

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:23-cv-00878-TDS-JEP

DEMOCRACY NORTH CAROLINA, et)
al.,)
)
Plaintiffs,)
)
v.)
)
ALAN HIRSCH, et al.,)
)
Defendants,)
)
And)
)
PHILIP E. BERGER, et al.,)
)
Intervenor-Defendants,)
)

**STATE BOARD
DEFENDANTS'
MOTION TO DISMISS**

NOW COME Defendants Alan Hirsch, Jeff Carmon, III, Stacy Eggers, IV, Kevin N. Lewis, Siobhan O’Duffy Millen, and Karen Brinson Bell (collectively, the “State Board Defendants”), through undersigned counsel, to move for dismissal of Plaintiffs’ Complaint [D.E. 1] pursuant to Fed. R. Civ. P. 12(b)(6). In support of this motion, State Board Defendants file a Memorandum of Law herewith.

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

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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**STATE BOARD
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MEMORANDUM OF LAW
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State Board Defendants provide this Memorandum of Law in support of their Motion to Dismiss Plaintiffs' Complaint [D.E. 1] pursuant to Fed. R. Civ. P. 12(b)(6).

Nature of the Matter Before the Court

On October 17, 2023, Plaintiffs filed a Complaint, alleging that the same-day registration provision of N.C. Session Law 2023-140 ("SB 747"), enacted on October 10, 2023, violates the First, Fourteenth, and Twenty-Sixth Amendments of the United States Constitution and seeking both declaratory and injunctive relief. [D.E. 1]. For the reasons discussed below, Plaintiffs fail to state a claim upon which relief can be granted and, therefore, their Complaint should be dismissed in its entirety pursuant to Rule 12(b)(6) of the Rules of Civil Procedure.

Statement of Facts¹

A. North Carolina Voter Registration Procedures

1. Standard Voter Registration Procedures

In North Carolina, a person must register to vote by 25 days before election day. N.C.G.S. § 163-82.6(d). North Carolina offers multiple ways to register, including by mail, facsimile, email transmission of a scanned document, or in person. *Id.*, -82.6(a). Additionally, one may register in person through various state agencies. *Id.*, §§ -82.11; -82.12; -82.19; -82.20; -82.21; -82.22; -82.23. North Carolinians may also utilize the NCDMV website to register, update their address, or update their party affiliation.²

To be qualified to register, the voter must: (1) be a U.S. citizen; (2) have resided in the county where they are registering for at least 30 days prior to election day; (3) be at least 18 years old by the date of the general election; and (4) not be serving a felony sentence. *Id.*, § -55(a).³

Each county board of elections reviews the registration forms submitted by the county's residents to ensure the forms contain all required information, and the board

¹ The Statement of Facts section in this Memorandum is largely the same as the same sections in Responses to Motions for Preliminary Injunctions previously submitted by State Board Defendants in the two other cases pending in this Court challenging SB 747, *Democratic National Committee, et al., v. N.C. State Board of Elections, et al.*, No. 1:23-cv-862, and *Voto Latino, et al. v. Hirsch, et al.*, No. 1:23-cv-861. Content has been added here to address issues unique to the claims raised in the present case and to incorporate guidance issued by the State Board concerning SB 747 on December 8, 2023, in Numbered Memo 2023-05, attached to the Declaration of Counsel as Exhibit E.

² See NCDMV websites, "Official NCDMV: Voter Registration Application," <https://www.ncdot.gov/dmv/offices-services/online/Pages/voter-registration-application.aspx>, last visited October 24, 2023.

³ These requirements are also found on the State Board's registration form, a copy of which is attached to the Declaration of Counsel as Exhibit A.

makes an initial determination whether the applicant is qualified to vote at the address given. *Id.*, -82.7(a). If county board staff find that the voter failed to complete any required item on the form but provided contact information, staff are required to attempt to contact the voter to correct the form. *Id.*, -82.4(f). If, at this initial stage, staff determine that the applicant is not qualified, they must send a notice of denial by certified mail to the applicant. *Id.*, -82.7(b). The notice states the alternatives means by which the applicant may still vote or appeal the denial decision. *Id.*, §§ -82.7(b) and -82.18. Section 163-82.18 sets forth the procedure for an appeal with a public hearing before the county board and allows for judicial review in North Carolina Superior Court. *Id.*, -82.18

If county board staff determine at this initial stage that the applicant is qualified, they then conduct the address verification mailing process under which they mail a notice, by nonforwardable mail, to the address provided on the form by the applicant. *Id.*, -82.7(c). The notice informs the applicant that they will be registered, unless the postal service returns the notice as undeliverable, and provides the precinct and voting place to which they will be assigned.⁴ *Id.* If the first notice is returned as undeliverable, a second nonforwardable notice is sent to the same address. *Id.*, -82.7(e). If the second notice is also returned as undeliverable, the application to register is denied. *Id.*, -82.7(f). No further notice is required or attempted by county board staff. *Id.*

⁴ Most voters would recognize this notice as the “voter registration card” they receive in the mail after registering or updating their registration.

2. *Same-Day Registration Prior to SB 747*

Since enactment in 2007, North Carolina has offered same-day registration as an additional opportunity for individuals to register even if they missed the standard registration cutoff of 25 days prior to election day. Session Law. 2007-230. Under the current version of that law, a person eligible to vote can register and vote at an early voting site in the person's county of residence during the early voting period. N.C.G.S. § 163-82.6A(a) (2012); *see also N.C. State Conf. of the NAACP v McCrory*, 831 F.3d 204, 237, 239, 242 (4th Cir. 2016); Numbered Memo 2016-15, attached to the Declaration of Counsel as Exhibit B.^{5,6}

The individual must complete the same voter registration form as required by section 163-82.4, described above, and provide proof of residence by presenting a North Carolina driver's license, a photo identification from a government agency showing the voter's name and address, a current utility bill, bank statement, government check, paycheck, or other government document. N.C.G.S. § 163-82.6A(b) (2012) (citing N.C.G.S. § 163-166.12(a)(2) for acceptable documents); *see also* Ex. B at 2-3; and the State Board's Registration website, n.5 *supra*.

In addition, the State Board has the authority to "designate additional documents or methods that suffice" in proving residency. N.C.G.S. § 163-82.6A(b)(2) (2012). The State

⁵ Appendix A to Numbered Memo 2016-15 contains a copy of N.C.G.S. § 153-82.6A (2012). Ex. B at 3.

⁶ *See* N.C. State Bd. of Elections' Public Website, "Register in Person During Early Voting," <https://www.ncsbe.gov/registering/how-register/register-person-during-early-voting>, last visited November 7, 2023.

Board has previously recognized that students living in campus housing may have difficulty producing documents displaying their on-campus address. Ex. B. at 3. To address this difficulty, the State Board authorized “the use of certain documents from the state’s public and private schools, colleges, and universities” as proof of residency for students residing on campus. *Id.* Specifically, the Board authorized the use of “any document originating with the educational institution and containing the student’s name and on-campus housing address or facility name[.]” *Id.* As an alternative, the State Board gave these educational institutions the option of “voluntarily provid[ing] elections officials with a list of all students residing in a particular campus housing facility, which may be referenced in conjunction with a valid student photo identification card presented by the registrant.” *Id.*

Any person who is qualified, completes the registration form, and presents the required documents is registered to vote and can immediately vote a retrievable ballot like all other early voters. N.C.G.S. § 163-82.6A(c) (2012).

Within two business days, county board staff, working with State Board staff, must verify the driver’s license number or last four digits of the Social Security Number provided on the registration form and update the registration database. *Id.*

After the voter is initially determined to be eligible, again like the standard voter registration process, the county board will proceed to verify the person’s address through the mailings described above. *Id.*, -82.6A(d). The county board will mail a notice to the applicant by nonforwardable mail. N.C.G.S. § 163 -82.7(c) (2023). If the notice does not

come back, the applicant's vote will be counted, but if the notice comes back as undeliverable, the county board will mail a second notice. *Id.*, -82.7(d) and (3).

Although this two-notice process tends to work effectively during standard voter registration, the short window of time between early voting and county canvass, which occurs ten days after election day when the vote totals are certified, can give rise to complications. *See* N.C.G.S. § 163-82.7(g), -182.5(b).

First, the limited period for early voting can result in the second verification mailing being returned as undeliverable *after* the county board canvass is complete and the vote totals are certified. *Id.*, -82.7(g)(3); *see also* Ex. B at 3, and *see* Numbered Memo 2022-05 at 2–3, attached to the Declaration of Counsel as Exhibit C at 8. As a result, a person ultimately deemed ineligible to register for failing the address verification process after canvass would have their vote counted.

Second, even if the second notice is returned as undeliverable before the county canvass, current law makes removing the applicant's vote difficult. Under such circumstances, section 163-82.7(g) applies and directs that the only means to have that person's ballot removed is through a challenge filed with the county board pursuant to section 163-89. *Id.*, -82.7(g)(2).⁷ Under state law, such a challenge may be filed by the county board. *See id.*, -182.5(a).

⁷ Section 163-82.7(g)(2) applies because, currently, early voting is a type of "absentee" voting, *see* N.C.G.S. § 163-227.2, and section 163-82.7(g)(2) authorizes a challenge for any "absentee ballot" cast by a voter who fails mail verification. Under SB 747, however, as of January 1, 2024, early voting will no longer be a type of absentee voting. *See* SB 747, N.C. Sess. Law 2023-140, sec. 27.

However, in 2018, this Court entered a permanent injunction, based on an interpretation of the National Voter Registration Act, that prohibits any voter challenges from being brought without individualized knowledge of the voter's circumstances within 90 days of a federal election. *N.C. State Conf. of the NAACP v. Bipartisan State Bd. of Elecs. & Ethics Enf't*, No. 1:16-cv-1274, 2018 U.S. Dist. LEXIS 134228, at *18-22, 24-25, 27-29, 37-38 (M.D.N.C. Aug. 8, 2018); *see also* Numbered Memo 2018-07, attached to the Declaration of Counsel as Exhibit D and Ex. C at 8. Accordingly, the State Board instructs county boards that a same-day registrant's ballot must be counted and cannot be challenged on the basis of undeliverable mail without additional individualized evidence that the voter is not a resident of the voting jurisdiction. *See* Ex. D and Ex. C at 8. As a practical matter, this means that county boards cannot challenge votes based on the fact that two mailings have been returned as undeliverable. Thus, individuals who are ultimately deemed ineligible to register for failing the address verification process before canvass would also nevertheless have their vote counted.

3. *Same Day Registration Under SB 747*

SB 747 has altered the same-day registration process to address these issues. Under the newly created section 163-82.6B, a prospective same-day registrant is greeted by the same process as before when they arrive at an early voting site: They must complete a voter registration application form, present a photo identification, and provide proof of residence. 2023 Session Law 140, sec. 10.a(b) and (e); *see also* Numbered Memo 2023-05, attached to the Declaration of Counsel as Exhibit E.

For proof of residence, an individual registering to vote using same-day registration must present “a HAVA document listing the individual’s current name and residential address.” *Id.*, sec. 10.a(b)(2). A “HAVA document” refers to any of the following showing the individual’s name and address: (1) a current utility bill; (2) a current bank statement; (3) a current government check; (4) a current paycheck; (5) another current government document; or (6) a current “document issued from the institution who issued the photo identification shown by the voter[.]” *Id.*, sec. 10.a(e).⁸

Subsection (6) incorporates the use of the same type of documents the State Board previously authorized to address the difficulty students living on college campuses may have in producing documents displaying their address. *Compare id.*, with Ex. B at 2-3; *see also* Ex. E at 4.⁹

The State Board’s guidance regarding what documents can be accepted as proof of residency remains largely the same as it was pre-SB 747. *Compare* Ex. B at 2-3, *with* Ex. E at 2-4. Moreover, despite what Plaintiffs allege in their Complaint, similar to before, colleges or universities are given the option of “voluntarily provid[ing] elections officials with a list of students and their residential addresses.” Ex. E at 4.

⁸ Typically, the acronym HAVA refers to the federal Help America Vote Act. However, the use of “HAVA document” in the new same-day registration law does not actually incorporate, and should not be confused with, the use of the acronym as it relates to that federal law, which has a different but similar identification requirement. *See* 52 U.S.C. § 21083(b); *see also* N.C.G.S. § 163-166.12 (implementing the HAVA ID requirement).

⁹ *See also* N.C. State Bd. of Elections’ Public Website, “Registering as a College Student,” <https://www.ncsbe.gov/registering/who-can-register/registering-college-student> (last visited Dec. 8, 2023).

Immediately upon providing proof of residency, a registrant is permitted to vote a retrievable ballot, just like all other early voters. 2023 Session Law 140, sec. 10.a(c). The county board staff then engages in the same process to verify the identity and eligibility of the applicant within two business days as they did previously. *Id.*, sec. 10.a(d).

Assuming the same-day registrant passes initial verification, the new legislation introduces changes that Plaintiffs challenge as unconstitutional. SB 747 directs that if a single notice mailed to the address provided on the applicant's registration form is returned as undeliverable, "the county board shall not register the applicant and shall retrieve the applicant's ballot and remove that ballot's votes from the official count." SB 747, N.C. Sess. Law 2023-140, sec. 10.(a)(d). This amendment removes the requirement for a second notice to verify an applicant's address and allows for a process that is more likely to be completed prior to county canvass. *Id.* This amendment also conforms the same-day registration process to standard registration, in that the applicant is simply denied registration following the failure of the address-confirmation process, rather than requiring the county board to conduct a challenge process. *Compare id. with* N.C.G.S. § 163.82.7(f). Finally, SB 747 no longer classifies early voting as absentee voting, and as a result, the challenge procedures in section 163-82.7(g)(2) no longer apply. *Id.*, sec. 27.

B. Summary of Plaintiffs' Allegations

First, Plaintiffs contend that SB 747's same-day registration provision does not meet the procedural due process requirements of the Fourteenth Amendment. [D.E. 1, ¶¶ 94-106]. According to Plaintiff, this is because residency is verified under SB 747's same-day registration procedures by mailing only one notice, and because SB 747 does not

otherwise provide for notice to the voter and an opportunity to be heard before removal based upon the failure of that single notice. [*Id.*].

Second, Plaintiffs contend that the one-notice procedure and the lack of notice and an opportunity to be heard also unduly burdens the right to vote in violation of the First and Fourteenth Amendments. [*Id.*, ¶¶ 107-13].

Finally, Plaintiffs contend that the changes made to same-day registration under SB 747 “target” the rights of young voters, thus making it more difficult for them to vote. [*Id.*, ¶¶ 1, 6-8]. Plaintiffs define young voters as those between the ages of 18 and 25 [*id.*, ¶ 3], with their allegations focusing largely on college-student voters [*see, e.g., id.*, ¶¶ 7, 31, 35-39, 63, 65-68, 82-87]. Plaintiffs allege that “curtaining” same-day registration will have a disproportionate impact on young voters because those voters disproportionately use that method to register. [*Id.*, ¶ 4]. Plaintiffs further allege that young voters “constitute the largest share of all recorded registration rejections for failed mail verification in the last decade.” [*Id.*, ¶ 62]. According to Plaintiffs, North Carolina has a recent history of “attacks on young voters and their preference for early voting and same-day registration[,]” including during the legislative process underlying the passage of SB 747. [*Id.*, ¶¶ 32-42, 82-91]. Based upon these and other allegations in the Complaint, Plaintiffs contend that the passage of SB 747, and its change from two to one residency verification mailing in particular, resulted from intentional age discrimination against young voters, that this change was justified by neither a legitimate nor compelling government interest, and that, accordingly, SB 747 violates the Twenty-Sixth Amendment. [*Id.*, ¶¶ 114-18].

Legal Argument

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

Legal Standard

To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter . . . ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In evaluating a Rule 12(b)(6) motion, the Court considers the allegations in the Complaint and any materials incorporated therein, as well as any document submitted by the movant that is “integral to the complaint and there is no dispute about the document’s authenticity.” *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Court may also take judicial notice of public records when considering a Rule 12(b)(6) motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (recognizing that a court may consider during Rule 12(b)(6) review any “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice”); *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004) (taking judicial notice of information publicly available on official government website); *see also* Fed. R. Evid. 201.

A. Count One Should Be Dismissed for Failure to State a Claim.

Plaintiffs argue in Count One that SB 747’s same-day registration provisions violate the U.S. Constitution’s Due Process Clause, because they do not provide notice or a meaningful opportunity to be heard prior to the cancellation of an otherwise eligible voter’s

registration and the removal of the voter's ballot based upon a failed single-notice address verification process. [D.E. 1, ¶¶ 94-106].

To show entitlement to due process, a plaintiff must establish “(1) [he possessed] a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate.” *Shirvinksi v. U.S. Coast Guard*, 673 F.3d 308, 314 (4th Cir. 2012).

At this preliminary stage, State Board Defendants agree that qualified voters who are eligible to register possess a cognizable liberty interest in having their votes properly counted. Also, State Board Defendants assume for the sake of argument at this preliminary stage that otherwise eligible voters may have their ballots erroneously retrieved and that this would be a deprivation by state action.

As for the third prong assessing the adequacy of the procedural protections, Plaintiffs seek to have the Court analyze the third prong under the three-factor procedural due process test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). [D.E. 1, ¶ 98]. *Mathews* holds that procedural due process requires notice and opportunity to be heard before the deprivation of a liberty interest. *Mathews*, 424 U.S. at 348 (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”); see also *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145-46 (4th Cir. 2018) (“The bottom line is that the deprivation of a protected interest warrants some sort of notice and opportunity to be heard.”). The State Board Defendants concede that the notice mailing process set forth under the new same-day registration regime does not provide for either of these protections. Therefore,

State Board Defendants acknowledge that if this Court applies the *Mathews* test, Plaintiffs claims are not subject to dismissal at this time.

That said, State Board Defendants disagree that the *Mathews* test is the most suitable test in cases challenging elections laws under the Fourteenth Amendment. *Richardson v. Hughs*, 978 F.3d 220, 233 (5th Cir. 2020). In those cases, the more appropriate test is one taken from *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)), and *Burdick v. Takshi*, 504 U.S. 428, 434 (1992), as every federal court of appeals to consider the issue has found. *Richardson v. Hughs*, 978 F.3d at 234; accord *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1195 (9th Cir. 2021); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); see also *Democratic Party of Va. v. Brink*, 599 F. Supp. 3d 346, 361 (E.D.Va. 2022); but see *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 226 (M.D.N.C. 2020) (applying *Mathews* where plaintiffs challenged the lack of a cure process for absentee ballots, without specifically analyzing which framework should apply).

That test—commonly referred to as *Anderson-Burdick*—requires courts to weigh “the character and magnitude of the asserted injury” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Pisano v. Strach*, 743 F.3d 927, 933 (4th Cir. 2014) (citing *Anderson*, 460 U.S. at 789, and *Burdick*, 504 U.S. at 434). Put differently, courts will ask “(1) whether the process poses a ‘severe’ or instead a ‘reasonable, nondiscriminatory’ restriction on the right to vote and (2) whether the state’s interest justifies the restriction.” *Richardson*, 978 F.3d at 235 (quoting *Burdick*, 504 U.S. at 434).

The address-verification process is a close question under *Anderson-Burdick*, but it does pass muster. Plaintiffs note correctly that, prior to SB 747, a two-notice address verification process applied to same-day registrations. But, under the prior same-day registration process, due to time constraints and a permanent injunction prohibiting certain challenges, even if two mailings were returned as undeliverable and the applicant's voting address is therefore unverified, the county board was unable to remove that vote. In this regime, the government's interest in ensuring only eligible ballots are counted in an election was undermined, because the government had to count even ballots submitted by voters who failed address verification.

The new process under SB 747 attempts to fix this problem. Under the new approach, after a same-day registrant's form is reviewed and passes initial review, the county board will mail a notice to the voter's registered address. SB 747, sec. 10.(a)(d). If that notice comes back as undeliverable, the voter's ballot will be retrieved and will not be counted. *Id.* This approach to registration attempts to balance voters' interest in having their lawful votes counted against the State's interest in counting only lawful votes.

Post SB 747, for those voters who register through the standard process before the voter registration deadline, as opposed to same-day registration after that deadline, the county boards still mail *two* notices before declining to register the voter. As a policy matter, sending two notices may be considered a more effective means of address verification than mailing a single notice. But sending two notices is not a feasible approach to address verification for voters who rely on same-day registration, given the narrow

window of time between registration and the canvass, at which time the counting (or discounting) of ballots is final.

In Count One, Plaintiffs specifically challenge SB 747 because it does not require the county boards to provide notice after an address-verification notice comes back as undeliverable or provide a mechanism for challenging the State's decision to retrieve a ballot on that basis. Plaintiffs are correct in their interpretation of SB 747, as noted above in discussing *Mathews*. But the address verification process is the last step in the same-day registration process, and the burdens it imposes upon applicants should not be analyzed in a vacuum. Instead, those burdens should be considered holistically in light of the other means by which voters may register, and then balanced against the government interests at stake. *Pisano*, 743 F.3d at 933 (citing *Anderson*, 460 U.S. at 789, and *Burdick*, 504 U.S. at 434).

North Carolina law allows any eligible resident to register online or in person at numerous state agencies up to 25 days before the election. N.C.G.S. § 163-82.6(d); *see also* Statement of Facts, Part A. If a potential voter does not register by that deadline, North Carolina provides same-day registration as an exception to the registration deadline. *See* 2023 Session Law 140, sec. 10.a (N.C.G.S. § 163-82.6B). To accommodate this significant exception, the government's interest in ensuring only eligible votes are counted requires a modification to the standard address-verification process to address the short period of time between early voting (when same-day registration occurs) and the county canvass. Notably, in contending that there are no legitimate government's interests in the changes to same-day registration under SB 747, Plaintiffs ignore this significant concern.

Instead of two mailed notices, same-day registrants are notified in person at same-day registration that the address provided on their registration form will be verified by a single notice mailing sent to their address. SB 747, sec. 10.(a)(d); Ex. E at 5.¹⁰ Thus, after leaving early voting, same-day registrants know that the address-verification mailing is coming; that if they do not receive it, they will have failed address verification; and that if they fail address verification, they will not be registered and their vote will not be counted. Taken as a whole, the burden this places on an individual registering to vote using same-day registration is a reasonable, nondiscriminatory restriction that is counterbalanced by the government interest in ensuring only eligible votes are counted. For these reasons, Plaintiffs' Count One fails to state a claim.

B. Count Two Should be Dismissed for Failure to State a Claim.

Plaintiffs argue in Count Two that the single-notice address verification process for same-day registration, alongside SB 747's failure to provide for notice and an opportunity

¹⁰ The State Board is specifically instructing election officials that, “[b]ecause a voter’s ballot may be discounted if a single piece of mail is returned as undeliverable by the Postal Service, it is vital that elections officials emphasize to voters that they must provide an address where they can receive mail.” Ex. E at 5 (bolding removed). The State Board’s guidance to election officials demands vigilance when assisting same-day registrants in completing their registration applications. *See id.* Officials “shall,” for example, ask voters whether they can receive mail at their residential address, if voters do not list a mailing address on their applications. *Id.* They “must” recommend voters provide phone numbers or email addresses, so that they may be contacted quickly if there are questions about their address. *Id.* And, if there are questions, officials are instructed that they “should” contact the voter to seek clarification before sending the first mail verification notice. *Id.* The State Board also created a written notice that poll workers are required to give to all same-day registrants informing them, among other things, that “[i]f the Postal Service is unable to deliver your voter registration card to your address, your voter registration will be denied and your vote will not be counted. For this reason it is very important that you provide a mailing address that will receive mail, if you do not receive mail at your residential address.” Notice to Same-Day Registrants, attached to Declaration of Counsel as Exhibit F, p. 1 (bolding omitted).

to be heard, imposes a severe burden on eligible voters' right to vote and, therefore, violates the First and Fourteenth Amendments. [D.E., ¶¶ 107-13]. As Plaintiffs recognize, the analysis applicable to this claim is the *Anderson-Burdick* test described in section A., and as the application of that test shows, SB 747's same-day registration procedures place a reasonable, nondiscriminatory restriction on voting that is counterbalanced by the government interest in ensuring only eligible votes are counted. Accordingly, the same-day registration procedures, including the single-notice address verification process, do not violate the First and Fourteenth Amendments, and Plaintiff thus fails to state a claim in Count Two.

C. Plaintiffs' Count Three Should be Dismissed for Failure to State a Claim.

Plaintiffs argue in Count Three that SB 747's same-day registration procedures violate the Twenty-Sixth Amendment. [D.E. 1, ¶¶ 114-18]. In support, Plaintiffs allege that the General Assembly passed SB 747 with the intent to suppress votes cast by younger voters and to discriminate on the basis of age; that SB 747's same-day registration procedures were not justified by any legitimate state interest, much less any compelling interests; and that those procedures in SB 747 deny and abridge young voters' right to vote on the basis of their age. (Id., ¶¶ 116-18).

The Twenty-Sixth Amendment provides that “[t]he 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. XXVI, § 1.

As this Court has already recognized, “[i]t is far from clear that the Twenty-Sixth Amendment was intended to encompass” laws that eliminate or modify “voting

conveniences” or “fail-safes,” such as same-day registration and early voting. *NAACP v. McCrory*, 182 F. Supp. 3d 320, 523 (M.D.N.C.), *rev’d on other others ground*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 581 U.S. 985 (2017). In *McCrory*, the plaintiffs raised, among others, a claim alleging that a prior North Carolina omnibus election law that completely eliminated same-day registration, shortened the early voting period, excluded student identification cards as acceptable forms of voter ID, and made other modifications to election procedures violated the Twenty-Sixth Amendment because those measures were designed to discriminate on the basis of age. *Id.* The district court in *McCrory* rejected the plaintiffs’ Twenty-Sixth Amendment claim. The Court assumed without deciding that even if the Twenty-Sixth Amendment was “effectively the Fifteenth Amendment but with young voters as the relevant class,” the plaintiffs’ claim failed because they had not established that the challenged law “was intended to discriminate against young voters.” *Id.* The Court also found the plaintiffs in *McCrory* did not establish that the law denied or abridged the right of any eligible eighteen-year-old to vote, because they failed to show the law imposed a heavier burden on young voters, and because “ample alternative registration and voting mechanisms” were available to qualified young voters, and indeed to all qualified voters. *Id.* at 524-25. The Fourth Circuit later struck down the law challenged in *McCrory*, concluding it discriminated on the basis of race, without addressing this Court’s analysis of the plaintiffs’ Twenty-Sixth Amendment claim. *See McCrory*, 831 F3d 204.

In *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 607 (4th Cir. 2016), the Fourth Circuit expressed uncertainty as to the proper analysis for a Twenty-Sixth Amendment

claim. The Court noted, similar to this Court in *McCrorry*, that “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.” In that case, the plaintiffs brought several claims, including one alleging Virginia’s voter-identification law constituted discrimination based upon age in violation of the Twenty-Sixth Amendment, arguing that examination of the claim should be governed by the same analysis used to examine racial discrimination claims under the Fifteenth Amendment. *Id.* As noted above, the Fourth Circuit expressed skepticism at the plaintiffs’ argument. *Id.* It nonetheless concluded that even if the Fifteenth Amendment’s jurisprudence applied, the plaintiffs in that case failed to demonstrate there was intentional discrimination based on age. *Id.*

Since this Court’s decision in *McCrorry* and the Fourth Circuit’s decision in *Lee*, at least two federal circuit courts have examined Twenty-Sixth Amendment claims and determined that the Amendment does not apply to laws affecting voting conveniences or fail-safes similar to the ones at issue in *McCrorry* and the one at issue in this case. In *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020), the Fifth Circuit declined to preliminarily enjoin a Texas law that provided only those voters aged sixty-five and older with the option to vote by mail, specifically concluding the law did not violate the Twenty-Sixth Amendment. The Court in that case determined that the amendment did confer “an individual right to be free from the denial or abridgment of the right to vote on account of age, the violation of which allows for pursuing a claim in court.” *Id.* at 184. However, according to *Abbott*, the scope of that right was limited to the scope of the right as it was understood at the time the amendment was ratified in 1971. *Id.* at 188. The Fifth

Circuit concluded that although absentee voting did exist at the time, it was the exception, and “in-person voting” was the rule. *Id.* at 188. Thus, “the right to vote in 1971 did not include a right to vote by mail.” *Id.* at 188. Because giving voters aged sixty-five and older the option to vote by mail did not deny or abridge the right of voters younger than sixty-five to vote, and specifically the right to vote in person, the practice did not violate the Twenty-Sixth Amendment. *Id.*; *cf. Disability Law Ctr. of Alaska v. Meyer*, 484 F. Supp. 3d 693, 706 (D. Alaska 2020) (concluding there was no Twenty-Sixth Amendment violation where Alaska was sending paper ballot applications to older voters because it was “doing nothing that would impede the present ability of voters under age sixty-five to apply for a vote-by-mail ballot,” or to vote in person, and therefore, it “cannot reasonably be construed as an abridgment”), *dismissed as moot*, 857 Fed. Appx. 284 (9th Cir. 2021). The Court in *Abbott* found this was the case even after examining the law in the context of the COVID-19 pandemic. *Abbott* 978 F.3d at 193. The circuit court was careful to caution that although the law in *Abbott* did not violate the Twenty-Sixth Amendment, that did not mean the Constitution may not otherwise prohibit such a law. *See id.* at 191, 193-94 (noting that “a state may [not] always enact such a law, but it does not violate the Twenty-Sixth Amendment,” and remanding the case for the district court to possibly examine the law for age discrimination under separate equal protection principles and, with that, determine the level of scrutiny to apply).

The Seventh Circuit recently declined to preliminarily enjoin an Indiana law that was similar to the one in *Abbott*, concluding the plaintiffs in that case would be unlikely to succeed on their claim that law violated the Twenty-Sixth Amendment. *Tully v. Okeson*,

977 F.3d 608, 613 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 2798 (2021). The law examined in *Tully* provided only certain categories of voters, including those over the age of sixty-five, with the option to vote by mail during the COVID-19 pandemic. *Id.* In declining to issue a preliminary injunction, the Seventh Circuit reasoned that the right to vote under the Twenty-Sixth Amendment did not encompass the “right to cast an absentee ballot by mail[, a]nd unless a state’s actions make it harder to cast a ballot at all, the right to vote is not at stake.” *Id.* at 611. To support this conclusion, the Court in *Tully* relied upon a United States Supreme Court case, *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802 (1969), which found that there is no constitutional right to vote specifically by absentee ballot. *Tully*, 977 F.3d at 611. Because Indiana voters could still “vote on election day, or during the early-voting period, at polling places all over Indiana[,]” the state’s “absentee-voting regime d[id] not affect [the] right to vote and d[id] not violate the [Twenty-Sixth Amendment].” *Tully*, 977 F.3d at 611.

The decisions in *Abbott* and *Tully* are instructive here, particularly considering this Court’s and the Fourth Circuit’s previous skepticism regarding the application of the Twenty-Sixth Amendment and proper analysis of claims brought under that amendment. Same-day registration was not available in any state at the time the Twenty-Sixth Amendment was ratified. *See ACORN v. Bysiewicz*, 413 F. Supp. 2d 119, 133 (D. Conn. 2005) (recounting the history of “election-day registration,” and noting that “[i]n the period between 1972 and 1974, Maine, Minnesota, and Wisconsin adopted [election-day registration] laws as part of a more general process of liberalizing the states’ registration requirements.”). What is more, not long after ratification of the Twenty-Sixth Amendment,

the United States Supreme Court recognized, albeit in a different context, that “a person does not have a federal constitutional right to walk up to a voting place on election day and demand a ballot.” *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (concluding that fifty-day durational residency and fifty-day voter registration requirements for state and local elections were not unconstitutional).

Same-day registration is a convenience that allows individuals to register to vote if they miss North Carolina’s voter registration deadline. Several methods other than same-day registration are provided by which young voters, and indeed all voters, can register to vote. N.C.G.S. §§ 163-82.6(a), -82.11, -82.12, -82.19, -82.20, -82.21, -82.22, and -82.23. Plaintiffs have not alleged that the right of young voters to avail themselves of these standard registration methods was abridged by SB 747, or that without same-day registration, they are unable to vote at all. Therefore, the changes to same-day registration under SB 747, even if they have an impact on young voters as alleged, are not prohibited by the Twenty-Sixth Amendment.

Accordingly, Plaintiffs’ Twenty-Sixth Amendment should be dismissed.

Conclusion

Plaintiffs’ Complaint should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

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

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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CERTIFICATE OF COMPLIANCE WITH RULE 7.3(d)

Undersigned counsel certifies that the present filing is in compliance with Local Rule 7.3(d) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina including the body of the brief, heading and footnotes, and contains no more than 6,250 words as indicated by Word, the program used to prepare the brief.

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

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