

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, )  
 )

**REPLY IN SUPPORT  
OF STATE BOARD  
DEFENDANTS'  
MOTION TO DISMISS**

State Board Defendants submit this reply to Plaintiffs' opposition [D.E. 50] to State Board's motion to dismiss [D.E. 47]. Pursuant to Local Rule 7.3(h), this reply is limited to a discussion of matters newly raised in the response. The Nature of the Matter Before the Court and Statement of Facts sections in State Board Defendants' initial memorandum are incorporated by reference as if set forth fully herein. [D.E. 48 at 1-10]. To the extent an argument Plaintiffs present in their response is not addressed in this reply, State Board Defendants rely upon their arguments in their initial memorandum. *Id.* at 11-22.

## ARGUMENT

### **I. PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIM SHOULD BE ANALYZED UNDER *ANDERSON/BURDICK*.**

As State Board Defendants argued in their initial memorandum, Plaintiffs' procedural due process claim should be analyzed under the test taken from *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takshi*, 504 U.S. 428, 434 (1992), and when properly analyzed, that claim fails. [See D.E. 48 at 13-15].

In opposing State Board Defendants' argument that the *Anderson/Burdick* framework applies, Plaintiffs attempt to distinguish the primary case relied upon by State Board Defendants, *Richardson v. Hughs*, 978 F.3d 220, 233 (5th Cir. 2020). According to Plaintiffs, *Richardson* provides no basis for the application of the *Anderson/Burdick* framework to their procedural due process claim. In support, Plaintiffs point out that the court in *Richardson* found there was no procedural due process violation based upon its conclusion that voting did not constitute a liberty interest (something State Board Defendants disagree with), and that the *Richardson* court even acknowledged that the Supreme Court's approaches in *Anderson* and *Burdick* were not based on procedural due process. [D.E. 50 at 10 (citing *Richardson*, 978 F.3d at 233)].

Plaintiffs' contention that *Richardson* offers no support for the application of the *Anderson/Burdick* test to their procedural due process claim is unavailing, as it is premised upon cherry-picked excerpts from the opinion. A review of the opinion in its entirety shows the opposite, that *Richardson* indeed supports the application of the *Anderson/Burdick* framework.

Like Plaintiffs in the instant case, the plaintiffs in *Richardson* brought several claims, including procedural due process claims. 978 F.3d at 226. Specifically, the plaintiffs in *Richardson* contended due process was violated by “the lack of notice and opportunity to cure after a ballot has already been rejected by [Texas’s] signature-verification procedures” for vote-by-mail ballots. *Id.* at 226, 228, 235 n.32. As Plaintiffs in the present case note in their response, the court in *Richardson* did initially reject the plaintiffs’ procedural due process claims based upon its determination that the right to vote did not constitute a liberty interest. *Id.* at 228-33. However, what Plaintiffs here fail to point out is that the court in *Richardson* also determined that, even assuming voting were a protected liberty or property interest, the procedural due process claims of the plaintiffs in that case still failed. *Id.* at 235-41.

Also, although the court in *Richardson* did indeed note that “[n]either *Anderson* nor *Burdick* [] dealt with procedural due process claims,” *id.* at 233, it went on to conclude that the *Anderson/Burdick* framework was the proper test for the plaintiffs’ procedural due process claims, as it was “better suited to the context of election [sic] laws than is the more general [*Mathews v. Eldridge*] test,” *Richardson*, 978 F.3d at 234; *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The court reasoned that, unlike *Anderson/Burdick*, *Mathews* fails to account for the “substantial regulation of elections” needed to ensure that elections are “fair and honest” and that “some sort of order, rather than chaos,” accompanies “the democratic processes.” *Richardson*, 978 F.3d at 234 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

The application of *Anderson/Burdick* in *Richardson* is persuasive here. Like the plaintiffs in that case, Plaintiffs in the present case challenge the lack of notice and opportunity to be heard arising from an election law that dictates the rejection of ballots based upon the inability to verify voter information--in *Richardson*, it was a failed signature-verification process, and in this case, it is a failed address-verification process. The court in *Richardson* found that even assuming that voting is a protected liberty or property interest, the correct framework for analyzing the plaintiffs' procedural due process claims was the *Anderson/Burdick* test. *Id.* at 233.

As State Board Defendants concede, voting indeed constitutes a liberty interest. But that concession does not foreclose the application of *Anderson/Burdick* to a procedural due process claim related to voting, as *Richardson* shows. The *Anderson/Burdick* test is the appropriate test because, among other things, it accounts for the "substantial regulation of elections" needed to ensure that elections are "fair and honest" and that "some sort of order, rather than chaos," accompanies "the democratic processes." *Id.* at 234 (quoting *Storer*, 415 U.S. at 730); see also *Democratic Party of Va. v. Brink*, 599 F. Supp. 3d 346, 361 (E.D. Va. 2022) (quoting the same passage from *Storer* and concluding that "[i]t makes sense to have a separate constitutional test for all election laws").

In arguing that *Mathews* provides the proper test, Plaintiffs also point out that other district courts in the Fourth Circuit, including this district in a preliminary injunction decision in *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 226 (M.D.N.C. 2020), have applied *Mathews* to analyze procedural due process

claims challenging voting laws. [D.E. 50 at 11-12]. However, district court judges are not bound by other district court judges' orders, even if the orders are issued by other judges in the same district. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987); *see also Threadgill v. Armstrong World Indus., Inc.*, 928 F.2d 1366, 1371 & 1371 n.7 (3d Cir. 1991) (providing that "there is no such thing as 'the law of the district'").

For these reasons and those stated in State Board Defendants' initial memorandum, this Court should apply the *Anderson/Burdick* test to Plaintiffs' procedural due process claim, and it should be dismissed pursuant to Rule 12(b)(6).

**II. PLAINTIFFS HAVE NOT ADEQUATELY ALLEGED A TWENTY-SIXTH AMENDMENT CLAIM, EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT FIFTEENTH AMENDMENT JURISPRUDENCE APPLIES TO SUCH A CLAIM.**

SB 747's changes to same-day registration are not proscribed by the Twenty-Sixth Amendment, primarily because same-day registration is a convenience that allows individuals to register to vote if they miss North Carolina's voter registration deadline, and because young voters, and indeed all voters, are provided with myriad other methods by which they can register to vote. [See D.E. 48 at 17-22]. Plaintiffs dispute this proposition by arguing that their Twenty-Sixth Amendment claim "does not center on S.B. 747's effects on the 'convenience' of [same day registration] for young voters, but rather on the cancellation of ballots already cast using that method, without notice or an opportunity to be heard" and that "the existence of alternative methods of registration is [therefore] irrelevant for those who have *already* voted." [D.E. 50 at 19 (emphasis in original)].

Plaintiffs' argument seeks to have the Court ignore that same-day registration is but one of many methods available to young voters in registering to vote by narrowing the scope of their claim to the same-day registration's mail-verification process. Simply stated, Plaintiffs do not allege, nor can they, that without same-day registration, which comes with the single-notice address verification process Plaintiffs challenge in this litigation, young voters are unable to exercise their right to vote. *See Texas Democratic Party v. Abbott*, 978 F.3d 168, 191 (5th Cir. 2020) ("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.").

Even if the Twenty-Sixth Amendment is triggered by SB 747's same-day registration provision, and Fifteenth Amendment jurisprudence applies, as Plaintiffs contend in their response in opposition, they have not alleged, and there is no basis to believe, that SB 747's mail verification procedure "bears more heavily on" a young voter due to their age versus any other voter who has chosen to vote using same-day registration. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269 (1977) (citation omitted). Rather, the allegations in Plaintiffs' Complaint are in essence that the potential disproportionate impact of SB 747's mail-verification process on young voters results from the disproportionate use of same-day registration by that demographic, not because of some aspect of the mail-verification process that is specific to their age, or any specific characteristic associated with all voters between the ages of eighteen and twenty-five. [*See, e.g.*, D.E. 1 at ¶¶ 4, 6 ("Same-day registration is disproportionately used by young voters so that curtailing its use will have a disproportionate impact on their

participation in the electoral process”; “[t]he impact on young voters is demonstrable: young voters, though they are the smallest age group of voters by any measure, constitute the largest share of all recorded registration rejections for failed mail verification in the last decade.”)]. That is correlation, not causation.

For the reasons discussed in State Board Defendants’ initial memorandum, SB 747’s changes to same-day registration are not proscribed by the Twenty-Sixth Amendment. Even if the Twenty-Sixth Amendment is somehow implicated, and the *Arlington Heights* analysis applies, Plaintiff’s Complaint fails to state a claim for intentional discrimination. As such, their Twenty-Sixth Amendment claim should be dismissed under Rule 12(b)(6).

### **CONCLUSION**

For the foregoing reasons and those stated in the initial memorandum supporting dismissal, State Board Defendants respectfully request that the Court dismiss this case.

Respectfully submitted this the 19th day of January, 2024.

NORTH CAROLINA  
DEPARTMENT OF JUSTICE

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This the 19th day of January, 2024.

/s/ Terence Steed  
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