

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:23-cv-00862-TDS-JEP

DEMOCRATIC NATIONAL
COMMITTEE, et al.

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD
OF ELECTIONS, et al.,

Defendants,

And

PHILIP E. BERGER, et al.

Intervenor-Defendants.

**STATE BOARD DEFENDANTS’
RESPONSE TO
PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

Now come State Board Defendants to provide this Response to Plaintiffs’ Motion for Preliminary Injunction. [D.E. 6, 7].

Nature of the Matter Before the Court

On October 10, 2023, Plaintiffs, the Democratic National Committee and the North Carolina Democratic Party, filed a Complaint, alleging that N.C. Session Law 2023-140 (“SB 747”), enacted on October 10, 2023, violates the United States Constitution, the North Carolina Constitution, and certain federal statutes. [D.E. 1]; *see also* SB 747 [D.E. 17-1].

The same day, Plaintiffs also filed a motion for preliminary injunction seeking to enjoin only the provisions of SB 747 that amend the same-day registration process. [D.E.

6, p. 2; D.E. 7, pp. 6-7]. The only claims relevant to the analysis of this motion are Counts II, IV, and V. [D.E. 7, pp. 6-7]. In Count II, Plaintiffs allege that the changes made to the same-day registration process violate procedural due process at the initial review phase and during the address verification process. [D.E. 1, ¶¶ 65-77]. In Count IV, Plaintiffs allege that the same-day registration process violates the Civil Rights Act of 1964 because it applies different voter-registration standards and procedures to different voters in a single county. *Id.*, Count IV, ¶¶ 82-88. In Count V, Plaintiffs allege that the same-day registration process violates the Help American Vote Act because the process does not provide the voter a way to track their provisional ballot. *Id.*, Count V, ¶¶ 89-92.

Plaintiffs' motion for preliminary injunction should be denied because they cannot demonstrate a likelihood of success on the merits and the balance of equities favors implementation of the new same-day registration process.

Statement of Facts

A. Standard Voter Registration Procedures in North Carolina.

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; -22; -82.23. North Carolinians may also utilize the NCDMV website to register, update their address, or update their party affiliation.¹

¹ 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.

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).²

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 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

² 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.

service returns the notice as undeliverable, and provides the precinct and voting place to which they will be assigned.³ *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.*

B. 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.^{4,5}

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

³ Most voters would recognize this notice as the "voter registration card" they receive in the mail after registering or updating their registration.

⁴ Appendix A to Numbered Memo 2016-15 contains a copy of N.C.G.S. § 153-82.6A (2012). Ex. B, p. 3.

⁵ *See* "Register in Person During Early Voting | NCSBE," <https://www.ncsbe.gov/registering/how-register/register-person-during-early-voting>, last visited November 7, 2023.

voter's name and address, a current utility bill, bank statement, government check, paycheck, or other government document. N.C.G.S. § 163-82.6(b); -166.12(a)(2); -82.6(b)(2); *see also* Ex. B at 2-3; and the State Board's Registration website, n.5 *supra*. 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. If staff determine a person is not qualified during this initial verification, because the voter has cast a ballot, the county board must challenge the voter pursuant to section 163-89 based on individualized knowledge, and the county board will hear and decide the challenge at the county canvass meeting, which occurs ten days after election day, N.C.G.S. § 163-182.5. *See* Numbered Memo 2022-05 at 2-3, attached to the Declaration of Counsel as Exhibit C. The person is provided notice and an opportunity to be heard before the county board at canvass. If the challenge is sustained, the registration is denied and the ballot is removed from the count. N.C.G.S. §§ 163-89(e), -90.2(a).

If 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. *Id.*, -82.7(c). 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 can give rise to complications. *Id.*, -82.7(g).

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 Ex. 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).⁶ Under state law, such a challenge may be filed by the county board. *See id.*, -182.5(a).

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

⁶ 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, early voting will no longer be a type of absentee voting. *See* SB 747, N.C. Sess. Law 2023-140, sec. 27.

90 days of a federal election. *N.C. State Conference 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 nondeliverable. Thus, individuals who are ultimately deemed ineligible to register for failing the address verification process before canvass would also nevertheless have their vote counted.

C. 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, s. 10.a(b) and (e) [D.E. 17-1, pp. 5-6]. Immediately upon providing that information, a registrant is permitted to vote a retrievable ballot, just like all other early voters. *Id.*, 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.*, 10.a(d). If a registration form is found to be missing information, county board staff attempt to contact the applicant. If an

applicant fails initial review, because early voting is no longer a form of absentee voting, the new law is unclear on the proper procedure to apply. However, based upon the county boards' authority to "pass upon the legality of disputed ballots" at canvass, the State Board interprets the law to require the county boards to proceed with a challenge to the ballot at the canvass meeting, and using the absentee ballot challenge procedures in section 163-89, as interpreted in Numbered Memo 2022-05. N.C.G.S. § 163-182.5(a); Ex. C.

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, shall retrieve the ballot, and remove it 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.

Legal Argument

Legal Standard

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

I. Plaintiffs Are Unlikely to Succeed on the Merits.

A. Plaintiff Fails to State a Claim for a Procedural Due Process Violation.

Plaintiffs argue that the same-day registration provisions violate the U.S. Constitution’s Due Process Clause by (1) providing no process to contest erroneous rejections during initial review, and (2) providing no process to contest erroneous rejections during address verification. [D.E. 7, pp. 6-7].

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.

With respect to the second prong, Plaintiffs’ allegations of votes being erroneously thrown out are conclusory, without any concrete explanation of how that is certain to

occur. [See, e.g., D.E. 7, p, 15 (“The first two prongs are clearly met here: Same-day registrants have a strong interest in exercising their right to vote, and the scheme enacted by S.B. 747 deprives them of the ability to do so.”); see also, e.g., D.E. 1, ¶ 56 (alleging that the burden to produce HAVA documents “will be insurmountable” for some individuals, such that —"students, young voters, elderly voters, low-income voters, and voters of color"—“may have more difficulty producing documentation verifying their addresses” (emphasis added))]. Nonetheless, at this preliminary stage, State Board Defendants assume for the sake of argument otherwise eligible voters may have their ballots erroneously retrieved, and that 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. Elaridge*, 424 U.S. 319, 335 (1976). [D.E. 7, pp. 15-21]. *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 are likely to prevail on the merits of their procedural due process

claim to the extent they are able to demonstrate that some eligible voters who meet the residency qualifications are nonetheless likely to fail mail verification. If the Court determines that the *Mathews* test is appropriate, the State Board Defendants stand ready to incorporate whatever additional procedural protections this Court deems necessary for such voters.

That said the State Board Defendants disagree that *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 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 same-day registration process survives this test. First, with respect to the initial review of an applicant’s registration form, the State clearly provides adequate due process. When a same-day registrant fills out the form, it is immediately reviewed by county board staff to ensure all information is correctly filled out and the person appears eligible to vote. If any information is missing, the applicant is immediately notified and given the ability to correct it. If the county board determines the voter is not eligible at initial verification, the voter’s ballot may be challenged, which includes notice and an opportunity to be heard at the county canvass, as described above. N.C.G.S. §§ 163-89, -182.5(a); Numbered Memo 2022-05 (Ex. C). As a result, during either the registration at the early voting site or following the initial review that takes place in the two days after that occurs, the voter is made aware of any issues with their registration and given the opportunity to attempt to have their vote counted. Thus, a voter’s burden is minimal because they are given the opportunity to correct any error multiple times. Under *Anderson-Burdick*, that minimal burden is outweighed by the governmental interest in counting only lawful votes.

The address-verification process is a closer question under *Anderson-Burdick*, but that, too, passes muster. Under the prior same-day registration process, due to time constraints and a permanent injunction prohibiting challenges, even if two mailings were returned as undeliverable, 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 entirely.

The new process under SB 747 attempts to fix this problem. Under the new approach, after a same-day registrant's form is reviewed, 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.

Plaintiffs point out that, for those voters who register through the ordinary process, as opposed to same-day registration, the county boards 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.

Plaintiffs also emphasize that state law does not (a) require the county boards to provide notice after an address-verification notice comes back as undeliverable or (b) 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).

Under standard registration, a person has the opportunity 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. *Id.*, N.C.G.S. § 163-82.6A (2012). To accommodate this significant exception, the government 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. 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). Thus, after leaving early voting, same-day registrants know that the address-verification mailing is coming, and they know that if they do not receive it, they will have failed 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.

B. Plaintiffs Fail to State a Claim under the Civil Rights Act of 1965.

Plaintiffs fail to state a claim that the same-day registration-provision of SB 747, § 10.(a) (N.C.G.S. § 163-82.6B), violates the Civil Rights Act of 1965 (“CRA”), 52 U.S.C. § 10101(a)(1)(A). [D.E. 1, ¶¶ 82-88; D.E. 7, pp. 16-18].

Section 10101(a)(1)(A) provides that in determining whether an individual is qualified to vote, no state actor shall “apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county. . . who have been found by State officials to be qualified to vote[.]” 52 U.S.C. § 10101(a)(1)(A). According to Plaintiffs, SB 747’s same-day-registration provision violates section 10101(a)(1)(A) because it applies different standards, practices, or procedures to those who use same-day registrations than it does to those who register prior to the 25-day deadline. [D.E. 1, ¶ 85; D.E. 7, ¶¶ 16-18].

First, Plaintiffs fail to state a claim under the CRA because that act is only enforceable through 42 U.S.C. § 1983, and Plaintiffs fail to allege they are bringing their CRA claim pursuant to that statute. *See, e.g., Migliori v. Cohen*, 36 F.4th 153, 159-62 (3d Cir. 2022), *vacated and remanded to dismiss as moot*, 143 S. Ct. 297 (2022); *Schwier v. Cox*, 340 F. 3d 1284, 1294-97 (11th Cir. 2003); [D.E. 1, ¶ 16].

Second, Plaintiffs fail to state a claim because their CRA claim is meritless. As the discussion in the Statement of Facts above establishes, same-day registration and standard registration are “inherently different” types of registration and, thus, it does not violate section 10101(a)(2)(A) to employ different procedures for each. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 840 (S.D. Ind. 2006) (concluding the

same in response to challenge to procedures for absentee voting that were different than those for in-person voting). The inherent difference between standard registration and same-day registration results from the variation in the function of each and is reflective of when each occurs during the election cycle. As discussed above, persons are required to register to vote by 25 days before election day. N.C.G.S. § 163-82.6(d). If an individual does not register before the deadline, for any reason, same-day registration provides an exception to the 25-day registration deadline by allowing them to register during early voting, which continues up to three days before an election. N.C.G.S. § 163-227.2(b), recodified as -166.40 by SB 747, sec. 27.(c). The modification to the verification process for same-day registration, replacing one of two verification mailings with a single mailing, preserves the exception provided by same-day registration, and preserves the government interest in ensuring residency eligibility can be established before canvass begins, despite there being less time between registration and canvass. This choice is reasonable because the same-day registration applicant comes late to the process as compared to a standard registration applicant. This presents a considerable temporal strain on the government interest of ensuring only eligible voters vote, and as a result, an accelerated verification process is warranted.

Furthermore, if the Court were to adopt Plaintiffs' argument to the contrary, it would also have to accept that section 10101(a)(2)(A) dictates "abolishing *all* requirements which uniquely apply to only one set of voters[,]" including for example the different procedures for voting by mail and in-person voting. *Rokita*, 458 F. Supp. 2d at

840 (emphasis added). This absurd reading of section 10101(a)(2)(A) assuredly does not reflect Congress's intent.

For these reasons, Plaintiffs' CRA claim is subject to dismissal for failure to state a claim.

C. Plaintiff Fails to State a Claim for a Help American Vote Act Violation.

Plaintiffs' final argument is that the amendments made by SB 747 to the same-day registration process violate section 21082(a)(5)(B) of the Help American Vote Act ("HAVA"). [D.E. 1, ¶¶ 89-92]. As an initial matter, like the CRA, HAVA itself does not create a private right of action, but it is enforceable through 42 U.S.C. § 1983. *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 572-73 (6th Cir. 2004). However, Plaintiffs did not bring this action pursuant to section 1983 or properly allege the elements of a section 1983 claim. [D.E. 1, ¶¶ 16-21 89-92]. As a result, this claim should be dismissed for failure to state a claim.

Moreover, this section of HAVA does not apply to the same-day registration provisions challenged in this action for two reasons. Section 21082(a)(5)(B) reads in relevant part:

(a) Provisional voting requirements. *If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:*

...

(5)

...

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that *any individual who casts a provisional ballot* may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

52 U.S.C.S. § 21082(a)(5)(B) (emphasis added).

First, this section of HAVA applies only to a person who insists that they are already registered to vote but who does not appear on the official list of registered voters. For all such voters, North Carolina complies with HAVA and permits the voters to cast provisional ballots and access a free tracking system. N.C.G.S. § 163-166.11.⁷ The same-day registration process is distinct, however. That process applies when a person is not yet registered but appears to vote during the early voting period, at which time they may apply to register. In these circumstances, the tracking requirement found in HAVA subsection (a)(5)(B), by its own terms, does not apply.

Second, subsection (a)(5)(B) also does not apply because any person who registers and votes on the same day during early voting is provided with a *retrievable* ballot, not a *provisional* ballot. Plaintiffs' Complaint and memorandum of law rely on conclusory assertions, without explanation, that "[a] 'retrievable ballot' under SB 747 is a 'provisional ballot' under HAVA." [D.E. 7, pp. 24 (citing 52 U.S.C. § 21082(a)); accord D.E. 1, ¶ 91]. But HAVA provides no definition for a provisional ballot to support this assertion. 52 U.S.C. § 21082.

⁷ See the State Board's free access system, "Provisional Search," <https://vt.ncsbe.gov/RegProvPIN/>, last visited November 6, 2023.

In North Carolina, a *retrievable* ballot is not a *provisional* ballot. Rather, these are two distinct types of ballots to which different procedural steps apply after the ballots are cast. A retrievable ballot is the same type of ballot every other registered voter casts during early voting or by mail. N.C.G.S. §§ 163-227.5, -230.1(c)(1). Unlike provisional ballot voters, the early voter deposits their ballot into a tabulator in the same manner as if it was cast in a precinct on election day. *Id.* Once the voter places the ballot into the tabulator, it is presumptively valid and will be counted unless a challenge is entered against the voter or if a same-day registrant fails the address verification process. N.C.G.S. §§ 163-227.2(i), -89. What makes the ballot “retrievable” is that the ballot has a unique identification number written in its margin, which corresponds with the number contained on the voter’s application to vote the ballot. *Id.*, -227.5, -230.1(c)(1). In the event of a successful challenge to a voter’s eligibility, this permits the county board to identify that voter’s ballot and remove it from the tabulation.

In contrast, a provisional ballot is offered only to those voters who claim to be eligible but are not on the official list of registered voters for that voting place, *id.*, -166.11, or who fail to present valid photo identification when they vote in person, *id.*, -166.16(c)–(d). After a provisional ballot is voted, it is not placed into the ballot box, but “placed in an envelope that contains an affidavit signed by the voter certifying identity and eligibility to vote.” *Id.*, -165(6). The provisional voter is informed about the free access system operated by the State Board and given a Provisional Identification Number

that allows them to determine the status of their ballot after county canvass is finished.⁸ *Id.*, -166.11(4). County board staff then research the information provided by the voter to determine the voter's eligibility, the results of which are relayed to the county board members. *Id.*, -166.11(5). During the canvass period, each provisional ballot cast is reviewed by the county board members in a public meeting and either approved or not approved, or returned to county board staff for further investigation. *See* n.8.

No such additional steps are required for a retrievable ballot. In other words, a retrievable ballot is a regular official ballot.

Moreover, Plaintiffs' interpretation presents an absurd result. If Plaintiffs' interpretation was adopted, in a typical presidential election, county board staff would go from reviewing fewer than 1% of all ballots cast (percent of provisional ballots cast in 2016 and 2020), to being required to review anywhere between 66% and 83% of all ballots cast (percent of retrievable ballots casts in 2016 and 2020).⁹ That would result in county board staff being forced to conduct provisional ballot review for approximately four million ballots. This would present an insurmountable administrative burden as it would likely be impossible to conduct canvass within ten days of the election. N.C.G.S. § 163-182.5(b).

⁸ The State Board's website provides a detailed explanation of this process. *See* the State Board's website, "Provisional Voting," <https://www.ncsbe.gov/voting/provisional-voting>, last visited November 6, 2023.

⁹ *See* State Board website, "Voter Turnout | NCSBE," <https://www.ncsbe.gov/results-data/voter-turnout>, last visited October 25, 2023.

Thus, Plaintiffs' proposed interpretation is premised upon a misreading of 52 U.S.C. § 21082(a), a misunderstanding the types of ballots cast in North Carolina, and presents an absurd result that must be rejected. And as a result, Plaintiffs cannot succeed on this claim.

II. The Balance of Equities and the Public Interest Weigh Against Injunction.

To obtain a preliminary injunction, plaintiffs must make a clear showing that they will likely be irreparably harmed absent such relief, that “the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. An averment that plaintiffs' harm might simply outweigh the defendant's is insufficient to tip the balance of equities in plaintiffs' favor. *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). The Court must give “particular regard” to the “public consequences” of any relief granted. *Id.*

Even assuming Plaintiffs' allegations are sufficient to show irreparable injury, Plaintiffs fail to carry their burden in establishing that the balance of equities and public interest weigh in favor of an injunction. Where, as here, granting a preliminary injunction means enjoining a state “from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). When weighing the irreparable injury to North Carolina in being unable to effectuate SB 747 against the conclusory assertion of irreparable injury to Plaintiffs, the balance of equities and public

interest weigh against an injunction. Under the pre-SB 747 address verification process for same-day registration, due to timing constraints and compliance with a permanent injunction against challenges issued by this Court, ballots cast by same-day registrants whose residence is not verified cannot be removed from the official count. The inclusion of potentially invalid ballots in official election results must weigh significantly against the possibility of erroneous address-verification failure for some same-day registrants. Contrary to what Plaintiffs argue, the public interest is best served by enforcement of SB 747.

Conclusion

For the reasons above, the State Board Defendants respectfully request that Plaintiff's motion for a preliminary injunction be denied.

This the 20th day of November, 2023.

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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 20th day of November, 2023.

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