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

DEMOCRACY NORTH CAROLINA; NORTH CAROLINA BLACK ALLIANCE; LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA,

Plaintiffs,

v.

ALAN HIRSCH, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, in his official capacity as SECRETARY OF THE STATE BOARD OF ELECTIONS; STACY EGGERS IV, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KEVIN LEWIS, in his official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; SIOBHAN O'DUFFY MILLEN, in her official capacity as MEMBER OF THE STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as EXECUTIVE DIRECTOR OF THE STATE BOARD OF ELECTIONS; NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants,

and

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 REPESENTATIVES,

Intervenor Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND DEFENDANT-INTERVENORS' MOTIONS TO DISMISS

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Democracy North Carolina, North Carolina Black Alliance, and League of Women Voters of North Carolina (together, "Plaintiffs") submit this response in opposition to the State Board Defendants' Motion to Dismiss (ECF. No. 48, "SBE Mot. __") and Legislative Intervenor-Defendants' Motion to Dismiss (ECF. No. 46, "LD Mot. __").

INTRODUCTION

North Carolina law grants all citizens over the age of 18 the right to vote if they have registered and are not otherwise ineligible. S*ee* ECF 1 ("Compl."), ¶ 44. Qualified individuals can register in two ways: (1) by registering at least 25 days before Election Day, *id*. ¶¶ 45-47; or (2) by using same-day registration ("SDR") during early voting, *id*. ¶ 49. Due in part to the flexibility that SDR provides, early voting has been extremely popular in North Carolina, often accounting for more than half of all ballots cast. *Id*. ¶ 3. Early voting, and SDR in particular, has been critical to encouraging young voters[1]—many of whom are newly eligible and/or recently moved—to exercise their franchise.

While SDR once provided a flexible means of voting with procedural safeguards to ensure that qualified voters could cast a ballot and have it count, Senate Bill 747 ("S.B. 747")—enacted October 10, 2023—has stripped those safeguards away, creating a trap that will disenfranchise the qualified voters who use SDR the most and who already face the highest rates of denied registrations due to failed mail verification: young voters. Plaintiffs seek a declaration that Section 10(a) of S.B. 747—the provision overhauling North Carolina's SDR procedure—is unconstitutional under the First, Fourteenth, and Twenty-Sixth Amendments and an injunction barring Defendants from enforcing the same.

[1] Young voters are defined as those aged 18 to 25.

FACTUAL BACKGROUND

SDR Before S.B. 747

Before S.B. 747, same-day registrants were required to attest to their eligibility by completing a voter registration form and providing documentary proof of their residential addresses. Compl. ¶ 50. A same-day registrant who met these requirements could then immediately vote. *Id*. ¶ 52. Upon receipt of the application, the county board of elections took steps to verify the qualifications and address of the registrant. *Id*. ¶ 56. This process involved two rounds of notices sent by non-forwardable mail to the address provided on the voter registration. *Id*. ¶¶ 55-56.[2] Only if both notices were returned undeliverable would a registrant fail mail verification and their application be denied. *Id*. ¶ 56. This is the same verification process utilized for a registrant who submits an application before the 25-day registration deadline. *Id*. ¶¶ 53-57.

In cases where an election occurred before the mail verification process was completed, the applicant—regardless of when they registered—was still permitted to vote. *Id*. ¶ 58. If a registrant failed mail verification after casting their ballot but *before* that ballot was counted, the ballot could be challenged. *Id*. ¶ 60. But the challenged voter was entitled to notice and a hearing, the outcome of which would determine whether the ballot would be counted. *Id.* If a voter failed mail verification *after* their ballot had been counted, the ballot was not disturbed. *Id*. ¶ 61.

SDR After S.B. 747

S.B. 747 substantially overhauls the steps county boards must take to verify a same-day registrant's address and the consequence if mail verification fails. Compl. ¶ 73. Now same-day registrants are only sent one notice, and if that notice returns as undeliverable "before the close

[2] The address to which the mail verification is sent need not be the address where a registrant resides, but any address where the registrant receives mail. Compl. ¶ 56; N.C.G.S. § 163-82.7(c); ECF 49-5 at 7.

business on the business day before canvass," the voter will not be registered and their ballot will not be counted. *Id.* ¶ 75. County boards no longer must provide notice or an opportunity to be heard before denying a voter's registration and canceling their ballot. *Id.* ¶ 7.

A Registrant Who Fails Mail Verification May Still Be an Eligible and Qualified Voter

The State Board has repeatedly acknowledged that failed mail verification should not be equated with voter ineligibility. In a Numbered Memo titled "Unverified Registrations," then-Executive Director Gary Bartlett noted that "[t]here are several reasons that could have been the basis for the unsuccessful verification mailings" and "that the failure of the verification process does not necessarily mean that the voters should not have cast a ballot." Compl. ¶ 71. Similar statements about the efficacy of mail verification and its lack of "precis[ion]" were made by State Board representatives in litigation defending a prior law that sought to curtail SDR. *Id.*

This concession is unsurprising given the many reasons why election mail may be returned as undeliverable, see *id.* ¶ 69, and the fact that mail verification need not always be directed to a registrant's physical residence in the first place. Additionally, lawful voters sometimes change addresses after voting, which can result in failed verification at their previous address, despite being eligible to vote in that election at that listed address. *Id.* ¶ 70. In fact, North Carolina law permits a voter who has moved from one precinct to another in the 30 days preceding an election to continue to claim that prior precinct as their residence even if no longer living there. N.C.G.S. § 163-55(a). Those voters too are likely to fail verification even though qualified to vote.

Young Voters Disproportionately Use SDR and Will Be Significantly Impacted by S.B. 747

Despite comprising a relatively small share (less than 15%) of the overall electorate, young voters were the single largest age demographic utilizing SDR in two of the last four statewide elections, and nearly led in the other two elections. Compl. ¶ 4. Young voters prefer SDR because they tend to move frequently, often annually, especially if they are in college; they are less likely

to have a driver's license or have access to other forms of transportation; they often have inflexible and irregular school and work schedules; and they are more likely to be navigating voting for the first time. *Id.* ¶ 5. Even under the pre-S.B. 747 regime, young voters were the demographic most likely to have their registrations rejected for failed mail verification. *Id*. ¶¶ 62-64. S.B. 747 exacerbates the challenges young voters and student voters already face. *Id*. ¶¶ 65-68.

All voters have a constitutional right to vote under the First and Fourteenth Amendments. Young voters have specific constitutional protections under the Twenty-Sixth Amendment. S.B. 747, by its disproportionate impact on young voters, cannot be enforced if it intentionally abridges those specific constitutional protections. Plaintiffs plausibly allege that it does.

ARGUMENT

A well-pleaded complaint contains factual allegations sufficient to "state a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). When considering a motion to dismiss, the Court must view the allegations in the light most favorable to the plaintiff by "accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

I. PLAINTIFFS HAVE STANDING TO CHALLENGE S.B. 747.

A. Plaintiffs Satisfy the Requirements of Article III Standing.

To establish Article III standing, a plaintiff must show: "(1) that the plaintiff has suffered an injury in fact that is concrete and particularized and actual or imminent; (2) that the injury is fairly traceable to the challenged conduct of the defendant; and (3) that a favorable decision is likely to redress the injury." *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 180 (M.D.N.C. 2020). An organizational plaintiff may establish Article III standing by demonstrating (1) a defendant's actions "impede[d] [the organization's] efforts to carry out its

mission," and (2) the organization was forced "to divert its resources in order to address the defendant's actions." *Id.* at 182. "When an action perceptibly impairs an organization's ability to carry out its mission and consequently drains the organization's resources . . . the organization has suffered injury in fact." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (cleaned up).

Here, all three Plaintiffs have adequately alleged organizational standing. *See* Compl. ¶¶ 14-21. Plaintiffs Democracy North Carolina, North Carolina Black Alliance, and League of Women Voters of North Carolina are 501(c)(3) non-partisan organizations who all work to engage, educate, and mobilize North Carolina voters to participate effectively in their democracy. *Id*. ¶¶ 14-16. Each spends significant time and resources in those efforts to reach youth and student voters, and has programs designed to address youth and student voting issues specifically. *Id.*

S.B. 747 severely restricts voting opportunities used by substantial numbers of North Carolinians and will make it significantly more difficult for Plaintiffs to engage in the get-out-the-vote, voter education, voter protection, and voter registration work that they perform in support of their civic engagement missions. *Id*. ¶¶ 17-18. Plaintiffs' programs that focus on youth and student engagement particularly will be hindered because young voters disproportionately rely on SDR and now face acute risk of disenfranchisement. *Id*. ¶¶ 18, 62-70.

Plaintiffs will therefore be required to divert time and resources away from their many other civic engagement activities in order to counteract and overcome the harm caused by S.B. 747. For example, S.B. 747 will force Plaintiffs to devote more resources to (i) voter registration efforts outside the 25-day registration period because qualified individuals who use SDR to register and vote can no longer rely on their ballots being counted, (ii) education efforts, so that voters are

warned about the risk of the new SDR regime, know how to complete their voter registration to increase the likelihood of their ballot counting, and are aware of voting methods that carry less risk of disenfranchisement; and (iii) educating election officials and university administrators on the consequences of failed verification and how best to assist at-risk voters. Compl. ¶ 18.

Legislative Defendants' contend[3] that Plaintiffs' complaints are "nothing more than generalized grievances," and that any harm to young voters "is speculative." LD Mot. 6. But those arguments ignore fact-based allegations of specific harm to Plaintiffs, including how young voters disproportionately use SDR, are most impacted by failed mail verifications, and will therefore face an actual and specific risk of disenfranchisement from S.B. 747. *See* Compl. ¶¶ 62-67, 92-93. *See also Democracy N.C.*, 476 F. Supp. 3d at 186-87 (evidence of absentee ballot rejection rates supported standing allegations about absence of absentee ballot curing procedures' impact on mission and resource diversion). These allegations also undercut any traceability arguments, since they more than adequately "demonstrate an impending injury" to Plaintiffs and the young voters they serve. LD Mot. 8.

Legislative Defendants also discount Plaintiffs' allegations concerning diversion of resources, arguing that they amount to a "general diversion of resources to inform and educate voters on a new law . . . without a sufficient connection to an organization's mission." LD Mot. 7. But Plaintiffs plausibly allege that their diversions of resources will go well-beyond that, *see* Compl. ¶¶ 17-18, constituting more than just "mere budgetary concerns," LD Mot. 7, including, for example, the need to substantially reconfigure their youth voter engagement efforts by shifting resources away from SDR (the method preferred by youth voters). Compl. ¶¶ 17-18. Far from simply "bootstrap[ing] standing by expending its resources in response to the actions of another,"

[3] State Board Defendants concede Plaintiffs' standing at the Rule 12 phase.

Lane v. Holder, 703 F.3d 668, 675 (4th Cir. 2012), these efforts are core to Plaintiffs' preexisting organizational missions and activities. Compl. at ¶¶ 17-18. Civic engagement organizations routinely establish organizational standing with averments like these. *See Democracy N.C.*, 476 F. Supp. 3d at 185-86; *N.C. A. Philip Randolph Inst. v. N.C. State Bd. of Elections*, No. 1:20-cv-00876, 2020 WL 6488704, at *3–5 (M.D.N.C. Nov. 4, 2020); *Action NC v. Strach*, 216 F. Supp. 3d 597, 616-18 (M.D.N.C. 2016).

Finally, that young voters experienced high rates of failed mail verification pre-S.B. 747 does not mean that Plaintiffs work to mitigate harm will be "minimal." LD Mot. 7-9. That argument wrongly assumes that rates of failed mail verification will not change under a single notice system. Plaintiffs' allegations on why voters, and young voters in particular, fail mail verification (often for reasons beyond their control) strongly suggest an increase in the rate of eligible voters disenfranchised under S.B. 747. *See* Compl. ¶¶62-67. Legislative Defendants also ignore the more urgent point: the prior two-mailer procedure was accompanied by notice and due process before a ballot could be rejected, whereas the new process has none. *Id*. ¶¶ 54, 57, 59-61. By making Plaintiffs' SDR efforts less effective, S.B. 747 will divert Plaintiffs' resources to other, far from "minimal" efforts. *Id*. ¶¶ 14-18. Because enjoining the challenged provision would prevent these organizational harms, Plaintiffs easily satisfy the redressability prong of the standing inquiry too. *Id*. ¶¶ 18, 92-93.

B. Plaintiffs Satisfy the Requirements of Prudential Standing.

Plaintiffs also have third-party standing to bring these claims, contrary to Legislative Defendants' assertions. LD Mot. 10. A plaintiff may establish prudential standing to assert the rights of third-parties when 1) the plaintiff has "'a close relation[ship]' with the person who possesses the right" and 2) that person is hindered from asserting their own interests. *Maryland*

Shall Issue, Inc. v. Hogan, 971 F.3d 199, 215 (4th Cir. 2020) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)).

Plaintiffs allege at least some young voters will be disenfranchised by S.B. 747, but that it is impossible to predetermine *which* particular voters. Comp. ¶ 20. Plaintiffs have close relationships with these young voters through their civic engagement work, and have extensive experience helping them navigate these potentially disenfranchising risks. *Id*. ¶¶ 14-16, 21, 65. Because the challenged provisions will disenfranchise voters only during the pendency of an actual election, when it would be far too late to press those claims in court, those voters will be unable to bring an action on their own behalf. *Id*. ¶ 21.

Finally, Section 1983 does not bar organizational plaintiffs from asserting third-party standing as Legislative Defendants argue. LD Mot. 11. And their reliance on the Fifth Circuit's decision in *Vote.org* is misplaced. *See Vote.org v. Callanen*, 39 F.4th 297, 304 (5th Cir. 2022) (considering whether plaintiffs could assert statutory standing under § 1983 as an *alternative* to third-party standing). Indeed, the Fifth Circuit recently held that a plaintiff's "position as a vendor and voting rights organization is sufficient to confer third-party standing" to bring a claim under Section 1983. *Vote.org v. Callanen*, No. 22-50536, 2023 U.S. App. LEXIS 33300, at *15 (5th Cir. Dec. 15, 2023) ("Section 1983 is an appropriate vehicle for third-party claims.").

II. PLAINTIFFS HAVE ADEQUATELY ALLEGED A PROCEDURAL DUE PROCESS CLAIM.

The Fourteenth Amendment prohibits the deprivation of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "Where the government seeks to deprive someone of a liberty interest protected by due process, due process demands that certain procedural safeguards be provided." *United States v. Baker*, 45 F.3d 837, 843 (4th Cir. 1995). To establish a procedural due process violation, a plaintiff must demonstrate: "(1) 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." *Accident, Inj. & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019). Here, S.B. 747 deprives qualified voters using SDR of their right to adequate notice and an opportunity to be heard prior to the disqualification of their ballot. Compl. ¶¶ 94-106.

In opposition, the State Board and Legislative Defendants take divergent approaches on what legal test applies and whether Plaintiffs satisfy those standards. State Board Defendants concede the first and second elements, SBE Mot. 12, but argue that the third—the adequacy of the procedures employed—should be considered under *Anderson-Burdick* rather than the *Mathews* test, *id*. at 13, and that Plaintiffs fail that standard.[4] Legislative Defendants acknowledge the "circuit split" on the appropriate test, note that *Anderson-Burdick* is "likely" the "correct standard," but then challenge all three elements of Plaintiffs' claim under *Mathews*. LD Mot. 12. Because the weight of persuasive authority in this and other circuits supports the *Mathews* test, and because Plaintiffs' allegations satisfy that standard, the procedural due process claim survives dismissal.

A. The *Mathews* Test Applies to Plaintiffs' Procedural Due Process Claim.

A court assessing procedural due process protections under *Mathews* must consider three factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of that interest given the procedures used, as well as the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that additional procedures would require. *Mathews v. Eldridge*, 424 U.S. 319, 340-49 (1976). "Procedural due process requires fair notice of impending state action and an opportunity to be heard." *Snider Int'l Corp. v. Town of Forest Heights*, 739 F.3d 140, 146 (4th Cir.

[4] Notably, State Board Defendants concede that if the *Mathews* test does apply, as many courts have found it does, "Plaintiffs claims are not subject to dismissal at this time." SBE Mot. 13.

2014); *see also Self Advoc. Sol. N.D. v. Jaeger*, 464 F. Supp. 3d 1039, 1052-53 (D.N.D. 2020) ("Because there is no . . . way to vote after an election is over [] sufficient pre-deprivation process is the constitutional imperative."). In contrast, *Anderson-Burdick* uses a balancing test that weighs "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, 932 (4th Cir. 2014).

To argue *Anderson-Burdick* should apply, State Board Defendants rely primarily on distinguishable out-of-circuit cases, and fail to address recent district court cases from this circuit applying *Mathews* under facts similar to those here. SBE Mot. 13. For example, State Board Defendants cite *Richardson v. Hughs*, 978 F.3d 220, 233 (5th Cir. 2020), but that case acknowledges that "[n]either *Anderson* nor *Burdick*, however, dealt with procedural due process claims, and both instead based their approach on the 'fundamental rights strand of equal protection analysis[,]'" *id.* at 233, which is not at issue here. Moreover, the court in *Richardson* rejected the argument that voting constitutes a liberty interest protected by procedural due process, 978 F.3d at 230-31, which is in conflict with State Board Defendants' position, SBE Mot. 12, and "contrary to a large body of case law[.]" *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 77 (D.S.C. 2020) (collecting cases). Indeed, the Fourth Circuit has said "[t]he right to vote…is certainly a protected liberty interest[.]" *Barefoot v. City of Wilmington*, 306 F.3d 113, 124 n.5 (4th Cir. 2002). Similarly, both of the other out-of-circuit cases cited dealt with deadlines for voting by mail, rather than registration and voting procedures themselves. *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1281 (11th Cir. 2020); *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1192 (9th Cir. 2021). The due process entitled to a voter who follows all applicable rules and is

disenfranchised through no fault of their own is quite different from the due process owed a voter who misses a statutory deadline.

Both sets of Defendants also cite *Democratic Party of Va. v. Brink*, 599. F. Supp. 3d 346, 360-61 (E.D. Va. 2022). SBE Mot. 13; LD Mot. 12. But *Brink* proves illusory for Defendants. There, plaintiffs challenged the notice and cure process for absentee ballot rejections where the registrar was required to notify a voter of ballot defects within a certain period before Election Day. *Brink*, 599 F. Supp. 3d at 353. The court recognized that *Mathews* is traditionally used in procedural due process challenges, but noted that "even if *Mathews* is the correct test to apply here, it is conceptually duplicative of the specific test in *Anderson*/*Burdick* and would likely lead to the same outcome." *Id.* at 361 n.19 (internal quotations omitted). This makes sense: the *Mathews* test can be thought of within the *Anderson-Burdick* framework as making certain protections mandatory when levying certain burdens (those that implicate due process) on the right to vote. When courts, like the Ninth and Eleventh Circuits, have chosen not to apply the *Mathews* test, they decided based on the specific nature of the burden imposed on the right to vote, not on whether procedural due process principles apply to voting generally. *See, e.g.*, *New Ga. Project*, 976 F.3d at 1282. Where a liberty interest is deprived with no notice or opportunity to be heard, as S.B. 747 surely does, *Mathews* governs.

Although the Fourth Circuit has not yet applied *Mathews* in this context, two district courts within the Circuit have. In *Democracy North Carolina*, 476 F. Supp. 3d at 226-29, 237, the court applied *Mathews*, ultimately finding a violation and entering an injunction preventing the rejection of absentee ballots without due process. And in *League of Women Voters of South Carolina*, 497 F. Supp. 3d at 77, the plaintiffs succeeded on a similar challenge under *Mathews*. Many district courts throughout the country addressing disenfranchising provisions with no notice or opportunity

to be heard have also found procedural due process violations under *Mathews*. *See Jaeger*, 464 F. Supp. 3d 1039; *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. 2018), *aff'd sub nom. Ga. Muslim Voter Proj. v. Kemp*, Nos. 18-14502-GG, 18-503-GG, 2018 WL 7822108 (11th Cir. Nov. 2, 2018); *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001). Therefore, *Mathews*, and not *Anderson-Burdick*, is the appropriate standard to assess Plaintiffs' procedural due process claim.

B. Plaintiffs Have Pleaded Sufficient Facts to Support Their Procedural Due Process Claim Under *Mathews*.

1. The Right to Vote and Have the Ballot Counted Is the Private Interest Affected by Official Action.

Legislative Defendants argue that Plaintiffs do not have a private interest at stake: (i) because "the private interest at issue here is the statutory right to use SDR" and there is no vested interest until a voter is actually registered; and (ii) because Plaintiffs are not themselves voters. LD Mot. 12-13. But Legislative Defendants' focus on voter registration alone is a red herring. S.B. 747 clearly impacts both voter registration and whether or not a ballot is accepted, and the right to vote and have that ballot counted is a constitutionally protected liberty interest. *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) ("[t]he right to vote includes the right to have the ballot counted."); *cf. Democracy N.C.*, 476 F. Supp. 3d at 227 ("North Carolina, having 'authorized the use of absentee ballots,' must afford appropriate due process protections to the use of the absentee ballots."); *see also supra* Section II.A. North Carolina law vests eligible voters with the opportunity to same-day register and vote and, therefore, must provide due process protections. As to Legislative Defendants' argument that Plaintiffs are not voters, this is just a rehashing of their empty standing argument. *Supra* Section I.

2. S.B. 747's SDR Regime Creates a High Risk of Erroneous Deprivation for All Voters, Young Voters in Particular.

The Complaint alleges extensive and detailed facts demonstrating a substantial risk of erroneous deprivation arising from the one-mailer verification scheme in S.B. 747. *See* Compl. ¶¶ 6-8; 72-81; 92-93. Plaintiffs also allege the existence of additional, feasible procedural safeguards, pointing to the pre-S.B. 747 scheme which contained precisely such measures. *Id.* ¶ 43-61. Legislative Defendants cannot dispute the existence of the pre-S.B. 747 procedures, so they dispute S.B. 747's risk of erroneous deprivation by wrongly reading into S.B. 747 protections that do not exist or will not help.

First, Legislative Defendants contend that same-day registrants are subject to the same verification procedures as those who register during the normal registration period, which include a notice of denial and appeal rights. LD Mot. 14. But as Plaintiffs make clear, Comp. ¶¶ 53-57, those protections only apply to the first step of the verification process—a county board of elections' "tentative determination of qualification," N.C.G.S. § 163-82.7(a)—not to the separate mail verification procedure set forth in N.C.G.S. § 163-82.7(c), and certainly not to S.B. 747's new procedure that demands county boards to "retrieve . . . and remove that ballot's votes" without any due process. N.C.G.S. § 163-82.6B(d). Here again, the Legislative and the State Board Defendants are at odds, with the latter acknowledging that "Plaintiffs are correct in their interpretation of S.B. 747 [with regard to notice]." SBE Mot. 15.

Next Legislative Defendants offer provisional ballots as a panacea to the harms caused by S.B. 747. LD Mot. 14. But provisional voting does not offer same-day registrants any additional due process, because only an already-registered voter will have their provisional ballot counted. N.C.G.S. § 163-182.2(a)(4). And if Legislative Defendants are saying that a provisional ballot may

save a SDR attempt that was rejected because of failed mail verification, the absence of notice renders that hypothetical useless.

Finally, Legislative Defendants incorrectly argue that the risk of harm under S.B. 747 is minimal because the "pre-S.B. 747 version of the law likewise provided no notice when a voter failed mail verification." LD Mot. 14. But the pre-S.B. 747 SDR regime incorporated the full protections of N.C.G.S. § 163-82.7(g), which at a minimum, provided notice and an opportunity to be heard during a challenge proceeding. Compl. ¶¶ 58-61. No such process exists under S.B. 747. *Id*.

3. The One-Mailer Verification System Does Not Support the Government's Stated Interests.

Defendants contend that strong government interests in the new SDR regime to counter Plaintiffs' fact-based allegations of a high risk of erroneous deprivation under S.B. 747. Compl. ¶¶ 62-71. Because the Undue Burden claim centers on these same stated interests, Plaintiffs address them *infra* Section III.B.

III. PLAINTIFFS HAVE ADEQUATELY ALLEGED AN UNDUE BURDEN CLAIM.

Before balancing interests under *Anderson-Burdick*, the Court "must first determine whether protected rights are severely burdened." *Fusaro v. Cogan*, 930 F.3d 241, 257-58 (4th Cir. 2019). "If so, strict scrutiny applies." *Id.* at 258-59. Only where the burden does not severely impede such a protected right does the court "consider the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests." *Libertarian Party of Virginia v. Alcorn*, 826 F.3d 708, 716 (4th Cir. 2016). Even the slightest burden "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., controlling op.). The court must further consider whether the interests are "*necessary* to burden the plaintiff's rights."

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (emphasis added). This is typically "a fact-intensive inquiry." *Daunt v. Benson*, 999 F.3d 299, 313 (6th Cir. 2021).

A. Plaintiffs have Plausibly Pled that S.B. 747 Imposes a Severe Burden on Constitutionally Protected Rights and Thus Strict Scrutiny Applies.

Under S.B. 747, a large subset of eligible voters risk complete disenfranchisement. A more severe burden on their right to vote does not exist. *See Nelson v. Warner*, 12 F.4th 376, 392 n.3 (4th Cir. 2021) ("[L]aws that deny '[ ] the right to vote" are ordinarily subject to strict scrutiny). Disenfranchisement with no notice or opportunity for redress is not tailored to *any* state interest, let alone a compelling one. Plaintiffs have therefore sufficiently alleged that S.B. 747 must survive strict scrutiny. Even Defendants concede that it cannot do so.

1. The Proffered State Interests Do Not Outweigh the Heavy Burden on Voters.

Even if the Court applies *Anderson-Burdick* balancing, Plaintiffs have sufficiently pled that the heavy burden placed on voters—particularly young voters, Compl. ¶¶ 72-81; 92-93—outweighs any benefit to the state's claimed interests.

State Board Defendants claim that the state has an "interest in ensuring only eligible ballots are counted in an election." SBE Mot. 14. S.B. 747, however, *removes* eligible ballots from the count, both via the circumstance of certain voters, Compl. ¶¶ 62-69, and function of law, *id*. ¶¶ 70-71. Legislative Defendants similarly claim that S.B. 747 supports the state's interest in preserving the integrity of and confidence in the electoral process by ensuring (1) "that registrants live in the precinct where they vote" and (2) "properly registered voters cast proper ballots in a timely fashion." LD Mot. 15-16, 18-20. But S.B. 747 does no such thing.

First, S.B. 747 is not necessary to confirm that voters cast their ballots within the proper precinct, as voters are directed to provide their "mailing address" if they cannot receive mail at

their place of residency. *See e.g.* SBE Mot. 16, n.10. Voter eligibility is determined by the voter's place of *residence*; a voter's mailing address is of no import. N.C.G.S. § 163-57. Further, North Carolina law already requires voters using SDR to provide "proof of residency by presenting a HAVA document," a requirement that is unique to the SDR process and verifies that the voter lives where they say they do. Compl. ¶ 112.

Second, S.B. 747 does not ensure votes are timely cast and counted. Most obviously, S.B. 747 will *dis*count many timely, valid ballots. Compl. ¶¶ 62-71. S.B. 747 also *expands* the time permitted to challenge voters' ballots, undermining this very interest. Compl. ¶¶ 78-79. And even taking the Legislative Defendants at their word that the state has some interest in expediting the count, there are far less restrictive means of doing so.[5]

Even under *Anderson-Burdick*, the balance favors Plaintiffs on a motion to dismiss.

IV. PLAINTIFFS HAVE ADEQUATELY ALLEGED A TWENTY-SIXTH AMENDMENT CLAIM.

Defendants offer three arguments for dismissing Plaintiffs' Twenty-Sixth Amendment claim. *First*, Defendants argue that it is unclear whether Twenty-Sixth Amendment claims should be analyzed under the Fifteenth Amendment framework. SBE Mot. 18; LD Mot. 20. *Second*, Defendants argue that Plaintiffs fail to allege that "there has been [a] denial or abridgement aimed at younger voters' ability to vote." LD Mot. 20-22; SBE Mot. 22. *Third*, Defendants argue that the Twenty-Sixth Amendment does not protect "conveniences" such as SDR. SBE Mot. 19-22; LD Mot. 21-22. These arguments fail.

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[5] *See, e.g.*, N.C.G.S. § 163-166.16(c) and 08 N.C.A.C. 17.0101(e) (outlining post-Election Day procedures for photo ID that require notice and opportunity to be heard); N.C.G.S. § 163-89 (outlining post-Election Day procedures for challenges to mail-in absentee ballots); *Absentee Container-Return Envelope Deficiencies*, Numbered Memo 2021-03 (Jun. 11, 2021), https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2021/Numbered%20Memo%202021-03_Absentee%20Deficiencies.pdf (same for cure procedures for mail-in ballots).

A. The Arlington Heights Standard Applies.

There are relatively few cases applying the Twenty-Sixth Amendment. In most, courts have applied the Fifteenth Amendment's "intentional discrimination" framework as articulated in *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). *See, e.g.*, *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1210-11 (N.D. Fla. 2018); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 902, 917, 925 (W.D. Wis. 2016). That standard should apply here.

In choosing to apply *Arlington Heights*, courts consistently focus on the Twenty-Sixth Amendment's plain language, which neatly tracks the "shall not be denied or abridged" language of the Fifteenth Amendment. *See* U.S. Const., amends. XV, XXVI. In *Detzner*, for example, the court explained that "the [Twenty-Sixth] Amendment's text is patterned on the Fifteenth Amendment … suggest[ing] that *Arlington Heights* provides the appropriate framework," and proceeded to grant a preliminary injunction using that standard. 314 F. Supp. 3d at 1210, 1222. Likewise, in *Thomsen*, the district court held that *Arlington Heights* was the applicable standard, also noting that "it is difficult to believe that the Twenty-Sixth Amendment contributes no added protection to that already offered by the Fourteenth Amendment, particularly if a significant burden were found to have been intentionally imposed solely or with marked disproportion on the exercise of the franchise by the benefactors of that amendment." 198 F. Supp. 3d at 926. On appeal, the Seventh Circuit agreed. *See Luft v. Evers*, 963 F.3d 665, 673 (7th Cir. 2020).

Ignoring these precedents, Defendants quote from a handful of opinions describing "uncertainty" regarding the proper framework for Twenty-Sixth Amendment claims. SBE Mot. 18; LD Mot. 20. In particular, Defendants point to *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016), and *North Carolina State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016). In both cases, however, the court applied *Arlington Heights*. *See Lee*, 843 F.3d

at 607; *McCrory*, 182 F. Supp. 3d at 523-24. *See also Detzner*, 314 F. Supp. 3d at 1221 (citing *Lee* and *Thomsen* for the proposition that "[a] consensus has been emerging, however, as recent courts have applied the *Arlington Heights* standard for Twenty-Sixth Amendment claims"). Nor do Defendants cite any case that actually reject the application of Fifteenth Amendment jurisprudence. *See Tully v. Okeson*, 78 F.4th 377, 382 (7th Cir. 2023) (agreeing that Fifteenth Amendment jurisprudence is "a good starting place for our analysis" of Twenty-Sixth Amendment claims); *Texas Democratic Party v. Abbott*, 978 F.3d 168, 183-84 (5th Cir. 2020).

Accordingly, this Court should apply Fifteenth Amendment standards in evaluating Plaintiffs' Twenty-Sixth Amendment claim.[6]

B. Plaintiffs Have Pleaded Sufficient Facts to Support Their Twenty-Sixth Amendment Claim Under *Arlington Heights*.

Arlington Heights calls for a "sensitive inquiry into [ ] circumstantial and direct evidence of intent" to determine whether "invidious discriminatory purpose" motivated the challenged legislation. 429 U.S. at 266. "The impact of the official action—whether it bears more heavily on one age-group than another, may provide an important starting point." *Detzner*, 314 F. Supp. 3d at 1222 (citing *Arlington Heights*, 429 U.S. at 266). An invidious purpose may be discerned using the traditional factors outlined in *Arlington Heights*. *Arlington Heights*, 429 U.S. at 266-68.

Here, the Complaint alleges extensive and detailed facts under *Arlington Heights*:

[6] *Accord*, *e.g.*, Yael Bromberg, *The Future Is Unwritten: Reclaiming the Twenty-Sixth Amendment*, 74 RUTGERS U.L. REV. 1671, 1674-75 (2022); Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653 (2017); Nancy Turner, *The Young and the Restless: How the Twenty-Sixth Amendment Could Play A Role in the Current Debate over Voting Laws*, 64 AM. U. L. REV. 1503 (2015).

- Curtailing SDR will have a disproportionate impact on young voters' participation in the electoral process given the unique challenges they face in accessing the polls. Compl. ¶¶ 4-6, 62-81, 92-93.
- The historical background of the legislature's decision to pass S.B. 747 specifically builds on its historical attempts to restrain the youth vote. *Id*. ¶¶ 32-38.
- The suspicious sequence of events leading up to the passage of S.B. 747—for example, how those who influenced its drafting also spearheaded a "crack down" on student voting and openly disparaged the youth vote during the two years preceding S.B. 747's passage—details an improper purpose. *Id*. ¶¶ 39-40.

Additionally, the legislature considered S.B. 747 remarkably quickly, despite evidence that changing the SDR provision could harm young voters. *Id*. ¶¶ 82-91. The Complaint also quotes statements from legislators expressing animus toward young voters' democratic participation. *Id*. ¶¶ 41-42. All these allegations raise serious questions under the Twenty-Sixth Amendment.

C. SDR Is Not a "Convenience," But Is Essential to Voting Itself.

Defendants argue that the SDR procedures of S.B. 747 constitute a mere "convenience" given the availability of other methods of registration, and that SDR thus lies outside the Twenty-Sixth Amendment's purview. SBE Mot. 19-22; LD Mot. 22-23. But Plaintiffs' claim does not center on S.B. 747's effects on the "convenience" of SDR for young voters, but rather on the cancellation of ballots *already cast* using that method, without notice or an opportunity to be heard. Compl. ¶¶ 114-118. The existence of alternative methods of registration is irrelevant for those who have *already* voted.

Given this factual context, the cases cited by Defendants are inapposite. While the photo ID requirements and elimination of SDR in *McCrory* arguably made voting less convenient for

young people, the legislation at issue there did not call for the disqualification of ballots already cast. 182 F. Supp. 3d at 521-25. Nor did it in *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749 (M.D. Tenn. 2015), also cited by Defendants. The same distinction undercuts Defendants' reliance on *Abbott* and *Tully*, where Texas and Indiana provided the option to vote by mail to voters over the age of sixty-five. *See Abbott*, 978 F.3d at 176; *Tully*, 78 F.4th at 379. The *Abbott* court held that "right to vote under the Twenty-Sixth Amendment is not abridged unless the challenged law creates a barrier to voting that makes it more difficult for the challenger to exercise her right to vote relative to the *status quo*." 978 F.3d at 192. "[B]ecause conferring a benefit on another class of voters does not deny or abridge the plaintiffs' Twenty-Sixth Amendment right to vote," the Fifth Circuit found no violation. *Id.* at 194. The *Tully* court followed similar logic. *Tully*, 78 F.4th at 387.

Rather than conferring a positive benefit to any class of voters, S.B. 747 actively functions to *deny* voting rights and due process to voters who have already cast their ballot. Because Plaintiffs show that this systematic denial is intentionally targeted at young voters in violation of the Twenty-Sixth Amendment, Compl. ¶¶ 72-81, their pleading burden is satisfied.

CONCLUSION

For these reasons, Plaintiffs request that the Court deny Defendants' Motions to Dismiss the Complaint.

Dated: January 5, 2024

Respectfully Submitted,

/s/ *Jeffrey Loperfido*

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 6,215 words as counted by the word-count feature of Microsoft Word.

/s/ Jeffrey Loperfido
Jeffrey Loperfido (State Bar #52939)

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to all parties of record.

/s/ Jeffrey Loperfido
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