severe burden on the right to vote. [D.E. 1, ¶110]. Plaintiffs allege the provision subjects voters "to having their vote disqualified through no fault of their own," D.E. 1, ¶110, yet Plaintiffs' own examples of failed verification include examples of people failing to list their correct mailing address or pick up their mail when notified to do so. [D.E.1, ¶¶66-67]. Moreover, Plaintiffs entirely ignore that no one is required to use SDR. In fact, SDR is an accommodation for individuals who failed to utilize the timely voter registration procedure. The Supreme Court has rejected arguments that voter inaction or negligence disenfranchises the voter. *See Rosario v. Rockefeller*, 410 U.S. 752, 757–58 (1973) ("[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the challenged voting regulation], but by their own failure to take timely steps to effect their enrollment."); *see also Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1188 (9th Cir. 2021) ("Most forms of voter negligence have no remedy").

Plaintiffs point to the U.S.P.S. as a potential cause of disenfranchisement through "misdirected or returned mail" [D.E. 1, ¶110]. This is a red herring. A properly addressed[7] piece of mail is presumed delivered and is sufficient for service. *Nibagwire v. Gonzales*, 450 F.3d 153, 156 (4th Cir. 2006) (regular mail service is entitled to the presumption of effective delivery); *Fed. Deposit Ins. Corp. v. Schaffer,* 731 F.2d 1134, 1137 n.6 (4th Cir. 1984). Thus, any claim that existing mail procedures create a risk of harm is specious at best. Moreover, a ruling by this Court that the use of mail is constitutionally improper would open the door for a similar challenge to voting by mail and likely have seismic repercussions. In sum, Plaintiffs' own negligence and the state's reliance on U.S.P.S. clearly does not present any, even minimal, burden on the right to vote.

ii. The State's interests are legitimate.

Under *Anderson/Burdick,* where an election regulation imposes a minimal burden that is non-discriminatory, courts "only ask that the state 'articulate' its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (quoting *Timmons*, 520 U.S. at 358) (cleaned up). ""[E]laborate, empirical verification of weightiness' is not required." *Id.* (quoting *Timmons*, 520 U.S. at 364) (cleaned up).

As discussed above, the early voting period begins seventeen days before election day and ends three days prior to election day. Unlike timely registration, which is completed twenty-five days before election day, there is not enough time to send a newly

[7] A same-day registrant either enters his or her own address in the registration application or dictates it to a poll worker. Under either procedure the registration application is printed and the registrant reviews and signs under penalty of perjury that the information is true and correct.

registered SDR voter two mail verification cards and have them returned before the relevant deadlines. *See N.C. State Conf. of the NAACP*, 182 F. Supp. 3d at 449-455. Thus, under the previous system, SDR voters were more likely to fail mail verification after their vote was counted than voters who registered twenty-five days before the election. *Id.* at ("[F]or the 2012 general election, 2.44% of SDR registrants (2,361/97,373) failed mail verification after voting, compared to 0.34% of non-SDR registrants (2,306/680,904)."). This is the exact compelling governmental interest S.B. 747 is designed to remedy. Thus, as explained *supra* pp. 15–16, the State has a legitimate interest in verifying a voter's residency so that voters cast a ballot in the correct district, and in ensuring votes are timely counted.

It is beyond dispute that "[r]easonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth." *Burdick*, 504 U.S. at 438. North Carolina provides voters ample timely opportunities to express their views. The State must balance those opportunities with the compelling government interest of the county boards of elections verifying the addresses of SDR voters. S.B. 747 does just that.

Additionally, while Defendants dispute Plaintiffs' contention that address verification is duplicative because a same-day voter is required to provide a HAVA document [D.E. 1, ¶112], the state is not required to show that "its chosen method was the least burdensome means" or the most "effective and efficient administration" of an election regulation because "the modest burden" here is "justified by the state's important

regulatory interests." *Nelson v. Warner*, 12 F.4th 376, 390 (4th Cir. 2021). Indeed, given the relative ease with which a utility bill or bank statement could be altered through PDF software, or the possibility that a voter could present a stale document, it is more than rational to require additional verification via mail.

Because S.B. 747 does not present a significant burden on the right to vote, and the General Assembly has a compelling interest in the rights protected by S.B. 747, Count II of Plaintiffs' complaint must be dismissed.

C. Plaintiffs fail to show a violation of the Twenty-Sixth Amendment.

Under the Twenty-Sixth Amendment: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XVI, § 1. Few courts have addressed the 26th Amendment. For example, as noted by the Fourth Circuit, it is "far from clear that the Twenty-Sixth Amendment should be read to create a cause of action that imports principles from Fifteenth-Amendment jurisprudence." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 607 (4th Cir. 2016).

Both the Fifth and Seventh Circuits recently issued instructive opinions regarding 26th Amendment claims. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 190–91 (5th Cir. 2020) (*TPDII*) (holding that an abridgment only exists if a law makes voting "more difficult" for a person than it was before the law was enacted); *Tully v. Okeson*, 78 F. 4th 377, 388 (7th Cir. 2023) (holding "Indiana's extension of absentee voting only to "elderly"

voters does not violate the Twenty-Sixth Amendment."); *see also Cascino v. Nelson*, No. 22-507348, 2023 WL 5769414 (Sept. 6, 2023).

Here, Plaintiffs assert that "[b]ecause of the system by which ballots cast using same-day registration fail with one failed-to-deliver notice, otherwise eligible young voters are denied the ability or register to vote and to have their vote count." [D.E. 1, ¶118]. First, because S.B. 747 does not adopt rules "based on age that deny or abridge the rights voters already have," there is no denial or abridgment of younger voters' right to vote. *See TDPII*, 978 F.3d at 189. Instead, the law applies equally regardless of age. While Plaintiffs may advocate for an "effects test," other courts have rejected that call, noting that "the handful of cases" finding a violation of the 26th Amendment "involved state actions that **actually blocked** young people from voting rather than simply exclud[ing] measures that would make it easier for them to do so." *Nashville Student Org. Comm v. Hargett*, 155 F. Supp. 3d 749, 757-58 (M.D. Tenn. 2015) (emphasis added) (finding no 26th Amendment violation because the challenged ID law applied to all voters, and even if younger voters were less likely to have an acceptable form of ID, the exclusion of student ID cards under the law "is not an abridgement of the right to vote.").

S.B. 747 does not prohibit younger voters from voting, *see TDPII*, 978 F.3d at 188 (stating "denied means prohibited"), nor "adds barriers primarily for young voters" restricting their right to vote, *see id.* at 191 ("Abridgment of the right to vote applies to laws that place a barrier or prerequisite to voting, or otherwise make it more difficult to vote, relative to the baseline."). S.B. 747 applies equally to all voters regardless of age.

And all voters have the ability to timely register and cast a provisional ballot. Therefore, Plaintiffs' 26th Amendment claim must be dismissed because there has been no denial or abridgement aimed at younger voters' ability to vote. *See Tully*, 78 F.4th at 387 (concluding that where a state "provides a myriad of ways" for voters to vote, and because the law affording a right to elderly voters did "not impose any unconstitutional burden on the right of those under sixty-five" the state was entitled to summary judgment).

CONCLUSION

For all the reasons herein, Legislative Defendants respectfully request that the Court dismiss Plaintiffs' Complaint.

Respectfully submitted this the 15th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 5,890 words as counted by the word count feature of Microsoft word.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification to counsel of record.

This the 15th day of December, 2023.

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