**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**
**No. 1:23-CV-862**

DEMOCRATIC NATIONAL COMMITTEE; *et al.,*

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; *et al.,*

Defendants.

**MOTION TO DISMISS**
**Fed. R. Civ. P. 12(b)(1) and 12(b)(6)**



NOW COME Intervenor-Defendants, 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 Representatives (collectively, the "Legislative Defendants"), by and through undersigned counsel, and pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectfully move this Court for an Order dismissing Plaintiffs' Complaint [D.E. 1], with prejudice. For the reasons set forth in detail in the contemporaneously filed Memorandum in Support of this Motion, Plaintiffs' Complaint should be dismissed because Plaintiffs lack standing and, alternatively, Plaintiffs have failed to state a claim upon which relief may be granted.

WHEREFORE, for the foregoing reasons, and as set forth in the corresponding Memorandum in Support of this Motion, Legislative Defendants respectfully request that this Court enter an order dismissing all of Plaintiffs' claims, with prejudice.

Respectfully submitted, this the 16th day of January, 2024.

**NELSON MULLINS RILEY & SCARBOROUGH LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that I filed the forgoing document using the Court's CM/ECF System which will send notification to all counsel of record.

This the 16th day of January, 2024.

**NELSON MULLINS RILEY & SCARBOROUGH LLP**

By:/s/ Phillip J. Strach
Phillip J. Strach
North Carolina State Bar No. 29456

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| DEMOCRATIC NATIONAL COMMITTEE; *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>NORTH CAROLINA STATE BOARD OF ELECTIONS; *et al.*,<br><br>Defendants. | **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** |



## INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER

Intervenor-Defendants 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 Representatives (collectively, the "Legislative Defendants") submit this Memorandum in Support of their Motion to Dismiss. Plaintiffs' Complaint, D.E. 1, should be dismissed in its entirety under Fed. R. Civ. P. 12(b)(1) because Plaintiffs lack Article III and prudential standing. In the alternative, Plaintiffs' claims should be dismissed for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) for reasons including, but not limited to, that the challenged statute provides the notice and opportunity to cure that Plaintiffs seek in their Complaint.

## STATEMENT OF FACTS

Senate Bill 747 ("S.B. 747") was first introduced in the North Carolina Senate on June 1, 2023. The bill was designed to make various changes to election procedures to

ensure that North Carolina elections are fair and non-partisan.[1] Over the next several months, the General Assembly held hearings and received feedback from constituents and election officials, including the North Carolina State Board of Elections ("NCSBE"), that resulted in several amendments to S.B. 747. Ultimately, the General Assembly overrode Governor Cooper's veto and S.B. 747 became law on October 10, 2023. N.C. Sess. Law 2023-140.

Within hours of the veto override, the Democratic National Committee (the "DNC") and the North Carolina Democratic Party ("NCDP") (collectively, the "Plaintiffs") filed suit against the NCSBE and its Members challenging alleged changes to North Carolina's same-day registration ("SDR") requirements, the deadline for receipt of absentee ballots, and rules governing poll observers.[2] [D.E. 1]. Plaintiffs' Complaint sets forth seven causes of action. Count I alleges that S.B. 747 violates the First and Fourteenth Amendments of the Constitution by imposing undue burdens on North Carolinians' right to vote via the SDR provisions, absentee ballot deadline, and poll observer provisions. [D.E. 1 at 19–23]. Counts II and III allege that S.B. 747's SDR provisions violate procedural due process rights under the federal and North Carolina Constitutions, respectively. [D.E. 1 at 24–29]. Count IV alleges that S.B. 747's SDR provisions violate the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(A) by purportedly applying "different sets of individuals who are qualified under North Carolina law to vote and who reside in the same county." [D.E. 1 at 29–31]. Count V alleges that S.B. 747 violates the Help America Vote Act ("HAVA"), 52 U.S.C.



[1] *See* https://www.ncleg.gov/BillLookUp/2023/S747 .
[2] The other provisions of S.B. 747 remain unchallenged.

§ 21082, by purportedly failing to establish a free access system for the tracking of retrievable ballots. [D.E. 1 at 31–32]. Lastly, Counts VI and VII allege that the S.B. 747's poll observer provisions violate Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b), and the state Constitution's Free Elections Clause, N.C. Const. art. I, § 10, by purportedly permitting intrusive conduct by poll observers "that is highly likely to intimidate voters." [D.E. 1 at 32–34]. Plaintiffs also filed a motion for preliminary injunction on October 10, 2023, but only as to the SDR provisions. [*See* D.E. 6–7].

Under North Carolina law, citizens can register to vote 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). For voters who miss this 340-day window, North Carolina provides an accommodation in the form of SDR during the early voting period, which runs for seventeen days beginning the third Thursday prior to election day and ends at 3:00 p.m. the Saturday before election day. N.C.G.S. §163-227.2; S.B. 747 §10(a) (*modifying* §163-82.6B). North Carolina also allows no-excuse absentee voting for all registered voters, § 163-226(a), and voters may request an absentee ballot until 5:00 p.m. the Tuesday before election day. N.C.G.S. §163-230.1. Finally, as an additional accommodation to all voters, North Carolina also allows everyone to cast a provisional ballot on election day or during in-person early voting. N.C.G.S. §163-82.4(f). Under no circumstance is an election worker allowed to deny an individual the right to vote a provisional ballot. *See* N.C.G.S. §163-166.11.

Only approximately twenty-two states and Washington, D.C. offer same-day voter registration. By offering SDR to any voter, North Carolina is providing its citizens with

more opportunities to register and vote than the majority of other states.[3] The same is true for absentee voting: North Carolina is one of only approximately half of the states that allow no-excuse absentee voting.[4] In requiring the absentee ballot to be received on election day, S.B. 747 now brings North Carolina in line with the majority of other states, which have the same requirement.[5]

In relevant part, S.B. 747 altered the SDR and absentee voting provisions in the following ways:

- A SDR voter casts a "retrievable ballot" which is counted unless the county board of elections where the voter cast his/her ballot determines that the voter is not qualified to vote. S.B. 747 §10(a). A retrievable ballot is a ballot with an identifier to allow for retrievability. N.C.G.S. §163-227.5 Under N.C.G.S. §163-227.5, a statute undisturbed by S.B. 747, the State Board "shall adopt" standards for retrievable ballots, which mandates that ballots have a number or equivalent identifier to allow for retrievability such as those for absentee ballots printed in accordance. *See* N.C.G.S. §163-230.1.

- As part of the address verification process, the county boards of elections will retrieve any ballot if, before the close of canvass, the required address verification card is returned undeliverable. S.B. 747 §10(a). This change was made at the request of the NCSBE because the time between early voting and the end of canvass.

- Requires that absentee ballots be received by 7:30 p.m. on election day. [D.E. 1 at ¶49] S.B. 747 §35.



[3] *Same-Day Voter Registration*, National Conference of State Legislatures (Oct. 31, 2023), https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration.
[4] *Table 1: States with No-Excuse Absentee Voting*, National Conference of State Legislatures (July 12, 2022), https://www.ncsl.org/elections-and-campaigns/table-1-states-with-no-excuse-absentee-voting
[5] *Table 11: Receipt and Postmark Deadlines for Absentee Mail Ballots*, National Conference of State Legislatures (July 12, 2022), https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots.

Notably, S.B. 747 did not alter several existing election laws, including:

- The requirement that individuals are notified if their voter registration application (which an SDR voter must complete) was rejected. This requirement, codified in N.C.G.S. §163-82.7(b), requires that voters be notified of their denial of registration by certified mail within two days, and provides for appeals from the denial of registration. N.C.G.S. §163-82.18. Moreover, nothing prohibits the county board's from challenging a ballot and providing notice under that challenge procedure pursuant to N.C.G.S. §163-89 for returned mail verification cards. In fact, S.B. 747 specifically contains a specific reference to N.C.G.S. §163-89 in the context of an undeliverable mail notice. S.B. 747 §11.

- The requirement that registrant's show a HAVA document to register to vote.

- The right for the political parties to appoint poll observers, and for those properly appointed observers to "move around the voting *place*." *See* 1967 N.C. Sess. Laws 865; 1973 N.C. Sess. Laws 1171; N.C.G.S. §§ 163-45 (restricting poll observer movement within the voting enclosure), 163-165 (distinguishing the voting place from the voting enclosure)[6]. The rights of poll observers have also always come with specific limitations and protections that prohibit conduct that might "impede the voting process or interfere or communicate with or observe any voter in casting his ballot." *See id.*; 1991 N.C. Sess. Law 2379.

- S.B. 747 also does not alter preexisting statutory limitations on the total number of poll observers permitted inside the voting *enclosure* at any time. *See* N.C.G.S. § 163-45(a). Furthermore, election officials may still regulate a poll observer's movement around the voting place if an observer "interfere[s] with the privacy of any voter or the conduct of the election[.]" S.B. 747 § 7(b). Current provisions of the North Carolina Administrative Code and other NCSBE guidance elaborate on how a poll observer might "interfere[e] with the privacy of the voter, including positioning themselves in such a way that they can view confidential voter information on poll books or laptops or standing in such a way that they can view the contents of ballots inserted into the tabulator." 08 N.C.A.C. 20.0101(d)(3).

[6] The "voting place" is "the building or area of the building that contains the voting enclosure." § 163-165(10). The "voting enclosure" is "the room within the voting place that is used for voting." § 163-165(9).

## STATEMENT OF QUESTION PRESENTED

1. Do Plaintiffs have Article III and prudential standing?

2. Even if Plaintiffs have standing, do Plaintiffs' allegations fail to state a claim upon which relief can be granted?

## ARGUMENT

### I. Plaintiffs lack Article III and prudential standing, therefore, the Complaint must be dismissed for lack of subject matter jurisdiction.

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows for a party to seek dismissal based on the court's "lack of subject matter jurisdiction." A complaint may be dismissed for lack of subject matter jurisdiction when it "simply fails to allege facts upon which subject matter jurisdiction can be based." *Kearns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quotation omitted). When seeking to dismiss for lack of subject matter jurisdiction on these grounds, "all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982) (footnote omitted). Construing all the facts in the Complaint, D.E. 1, as true in a light most favorable to Plaintiffs, they do not have Article III or prudential standing and, therefore, the Complaint should be dismissed.



#### A. Plaintiffs lack Article III standing to challenge S.B. 747.

To establish Article III standing, the party invoking federal jurisdiction must show: (1) an "injury in fact[;]" (2) "a causal connection between the injury and the conduct complained of[;]" and (3) that it is "'likely,' as opposed to merely 'speculative,' that the

injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotations omitted). At the motion to dismiss stage, "the party invoking the jurisdiction of the court must include the necessary factual allegations in the pleading, or else the case must be dismissed for lack of standing." *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (internal citation omitted).

"[W]here the plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways. Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert 'standing solely as the representative of its members.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2157 (2023) (hereinafter, "*SFFA*") (citation omitted). Where an organization asserts standing on behalf of its members, it must "make specific allegations establishing that at least one identified member" would have standing in that member's own right. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).



Construing the factual allegations in the Complaint in a light most favorable to them, Plaintiffs have failed to plead sufficient facts to show that they have established an injury in fact that is fairly traceable to S.B. 747 that can be adequately redressed through this litigation. Because Plaintiffs do not have Article III standing, this case should be dismissed for lack of subject matter jurisdiction.

**i. Plaintiffs have not suffered an injury in fact.**

The "injury in fact" element of Article III standing requires a plaintiff to have a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). When an alleged harm amounts to a "generalized grievance" shared by all or a

large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth* 422 U.S. at 499. Thus the "injury in fact" element of is only met when an injury is both "concrete *and* particularized" to the defendant. *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 334 (2016) (quotation omitted) (emphasis in original). An injury is concrete when it is actual and specific, not speculative. *Doe v. Virginia Dept. of State Police*, 713 F.3d 745, 758 (4th Cir. 2013). An injury is particularized when it "affect[s] the plaintiff in a personal and individual way." *Spokeo,* 578 U.S. at 339. While a plaintiff may generally challenge alleged statutory or constitutional violations prospectively, the plaintiff must show that "the threatened injury is real, immediate, and direct." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

Plaintiffs' allegations amount to nothing more than generalized grievances. The alleged harm throughout the Complaint is the same for all North Carolina citizens. [D.E. 1 at ¶¶ 2, 8, 15, 41, 42, 45, 54, 63, 64, 88]. Furthermore, any alleged harm is speculative at best. Plaintiffs point to no persons whose registration has been denied, their absentee vote not counted, or whose rights were interfered with by a poll observer. As to their own members, Plaintiffs merely forecast, without facts, that it is "exceedingly likely that one or more members of NCDP… will be removed from the voting rolls or otherwise prevented from voting because of S.B. 747." [D.E. 1 at ¶ 26]. The Fourth Circuit has found similar allegations of an alleged likelihood of potential harm to be "merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' " *Bishop,* 575 F.2d at 424 (quotation omitted) (holding allegations that

"potentially misleading language" on a ballot was insufficient harm to establish standing for plaintiffs' due process claims).

Furthermore, a general diversion of resources to inform and educate voters on a new law, without a sufficient connection to an organization's mission, is not a concrete injury under binding Fourth Circuit precedent. *Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012). For example, in *Lane*, the Fourth Circuit determined that a gun rights group lacked standing to challenge a new federal statute restricting the interstate transfer of handguns because mere allegations that a group's "resources [were] taxed by inquiries into the operation and consequences of interstate handgun transfer provisions" did not constitute a concrete injury. *Id.* In so holding, the Court specifically recognized that a general diversion of resources to "educat[e] members, respond[] to member inquiries, or undertaking litigation in response to legislation" are generalized grievances insufficient to establish standing. As in *Lane*, this Court should find that the Plaintiffs do not have a concrete injury because they generally claim they will have budgetary concerns. [D.E.1 ¶27].



Plaintiffs also fail to identify any members that were denied the right to vote as a result of S.B. 747. Absent allegations that any members intend to utilize same-day voter registration, vote by absentee-by-mail, or even vote at all in the future or at a voting place with poll observers, Plaintiffs' injuries fail. *See Summers*, 555 U.S. at 498.

**ii. Plaintiffs' alleged injuries are not fairly traceable to S.B. 747.**

Even if the Court determines that Plaintiffs have suffered an injury in fact, Plaintiffs fail to plead facts sufficient to show that Plaintiffs' alleged injuries are fairly traceable to

S.B. 747. The causation, or fairly traceable, prong of the injury in fact test requires a plaintiff to "demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Disability Rights South Carolina v. McMaster*, 24 F.4th 893, 901 (2022) (emphasis omitted). For example, Plaintiffs' Complaint includes conclusory allegations that S.B. 747 will somehow "reduc[e] the number of registered Democrats able to vote in North Carolina" or otherwise deny "Democratic voters' right to cast a ballot and have it counted." [D.E. 1 ¶ 27]. Plaintiffs also claim that it is "exceedingly likely" that Democrats "will be removed from the voting rolls or otherwise prevented from voting because of S.B. 747." However, the challenged portions of S.B. 747 apply equally to Democrats, Republicans, and Unaffiliated Voters. Plaintiffs have not pled any facts or made any allegation to show how S.B. 747 will have a disparate impact on Democrats (who are not themselves a suspect class), nor have they alleged anything showing how S.B. 747 might target persons with Democratic beliefs.



Plaintiffs' allegations regarding poll observers are especially attenuated because they rely on third party conduct. For S.B. 747 to cause the harm Plaintiffs contemplate would require a properly appointed poll observer to ignore the existing rules and for local officials to choose not to enforce the existing rules and conditions. This chain of inferences is insufficient for Plaintiffs' alleged injury to be fairly traceable to S.B. 747. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n. 5 (2013) (holding injury was not fairly traceable to challenged statute "in light of the attenuated chain of inferences necessary to find harm"). Plaintiffs fail to meet the causation element of Article III standing and the Complaint must be dismissed.

### iii. Plaintiffs' alleged injuries are not adequately redressable.

Lastly, Plaintiffs fail the redressability prong. "An injury is redressable if it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' " *Doe*, 713 F.3d at 755; *Leifert v. Strach*, 404 F.Supp.3d 973, 988 (M.D.N.C. 2019). While this burden is not stringent, it is "problematic when third persons not parties to the litigation must act in order for an injury to arise or be cured." *Id.* at 755. In such situations, even when constitutional harm is alleged, the Fourth Circuit has refused to find standing when there "exists an unchallenged, independent rule, policy, or decision that would prevent relief even if the court were to render a favorable decision." *Id.* at 756 (holding that because Plaintiff had not yet attempted to follow the statutory process for challenging the statute in question, the Court had no way of determining whether her constitutional rights would ultimately be infringed); *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 . 3d 138, 148–49 (4th Cir. 2009). Moreover, to the extent that Plaintiffs get the existing law wrong (and they do), this litigation cannot adequately redress their concerns. Even if S.B. 747 is enjoined, *see* D.E. 1 at Prayer for Relief, preexisting laws allow for processes for same day registrants to receive notice and an opportunity to be heard.



## B. Plaintiffs lack prudential standing to challenge S.B. 747.

Even if Plaintiffs could meet the Article III standing requirements, which they cannot, Plaintiffs also lack prudential standing. *See Doe*, 713 F.2d at 753 (noting the court need not engage in prudential standing analysis because the plaintiff failed to meet the Article III standing requirements). A "plaintiff generally must assert his own legal rights

and interests, and cannot rest his claim to relief on the legal rights or interests of third parties[.]." *Bishop*, 575 F.3d at 423 (quoting *Warth*, 422 U.S. at 499). In limited circumstances, a plaintiff may assert the legal rights or interests of third parties. To do so, the burden is on the plaintiff to prove (1) the named plaintiff was injured in fact; (2) the named plaintiff has a "close relationship" to the injured third party; and (3) there was some hinderance to the third parties in asserting their own rights. *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998). "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (internal quotation omitted). Typically, the close relationship requires some type of fiduciary duty or link between the plaintiff and the third party, such as a doctor suing on behalf of his or her patients. *See Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004).

To the extent that Plaintiffs attempt to assert the rights of other voters who "would vote for Democratic candidates in North Carolina," Plaintiffs fail to plead facts sufficient to show that a close relationship exists between those voters and the Democratic Party. Plaintiffs also fail to show that such unidentified individuals who would vote for Democratic candidates in North Carolina would face some hinderance in asserting their own rights. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 818 (S.D. Ind. 2006), *aff'd sub nom*. *Crawford v. Marion Cnty. Election Bd*., 472 F.3d 949 (7th Cir. 2007), *aff'd,* 553 U.S. 181 (2008) (declining to permit an organization to assert third party standing).

## II. In the alternative, Plaintiffs' Complaint should be dismissed for failure to state a claim upon which relief can be granted.

Alternatively, Plaintiffs fail to plead sufficient facts which, accepted as true, state a claim of relief that is plausible on its face. Plaintiffs' claims should be dismissed.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While all well-pleaded factual allegations are presumed to be true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient. *Id.* at 678.



### A. Plaintiffs fail to show that S.B. 747 imposes an undue burden (Count I) on North Carolinians' right to vote.

The *Anderson/Burdick* test is used to assess undue burden claims under the First and Fourteenth Amendments, whereby a court must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that [Plaintiffs] seek[ ] to vindicate." *Anderson*, 460 U.S. at 789. Then, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule" and weigh "the legitimacy and strength of each of those interests." *Id.* The court must also "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* However, "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 434.

**i. The magnitude of the alleged constitutional violation is minimal.**

Plaintiffs challenge S.B. 747's single-notice address verification process, the extension of the absentee ballot deadline, and rules governing poll observers, alleging they impose severe burdens on the right to vote. [D.E. 1, ¶¶19-23]. As explained herein, Plaintiffs claims that the poll observer rules are new is flat wrong. As to the address verification and absentee ballot deadline extension, the risk of disenfranchisement also arises primarily from voters' own errors.

First, as explained above, S.B. 747 does not alter the notice and opportunity to cure afforded under N.C.G.S. §163-82.18 for SDR applicants. Second, Plaintiffs entirely ignore that no one is required to use SDR or vote by mail-in absentee ballot. In fact, these mechanisms are accommodations for applicants who fail to utilize timely procedures. Moreover, North Carolina also allows all individuals to cast a provisional ballot on election day or during in-person early voting. N.C.G.S. §163-82.4(f).

Third, the Supreme Court has rejected arguments that voter inaction or negligence disenfranchises the voter. *See Rosario v. Rockefeller*, 410 U.S. 752, 757–58 (1973) ("[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the challenged voting regulation], but by their own failure to take timely steps to effect their enrollment."); *see also Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1188 (9th Cir. 2021) ("Most forms of voter negligence have no remedy."). Indeed, any allegation of poll worker error on a SDR application is negated by the fact that the application is printed for the SDR applicant who, after review, signs under penalty of perjury that the information is true and correct. [D.E. 55-1].

Finally, Plaintiffs pointing to U.S.P.S. as a potential cause of disenfranchisement is a red herring. A properly addressed piece of mail is presumed delivered and is sufficient for service. *Nibagwire v. Gonzales*, 450 F.3d 153, 156 (4th Cir. 2006) (regular mail service is entitled to the presumption of effective delivery); *Fed. Deposit Ins. Corp. v. Schaffer,* 731 F.2d 1134, 1137 n.6 (4th Cir. 1984). And Congress chose mail verification as the proper mechanism to maintain voter registration lists under the National Voter Registration Act. *See* 52 U.S.C. § 20507. Thus, any claim that existing mail procedures create a risk of harm is specious at best. A ruling by this Court mail is constitutionally improper would open the door for a similar challenge to voting by mail and likely have seismic repercussions. In sum, Plaintiffs' own negligence and the state's reliance on U.S.P.S. do not present any, even minimal, burden on the right to vote. Nor have Plaintiffs explained in any way how requiring absentee ballots to be received on election day is a burden.



**ii. The State's interests are legitimate.**

Under *Anderson/Burdick,* 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*, 520 U.S. at 358) (cleaned up). "'[E]laborate, empirical verification of weightiness' is not required." *Id.* (quoting *Timmons*, 520 U.S. at 364) (cleaned up).

"Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," *Purcell v. Gonzales,* 549 U.S. 1, 4 (2006), and is another compelling state interest here. To promote confidence in the election process, the General Assembly has an interest in setting deadlines that ensure election finality. An integral part

of this is knowing which properly registered voters cast proper ballots in a timely fashion. S.B. 747 addresses the issue, raised by the NCSBE, that there was insufficient time for same-day registrants to be mailed two address verification cards in order to ensure the voter was properly registered and voted at the correct address. *See N.C. State Conf. of the 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), *cert. denied, N. Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 1399 (2017).

Unlike timely registration, which is completed twenty-five days before election day, there is not enough time to send an SDR applicant two mail verification cards and have them returned before the relevant deadlines. *See N.C. State Conf. of the NAACP*, 182 F. Supp. 3d at 449-455. Thus, under the previous system, SDR applicants were more likely to fail mail verification after their vote was counted than timely registrants. *Id.* at 453. This is the exact compelling governmental interest S.B. 747 is designed to remedy. The State has a legitimate interest in verifying a voter's residency so that voters cast a ballot in the correct district, and in ensuring votes are timely counted.



It is beyond dispute that "[r]easonable regulation of elections . . . does require [voters] to act in a timely fashion if they wish to express their views in the voting booth." *Burdick*, 504 U.S. at 438. North Carolina provides voters ample timely opportunities to express their views. The State must balance those opportunities with the compelling government interest of the county boards of elections verifying the addresses of SDR voters. S.B. 747 does just that.

Because S.B. 747 does not present a significant burden on the right to vote, and the General Assembly has a compelling interest in the rights protected by S.B. 747, Count I of Plaintiffs' Complaint must be dismissed pursuant to Fed. R. Civ. P 12(b)(6).

### B. Plaintiffs fail to show that S.B. 747 amounts to a Procedural Due Process violation (Counts II and III).

In the interest of brevity, Legislative Defendants incorporate by reference their arguments regarding Plaintiffs' Procedural Due Process claims as set forth in their Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, D.E. 52 at pp. 11–14, as if fully set forth herein. For the same reasons, Plaintiffs have failed to state a claim under the Fourteenth Amendment.

### C. The *Pennhurst* Doctrine bars Plaintiffs' North Carolina constitutional claims (Counts III and VII).

Plaintiffs' state law claims (Counts III and VII) seek to enjoin the NCSBE from implementing and enforcing certain provisions of S.B. 747 on the grounds that those provisions the North Carolina Constitution's Law of the Land Clause, art. 1, sec. 19, and Free Elections Clause. [D.E. 1, Prayer for Relief, at ¶¶ 78-81, ¶¶97-110]. But the Free Elections Clause is unique to the North Carolina Constitution. And, even if the North Carolina Constitution offered greater protections in its due process provisions, Plaintiffs' state law claims are barred by sovereign immunity. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 120 (1984) (holding the Eleventh Amendment bars a pendent claim against state agencies and officers which seeks prospective injunctive relief for a violation of state law); *Guseh v. N.C. Cent. Univ.*, 423 F. Supp. 2d 550, 561-62 (M.D.N.C. 2005), *aff'd* 206 Fed. Appx. 255 (4th Cir. 2006) (granting summary judgement

on North Carolina Constitution claim under *Pennhurst* because the Eleventh Amendment bars federal courts from granting relief on the basis of state law).

Indeed, "[t]here are two options for a post-*Pennhurst* plaintiff who wishes to bring a claim for injunctive relief against state officials under alternative federal and state theories: either to litigate both federal and state claims in state court or to bifurcate the litigation so that the state claims are heard in state court and the federal claims are heard in federal court." *Sherman v. Univ. of N.C. at Wilmington*, No. 7:07-cv-167-FL, 2008 WL 4461911 (E.D.N.C. Aug. 13, 2008) (quoting *Cuesnongle v. Ramos*, 835 F.2d 1486, 1497 (1st Cir. 1987)), *report and recommendation rev'd in part on other grounds*, 2008 WL 4461935 (E.D.N.C. Sept. 30, 2008).

Here, Plaintiffs do not seek injunctive relief under federal law for their state constitutional claims, nor are there any allegations that the NCSBE has waived immunity. Therefore, because *Pennhurst* holds that the Eleventh Amendment prevents federal courts from granting injunctive relief against "state officials on the basis of state law," 465 U.S. at 117, Plaintiffs' two North Carolina Constitution claims (Counts III and VII) must be dismissed. *See, e.g., Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 225, 228 (4th Cir. 1997) (holding the district court lacked subject matter jurisdiction to hear claim seeking injunctive relief for state official's violation of state constitutional right because jurisdiction was barred by the Eleventh Amendment).[7]



[7] "The Fourth Circuit has not conclusively established whether a dismissal based on Eleventh Amendment immunity is a dismissal under Rule 12(b)(1) or 12(b)(6). *Mary's House, Inc. v. North Carolina*, 976 F. Supp. 2d 691, 696–97 (M.D.N.C. 2013). Other matters in the Middle District have considered Eleventh Amendment Immunity under Rule 12(b)(1). *Brown v. Univ. of N.C.*

### D. Plaintiffs' CRA and HAVA claims (Counts IV and V) fail to state a claim upon which relief can be granted.

In the interest of brevity, Legislative Defendants incorporate by reference their arguments regarding Plaintiffs' CRA and HAVA claims set forth in their Response in Opposition to Plaintiffs' Motion for Preliminary Injunction, D.E. 52 at pp. 11–14, as if fully set forth herein. For the same reasons, namely that the CRA and HAVA do not allow for a private right of action, Plaintiffs have failed to state a claim under the CRA or HAVA.

## III. Counts VI and VII regarding poll observers are not ripe and should be dismissed.

Plaintiffs' seek relief that already exists by relying solely on the allegations that S.B. 747 now "allow[s] poll observers to roam freely" with "few if any clear limits."[8] *See* N.C.G.S. § 163-45; § 163-489; 08 N.C.A.C. 10B.0105(h); 08 N.C.A.C. 20.0101(d)(3). [D.E. 1 at ¶¶ 2, 8, 14, 51, 61-63, 93-96, 99]. Even so, Plaintiffs' claims regarding poll observers (Counts VI and VII) are not ripe.



When determining whether a controversy is ripe for judicial determination, federal courts consider "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). "Under

*Health Care Sys.*, No. 1;20-cv-0086, 2021 WL 51222, at *2 (M.D.N.C. Feb. 11, 2021). Under a 12(b)(1) standard Plaintiffs have the burden of proving subject matter jurisdiction, and the motion should be granted when the material facts are not in dispute and the moving party is entitled to prevail. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).That standard is clearly met here. In any event, the Counts III and VII must be dismissed regardless of whether 12(b)(1) or 12(b)(6) applies.

[8] Plaintiffs seemingly confuse the terms "voting place" and "voting enclosure", which have distinct definitions. [*Compare* D.E. 1 at ¶ 51 *with* D.E. 1 at ¶62].

the fitness for review inquiry, a court considers whether the issues presented are purely legal, as opposed to factual, and the degree to which the challenged action is final." *Id.* "Where an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court." *Doe*, 713 F.3d at 758–59 (citations omitted).

Even assuming *arguendo* that poll observer conduct is now unlimited, Plaintiffs' alleged harm will only occur if some unknown poll observer chooses to intimidate an unknown Democratic voter at some point in the future. Because Plaintiffs have not yet suffered an injury due to poll observer conduct and any alleged future injury "remains wholly speculative," Plaintiffs allegations regarding poll observers, Counts VI and VII, should be dismissed as not ripe. *Doe,* 713 F.3d at 759 (quotation omitted).



**IV. In The Alternative, the Court Should Construe S.B. 747 to Require a Challenge Pursuant to N.C.G.S. §163-89 Under The Constitutional Avoidance Doctrine.**

While Legislative Defendants contend that S.B. 747 is constitutional and that Plaintiffs' claims fail, 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). 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).

Here, the Court does not need to confront the constitutional question because it is possible to read S.B. 747 to already require the notice and cure provisions Plaintiffs seek. Specifically, S.B. 757 §11 re-writes a portion of 82.7(g)(2), which discusses when mail verification cards are returned as undelivered. This includes a reference to N.C.G.S. §163-89[9] which outlines the challenge procedure for county boards challenging absentee ballots. Utilizing the same challenge provision as used for absentee is not only efficient, but logical since the undelivered mail is returned to the county boards like absentee ballots. Thus, it is entirely reasonable to construe S.B. 747 as already providing the notice and cure opportunities Plaintiffs seek in their Complaint.[10] Because of this, should the Court be concerned about due process without a new explicit challenge process, the Court should choose the "reasonable construction" and "interpretation that 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)).



## CONCLUSION

For these reasons, Legislative Defendants respectfully request that the Court dismiss Plaintiffs' Complaint.

[9] Notably the previous version of 82.7(g)(2) also included a reference to 163-89.

[10] The NCSBE is likely to take issue with this interpretation due to an order by Judge Biggs 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 analyzed challenge provisions under §163-85 not, §163-89. *Id.* at *1.

Respectfully submitted this the 16th 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 6040 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 16th day of January, 2024.

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