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

DEMOCRACY NORTH CAROLINA; *et al.*,

Plaintiffs,

vs.

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

Defendants.

REPLY BRIEF IN SUPPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

In Plaintiffs' Response in Opposition [D.E. 50 ("Opp.")], they admit that same-day registration ("SDR") prior to Senate Bill 747 ("S.B. 747") provided adequate procedural safeguards. [Opp. at 1]. That admission should end this case because the same procedural safeguards prior to S.B. 747 are still in place under the most reasonable interpretation of the relevant statutes. Moreover, a person is not a registered voter if their voter application is rejected, and the undeliverable mail provision is a minimal registration burden supported by a compelling state interest. Additionally, assuming *arguendo* that the 26th Amendment applies to the circumstances of this case, Plaintiffs fail to demonstrate the Legislature's intent to discriminate on the basis of age or that S.B. 747 will have a disparate impact based on age. Common sense should prevail, and Plaintiffs' Complaint [D.E. 1] should be dismissed.

ARGUMENT

I. Plaintiffs' Complaint should be dismissed under Fed. R. Civ. P. 12(b)(1).

Plaintiffs' Complaint alleges generalized grievances that are speculative and not judicially cognizable to confer Article III standing.[1] *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (requiring a "personal stake in the outcome of the controversy"). Plaintiffs, as organizations, claim S.B. 747 harms them because they may need to educate applicants on providing an accurate mailing address on a voter registration application. But this purported harm is the same as it was before S.B. 747. All applicants, be it timely registrants or SDR, have always had to enter an accurate mailing address on a voter registration application and verify under penalty of perjury that the mailing address is true and correct. Merely educating persons about a requirement that *already exists* does not equate to an injury by diverting resources away from Plaintiffs' normal engagement activities. *See Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012) (explaining that a diversion of resources to "educat[e] members, respond[] to member inquiries, or undertak[e] litigation in response to legislation" is insufficient to establish standing).

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Plaintiffs also fail to plead facts showing a close relationship between themselves and young voters in order demonstrate prudential standing. In *Maryland Shall Issue Incorporated v. Hogan*, a case cited by Plaintiffs, Opp. at 7-8, the Fourth Circuit explained a firearms dealer had standing to assert a Second Amendment claim on behalf of its potential customers because of long-standing precedent recognizing the closeness of the

[1] Plaintiffs do not argue that they have representational standing under Article III.

vendor-vendee relationship. 971 F.3d 199, 215-16 (4th Cir. 2020) (internal citations omitted). Here, Plaintiffs fail to plead facts showing a close relationship between themselves and young voters or that S.B. 747 prevents or deters interactions between Plaintiffs and any third parties. Therefore, Plaintiffs' Complaint must be dismissed pursuant to Rule 12(b)(1).

II. Plaintiffs' Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6).

A. Count I should be dismissed because Plaintiffs fail to show a Procedural Due Process violation.

For assessing constitutional adequacy, the Fourth Circuit has not addressed "which test to employ in a procedural due process challenge to an election regulation." *Democratic Party of Va. v. Brink*, 599. F. Supp. 3d 346, 360-61 (E.D. Va. 2022). Despite Plaintiffs' mischaracterizations, *see* Opp. at 10, the Ninth, Fifth, and Eleventh Circuits have applied the test set out in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992) ("*Anderson/Burdick*") instead of the test from *Mathews v. Eldridge*, 424 US 319 (1976) ("*Mathews*"). *Id.* at 361. Plaintiffs also misconstrue opinions from district courts in the Fourth Circuit. [Opp. at 11]. First, the District of South Carolina applied both tests without deciding which one applies, *League of Women Voters of S.C. v. Andino*, 497 F. Supp. 3d 59, 76–77 (D.S.C. 2020). Second, the Middle District of North Carolina applied *Mathews* without analyzing which test to apply in *Democracy N.C. v. N.C. State Board of Elections*, 476 F. Supp. 3d 158, 226 (M.D.N.C. 2020). Third, the Eastern District of Virginia applied *Anderson/Burdick* after examining which test applies for procedural due process claims against election regulations. *Democratic Party of Va. v. Brink*, 599. F. Supp.

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3d at 360-61 ("[I]t makes sense to have a separate constitutional test for all election laws because, unlike run-of-the-mill procedural due process issues, 'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'") (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Regardless, Plaintiffs cannot meet the more stringent *Mathews* test.

i. Plaintiffs fail to allege a risk of a wrongful deprivation.

Plaintiffs argue that the pre-S.B. 747 election regime provided SDR applicants notice and opportunity to cure before canvas if a ballot is challenged. [Opp. at 2-3]. Plaintiffs are correct in their interpretation of the law *as written* pre-S.B. 747. However, Plaintiffs critically ignore the NCSBE's interpretation of the order by Judge Biggs in *N.C. Conf. of NAACP v. Bipartisan Bd. of Election and Ethics Enforcement*, No. 1:16-CV-01274, 2018 WL 3748172 (M.D.N.C. Aug. 7, 2018), whereby the NCSBE, through the county boards of election, stopped challenging ballots on the basis of failed mail verification alone.[2] Instead, ballots cast by SDR applicants were counted even if their voter registration application was denied. Thus, practically, there was no notice or opportunity to cure an invalid ballot. Plaintiffs seek to continue the practice of counting SDR-applicants' invalid ballots. But such a scheme treated SDR applicants better than timely registrants because SDR applicants could fail mail verification but have their ballot count even though they were not qualified, properly registered voters.

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[2] *See Voter Challenge Procedures Guide*, NCSBE (last updated December 18, 2023), https://s3.amazonaws.com/dl.ncsbe.gov/Legal/Voter%20Challenge%20Guide.pdf.

Further, it is more appropriate to construe S.B. 747 as already providing the notice and cure opportunities Plaintiffs seek in their Complaint. Plaintiffs argue that SDR pre-S.B. 747 incorporated the notice and opportunity to cure during a challenge proceeding under N.C.G.S. §163-82.7(g). [Opp. at 14]. But a plain reading of S.B. 747 shows it expressly incorporates the provision Plaintiffs cite. Specifically, S.B. 757 §11 re-writes a portion of N.C.G.S. §163-82.7(g)(2), which discusses when mail verification cards are returned as undeliverable, and includes a reference to N.C.G.S. §163-89,[3] which outlines the procedure for county boards challenging absentee ballots. Thus, after a failed mail verification, the county boards should challenge the invalid ballot pursuant to this provision.[4]

The Court has a duty under the constitutional avoidance doctrine to construe S.B. 747 to avoid constitutional issues unless such a construction is plainly contrary to the intent of the enactor. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *Ward v. Dixie Nat. Life Ins. Co*., 595 F.3d 164, 177 (4th Cir. 2010) (collecting cases). Moreover, the constitutional avoidance doctrine "reflects the prudential concern that constitutional issues must not be confronted needlessly." *Smithfield Foods, Inc. v. United Food & Com. Workers Int'l Union*, 585 F. Supp. 2d 789, 807 (E.D. Va. 2008).

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[3] Notably, the previous version of N.C.G.S. §163-82.7(g)(2) also included a reference to §163-89.
[4] The NCSBE may object to this interpretation based on the decision in *N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections and Ethics Enforcement*, No. 1:16-CV-1274, 2018 WL 3748172 (M.D.N.C. Aug. 7, 2018). But that case involved challenges by private citizens under §163-85, not §163-89 and is entirely distinguishable. *See id.* at *1.

Interpreting S.B. 747 as not requiring the challenge obligations of a county board is plainly contrary to the intent of the drafters. Utilizing the same challenge provision for SDR and absentee voters is logical because both rely on mail that is returned to the county boards. The Court can address any concerns regarding due process by choosing a "reasonable construction" which "avoids raising constitutional problems." *FERC v. Powhatan Energy Fund, LLC,* 286 F. Supp. 3d 751, 758 (E.D. Va. 2017) (*citing United States v. Jin Fuey Moy,* 241 U.S. 394, 401 (1916)). Employing this reading decides this issue and gives Plaintiffs what they want.

ii. S.B. 747 supports the government's interests.

S.B. 747 also supports the government's interests in conducting fair elections and preserving the integrity of the election process. Plaintiffs claim that a voter's mailing address "is of no import" in verifying residency. [Opp. at 16]. While there are some voters who have mailing addresses that differ from residential addresses, that does not defeat the important interest of ensuring voters cast ballots for candidates representing their specific community needs, which in turn, promotes confidence in the integrity of the electoral process.

Plaintiffs oddly assert that ballots cast by applicants whose voter registration applications have been denied results in removing valid ballots. [Opp. at 16]. But this cannot be true as only properly registered voters may cast lawful ballots to be counted. As such, S.B. 747 fixes the issue of counting invalid ballots resulting from insufficient time for SDR applicants to be mailed two address verification cards. *See N.C. State Conf. of the*

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NAACP v. McCrory, 182 F. Supp. 3d 320, 449-455 (M.D.N.C. 2016) (discussing how SDR time limitations resulted in votes being counted despite voters failing mail verification), *reversed on other grounds*, 831 F.3d 204 (4th Cir. 2016).

B. Count II should be dismissed because Plaintiffs fail to adequately allege an undue burden claim.

Plaintiffs' conclusory assertion that S.B. 747 risks disenfranchisement and is therefore subject to strict scrutiny is incorrect. [Opp. at 15]. First, Plaintiffs fail to identify a targeted and "invidious" Fourteenth Amendment violation. *See Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 (2008). Nor could they, as "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious." *See id.* (quoting *Anderson*, 460 U.S. at 788). Indeed, S.B. 747 is a reasonable, minimal restriction that fixes the issue of insufficient time to complete mail verification before canvas, and does not deny North Carolinians the right to vote based on "irrelevant . . . voter[] qualifications." *See id.* Second, to the extent Plaintiffs are alleging a ballot-access case, to determine whether strict scrutiny applies, a court examines "the combined effect of the state's ballot-access regulations." *See Pisano v. Strach*, 743 F.3d 927, 933 (2014). Thus, North Carolina's election scheme should be evaluated in its entirety to determine whether S.B. 747 imposes a severe burden. *See Luft v. Evers*, 963 F.3d 665, 672, 675 (7th Cir. 2020) ("[E]lectoral provisions cannot be assessed in isolation.").

North Carolina provides abundant ways for North Carolinians to register and cast a ballot, including registration in person, online, via mail, or even at the DMV up to 25 days prior to election day, N.C.G.S. §163-82.6(d); SDR during the 17-day early voting period,

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N.C.G.S. §163-227.2; S.B. 747 § 10.(a) (*modifying* §163-82.6B); no-excuse absentee voting for all registered voters, N.C.G.S. §163-226(a); and voting via a provisional ballot on election day or during in-person early voting, N.C.G.S. §163-82.4(f). Therefore, S.B. 747's undeliverable mail provision does not deny registered voters the right to vote and does not impose a severe burden; it only applies a minimal burden to those who choose to utilize SDR. *See Burdick*, 504 U.S. at 433 ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently."); *see also Luft*, 963 F.3d at 675 (reversing finding of undue burden and holding that Wisconsin's electoral scheme and the challenged law did not make it hard for anyone to vote).

As such, where an election regulation imposes a minimal burden that is non-discriminatory, courts "only ask that the state 'articulate' its asserted interests." *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 719 (4th Cir. 2016) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (cleaned up)). "'[E]laborate, empirical verification of weightiness' is not required." *Id.* (quoting *Timmons*, 520 U.S. at 364) (cleaned up). Here, as explained above and in Legislative Defendants' Memorandum in Support of their Motion to Dismiss [D.E. 46 at 15-16, 18-20], S.B. 747 supports the government's important interests in (1) preserving the integrity of the election process and (2) instilling confidence in the electorate. *See Ohio Democratic Party v. Husted*, 834 F.3d 620, 633-35 (2016) (finding important government interests of "preventing voter fraud,

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increasing voter confidence by eliminating appearances of voter fraud, and easing administrative burdens on boards of elections" in challenged law that eliminated SDR where SDR allowed overlap of registration, including the mail verification process, and voting).

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

A. The *Arlington Heights* standard does not apply.

Plaintiffs badly misconstrue the limited federal case law examining the Twenty-Sixth Amendment. [Opp. at 17-18]. First, most courts have not applied *Arlington Heights* factors. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 190–91 (5th Cir. 2020) (*TPDII*) (holding an abridgment only exists if a law makes voting "more difficult" for a person than before the law was enacted); *Tully v. Okeson*, 78 F. 4th 377, 388 (7th Cir. 2023) (holding "Indiana's extension of absentee voting only to "elderly" voters does not violate the Twenty-Sixth Amendment."); *Johnson v. Waller County*, 593 F. Supp. 3d 540, 615-17 (S.D. Tex. 2022); *The New Ga Project v. Raffensperger*, 484 F. Supp. 1265, 1296 (N.D. Ga. 2020); *Nashville Student Org. Comm. v. Hargett*, 155 F. Supp. 3d 749, 757 (M.D. Tenn. 2015); *see also Cascino v. Nelson*, No. 22-507348, 2023 WL 5769414 (5th Cir. Sept. 6, 2023).

Second, Plaintiffs also misconstrue the cases they cite in support of applying the *Arlington Heights* factors. In *League of Women Voters of Fla., Inc. v. Detzner*, the court applied the *Arlington Heights* factors in part because the parties consented to use of the

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factors. 314 F.Supp.3d 1205, 1221, 1221, n.16 (N.D. Fla. 2018). Further, the Fourth Circuit did not approve using *Arlington Heights* in *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016). Instead, the court expressed doubt that the Twenty-Sixth Amendment standard should "import principles from Fifteenth-Amendment jurisprudence," but "[e]ven if it does," the plaintiffs had merely stated that young people are less likely to possess photo IDs, and therefore failed to demonstrate the legislature's intent to discriminate on the basis of age. *Id.* at 607.

This Court should follow the majority of courts in declining to apply *Arlington Heights* factors to a Twenty-Sixth Amendment claim. Indeed, Plaintiffs, in trying to apply *Arlington Heights* ignore that age, unlike race, is not an immutable characteristic.[5]

Even if the Court were inclined to apply *Arlington Heights*, Plaintiffs' claim still fails because Plaintiffs fail to allege that young voters "face burdens that they cannot overcome with reasonable effort." *One Wisconsin Institute, Inc., v. Thomse*n, 198 F. Supp. 3d 896, 926 (W.D. Wis. 2016), *aff'd in part, vacated in part on other grounds*, *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). In *One Wisconsin*, a case Plaintiffs cite, the court did not find strong evidence of disparate impact regarding a facially neutral voter I.D. law because the plaintiffs did not show that young voters lacked the credentials needed to obtain a voter I.D., nor did their likelihood to move more show they lacked documents needed in order to register to vote. *Id.* The court then applied rational basis review under *Anderson/Burdick*

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[5] Plaintiffs define "young voters" as those aged 18 through 25, [Opp. at 1, n.1]; tellingly, they do not cite any support for this definition and ignore that an entire class of 25-year-olds will age out before any grant of alleged relief.

and found that any effect on college students was outweighed by the state's legitimate interest in election integrity by "ensuring that students registered in one place," and therefore, the law was not "baseless as to suggest purposeful discrimination." *Id.* at 927.

Here, Plaintiffs fail to allege that young voters are unable to overcome any minimal burden associated with S.B. 747's undeliverable mail provision such that they are unable to vote. For example, voters can simple avoid waiting until the last day of SDR to register to vote or take advantage of all the ways North Carolina provides access to registration and voting. Indeed, N.C.G.S. §163-82.15 and the NCSBE website suggest that voters who moved fewer than 30 days before an election should vote in their prior precinct; thus, individuals who fall in this category cannot use SDR to vote in their new polling place anyway.[6]

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B. Plaintiffs fail to allege a viable Twenty-Sixth Amendment claim.

Plaintiffs' attempt to discredit cases cited by Legislative Defendants because those cases "did not call for the disqualification of ballots already cast." [*Id.* at 20]. As explained above, the applicable statutes, to the extent they were amended by S.B. 747, continue to provide notice and opportunity to cure invalid ballots through a challenge procedure. Moreover, an SDR applicant cannot lawfully cast a valid ballot until they are successfully registered to vote. In other words, whether a ballot cast using SDR is valid is contingent upon successful mail verification and voter registration.

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[6] *See* FAQ: Voter Registration, NCSBE, https://www.ncsbe.gov/registering/faq-voter-registration#WhatifIhavemovedwithinatimeperiodclosetoanelection-1788 (last accessed January 19, 2024).

Here, S.B. 747 does not prohibit younger voters from voting, nor does it restrict younger voters' right to vote. North Carolina also provides numerous methods to register and vote, and for those who fail to utilize them, voters can cast provisional ballots under N.C.G.S. §163-166.11. Therefore, Plaintiffs' Twenty-Sixth Amendment claim must be dismissed because there is no denial or abridgement of younger voters' ability to vote.

CONCLUSION

For all the reasons herein and in Legislative Defendants' Memorandum in Support, D.E. 46, Legislative Defendants respectfully request that the Court dismiss Plaintiffs' Complaint.

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

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 2946 words as counted by the word count feature of Microsoft word.

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CERTIFICATE OF SERVICE

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

This the 19th day of January, 2024.

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