

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'
MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DISMISS**

This Memorandum of Law is provided in support of State Board Defendants' Motion to Dismiss Plaintiffs' Complaint. [D.E. 1].

Nature of the Matter Before the Court

On October 10, 2023, Plaintiffs filed a Complaint challenging various provisions in N.C. Session Law 2023-140 ("SB 747"), which was enacted on October 10, 2023, and in relevant part to this action, became effective on January 1, 2024. [D.E. 1]. Plaintiffs raise the following claims in their Complaint:

Count I: SB 747's same-day registration, poll-observer, and absentee-ballot-deadline provisions violate the First and Fourteenth Amendments of the U.S. Constitution.

Counts

II and III: SB 747's same-day registration provision violates procedural due process rights as guaranteed by the Fourteenth Amendment to the U.S. Constitution and the N.C. Constitution's Law of the Land Clause.

Counts

IV and V: SB 747's same-day registration provision violates the Civil Rights Act of 1965 and the Help America Vote Act.

Counts

VI and VII: SB. 747's poll-observer provision violates the Voting Rights Act and the N.C. Constitution's Free Elections Clause.

[*Id.* at ¶¶ 52-100].

Plaintiffs' claims challenging the poll-observer provision should be dismissed under Rule 12(b)(1) of the Rules of Civil Procedure, their state constitutional claims should be dismissed based upon sovereign immunity, and the remaining claims in the Complaint, except for the challenges to SB 747's same-day-registration mail-verification procedure,¹ should be dismissed under Rule 12(b)(6).

¹ On January 21, 2024, the Court issued an order ("PI Order") enjoining SB 747's same-day-registration procedure to the extent it required recalling a same-day registrant's ballot after a single address-verification notice came back as undeliverable without giving the registrant notice and an opportunity to be heard. *Id.* at 93-94. The Court held that this approach likely violated procedural due process.

Since the PI Order, State Board Defendants have established a process that provides same-day registrants notice and an opportunity to cure after their first address-verification notice is returned as undeliverable. [*See* D.E. 71].

In light of the Court's PI Order, State Board Defendants are not moving to dismiss Plaintiffs' federal constitutional claims challenging SB 747's same-day registration mail verification process—namely, Count One in part and Count Two.

Statement of Facts

Relevant North Carolina Election Provisions

A. Voter-Registration Procedures

State Board Defendants detailed North Carolina’s voter-registration procedures in the Statement of Facts of their Response in Opposition to Plaintiffs’ Preliminary Injunction Motion (“PI Response”). [D.E. 53 at 2-8]. To avoid unnecessary repetition, that Statement of Facts is hereby incorporated into this filing.

B. Receipt Deadline for Absentee Ballots

Prior to SB 747, to be accepted by the county board, absentee ballots received by mail were required to be “received by the county board not later than 5:00 p.m.” on the day of the election; however, ballots received after that deadline were also accepted if postmarked on or before Election Day and received “no later than three days after the election by 5:00 p.m.,” unless a different deadline was dictated by federal law. N.C.G.S. § 163-231(b)(1) and (2) (effective until Jan. 1, 2024).²

SB 747 changed the deadline for receipt of absentee ballots. Now, unless federal law requires otherwise, absentee ballots will not be accepted if received by the county board after 7:30 p.m. on Election Day unless the State Board or court order extends the closing time for all polls in the county, in which case ballots will be accepted if received “by the closing time as extended [.]” N.C.G.S. §163-231(b)(1)a. and (2).

² The portion of the above statutory provision Plaintiffs challenge concern the *civilian* absentee voting process only. A different ballot receipt deadline applies to absentee voting by military and overseas citizens. *See* N.C.G.S. § 163-258.12.

C. Poll Observers and Laws Policing their Behavior

Myriad laws regulate the conduct of poll observers and others in “the room within the voting place that is used for voting,” referred to as “the voting enclosure,” N.C.G.S. § 163-165(9), as well as in and around “the building or area of the building that contains the voting enclosure,” referred to as “the voting place,” *id.*, 163-165(10).

First, section 163-45.1(e) limits the number of observers in the voting enclosure to no more than three from each party at any time. N.C.G.S. § 163-45.1(e). This was the same maximum number of observers per party allowed in the enclosure prior to SB 747. *See* N.C.G.S. § 163-45(a) (effective until Jan. 1, 2024). These observers are now required to wear identification badges “to make voters and election officials aware of the observer’s role in the voting place.” *Id.*, -45.1(d); *see also* Numbered Memo 2023-06, p. 3, attached to 3d Supplement Declaration of Counsel as Exhibit G.

Second, observers are expressly prohibited from doing any of the following in the voting place:

- (1) Look[ing] at, photograph[ing], videotap[ing], or otherwise record[ing] the image of any voter’s marked ballot.
- (2) Imped[ing] the ingress or egress of any voter into the voting place.
- (3) Inhibit[ing] or interfer[ing] with any election official in the performance of his or her duties, including interfering with the transport of sealed ballot boxes, election equipment, or election results to the county board of elections.
- (4) Engag[ing] in electioneering.
- (5) Mak[ing] or receiv[ing] phone calls while in the voting place.

N.C.G.S. § 163-45.1(h); *see also* 08 N.C.A.C. 21.0101, 21.0102, and 21.0103 (temporary amendments and rules regulating poll-observer conduct, adopted January 2, 2024).

Third, there are other laws that regulate the conduct of all individuals, including observers, in and around voting places and enclosures. Individuals, including observers, are not allowed to “photograph, videotape, or otherwise record the image of any voter within the voting enclosure, except with the permission of both the voter and the chief judge of the precinct.” N.C.G.S. § 163-166.3(c). They can be criminally prosecuted if they interfere with the duties of, assault, intimidate, or attempt to intimidate election officials. N.C.G.S. § 163-274(4), (5), (10), and (11); Ex. G at 9. Similarly, persons who “interfere with, or attempt to interfere with, any voter when inside the voting enclosure” or “when marking his ballots” can be criminally prosecuted. N.C.G.S. § 163-273(a)(3) and (4). Interference with voters includes questioning them in the voting place. *See* Ex. G at 8. It is also a crime for individuals to provide false information to the public about voting “where the intent and the effect is to intimidate or discourage potential voters from exercising their lawful right to vote.” *See* N.C.G.S. § 163-275(17).

Individuals are prohibited from harassing anyone in the voting place or buffer zone around it. N.C.G.S. § 163-4(a). Conduct considered voter intimidation is a crime under both state and federal law and is also otherwise prohibited by federal law. *See* N.C.G.S. § 163-274(a)(7) (providing that it is a Class 2 misdemeanor to “intimidate or oppose any legally qualified voter on account of any vote such voter may cast or consider or intend to cast, or not to cast, or which that voter may have failed to cast”); *see also* 18 U.S.C. § 594; 52 U.S.C. § 20511(1); 52 U.S.C. § 10307(b). Voter intimidation punishable by law includes any “conduct that would make a voter reasonably fearful, threatened, or coerced during the

voting process” and can take many forms. Ex. G at 8-10 (providing examples of voter intimidation and other guidance on the subject).

Individuals are not allowed access to voted ballots or to know “how a particular voter voted[.]” N.C.G.S. § 163-165.1(e). And if a person somehow obtains such information and disseminates it, that person can be criminally prosecuted. *Id.* Individuals also face prosecution if they induce voters to show their marked ballot. N.C.G.S. § 162-273(6).

Fourth, precinct judges are granted broad authority to “conduct [elections] fairly and impartially, and they *shall* enforce peace and good order in and about the place of registration and voting.” N.C.G.S. § 163-47(a) (emphasis added). They are required to keep voting places “open and unobstructed”; “prevent and stop improper practices and attempts to obstruct, intimidate, or interfere with any person in registering or voting”; and “prevent riots, violence, tumult, or disorder.” N.C.G.S. § 163-48; *see also* 08 NCAC 10B .0101 (“Tasks and Duties of Precinct Officials at Voting Places”). They have the authority to call upon law enforcement to assist them and to order the arrest of any person violating these laws, and law enforcement “shall immediately obey and aid in the enforcement of any lawful order made by the precinct election officials in the enforcement of the election laws.” N.C.G.S. § 163-48.

Notably, “[a] chief judge may remove an observer who engages in prohibited behavior. A chief judge may also remove an observer for good cause, which shall include evidence that the observer could impact the conduct of the election.” N.C.G.S. § 163-45.1(j).

Finally, section 163-45.1(g) provides that poll observers are not to be prohibited from taking notes; listening to conversations between voters and election officials related to election administration; moving about the voting place, including the designated curbside voting area; leaving and reentering the voting enclosure; communicating via phone outside the voting enclosure; or witnessing a voting place's opening and closing procedures. N.C.G.S. § 163-45.1(g)(1-6). However, the above conduct is allowed *only if* it does not “interfere with the privacy of any voter or the conduct of the election.” *Id.* In addition, such conduct is not allowed if it otherwise violates the above-noted laws regulating the conduct of observers and others in and around voting places. *See* Ex. G at 4-7. The State Board has already issued guidance on what conduct “interfere[s] with the privacy of any voter or the conduct of the election,” N.C.G.S. § 163-45.1(g), and the application of other laws limiting poll observers' behavior. *See* Ex. G.

Questions Presented

1. Whether Plaintiffs have standing to challenge SB 747's poll-observer provision.
2. Whether Plaintiffs' state constitutional Claims are barred by sovereign immunity.
3. Whether Plaintiffs' remaining claims, except those challenging SB 747's same-day registration mail-verification procedure under the federal constitution, should be dismissed under Rule 12(b)(6).

Legal Argument

Legal Standard

Plaintiffs bear the burden of proving subject matter jurisdiction on a motion to dismiss under Rule 12(b)(1). *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). When

a defendant challenges the factual predicate of subject matter jurisdiction, a court is to view the allegations in pleadings “as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991) (cleaned up).

To avoid dismissal under Rule 12(b)(6), “a complaint must contain sufficient factual matter . . . ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In evaluating a Rule 12(b)(6) motion, the Court considers the allegations in the Complaint and any materials incorporated therein, as well as any document submitted by the movant that is “integral to the complaint and there is no dispute about the document’s authenticity.” *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Court may also take judicial notice of public records when considering a Rule 12(b)(6) motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004); *see also* Fed. R. Evid. 201.

I. PLAINTIFFS’ CLAIMS CHALLENGING SB 747’S POLL-OBSERVER PROVISION SHOULD BE DISMISSED FOR LACK OF STANDING.

This Court lacks subject matter jurisdiction over Plaintiffs’ claims challenging SB 747’s poll-observer provision in Counts One, Six, and Seven. This is because Plaintiffs lack standing to challenge that provision.

To establish standing under Article III of the United States Constitution, plaintiffs must allege the following:

(1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the [enforcement of the statute]); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005).

Plaintiffs establish an injury in fact where they show they “suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Matherly v. Andrews*, 859 F.3d 264, 277 (2017) (cleaned up). A claim that a challenged act “‘could very likely’ cause [] harm at some point in the future . . . fails for lack of standing.” *Id.* To be imminent, “[a] threatened injury must be certainly impending”—“allegations of possible future injury are not sufficient.” *Clapper v. Amnesty Int’l U.S.A.*, 568 U.S. 398, 409 (2013) (cleaned up).

Plaintiffs cannot satisfy this standard. Plaintiffs speculate that SB 747 will “permit an influx of intimidating and largely unconstrained poll observers into voting places”; “permit[] poll observers to interfere with and intimidate voters”; permit them to “engage in more intrusive conduct in voting places” and “potentially allow[] them to get uncomfortably close to voters as they engage in the act of voting itself[,] which “will no doubt be disconcerting to many voters, some of whom will choose not to vote at all.” [*Id.*, ¶¶ 2, 10, 51, 62].

The State Board Defendants are deeply committed to ensuring that all eligible North Carolina voters are able to cast their ballots free of interference and intimidation. To that end, the State Board Defendants are committed to enforcing the myriad state laws intended to prevent precisely the kinds of harms to voters identified in Plaintiffs’ complaint. *See*

Statement of Facts, Part C. And State Board Defendants have and will advise county boards and their poll workers to enforce these laws, as well. *E.g.*, Ex. G. SB 747 does not repeal or invalidate these important voter-protection laws, nor do Plaintiffs allege that the State Board Defendants will fail to enforce them. Plaintiffs’ allegations about SB 747 are thus too speculative to establish standing. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (cleaned up) (requiring plaintiffs to prove their alleged harms are “certainly impending” or that “there is a substantial risk that the harm will occur”).

Plaintiffs similarly fail to satisfy the traceability prong of the standing inquiry. To satisfy this requirement, plaintiffs must show that their alleged injury is traceable to the actions of the defendant in enforcing the challenged statutory provisions, “and not [an] injury that results from the independent action of some third party not before the court.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Plaintiffs do not allege that *State Board Defendants’* actions will give rise to any injury. Instead, their alleged injuries arise from the potential conduct of independent third parties—namely, rogue poll observers defying preexisting state laws prohibiting voter interference and intimidation. Such allegations are insufficient to establish standing.

Because Plaintiffs’ claims challenging SB 747’s poll-observer provision fail to satisfy the requirements for standing, they should be dismissed under Rule 12(b)(1).

II. PLAINTIFFS’ STATE CONSTITUTIONAL CLAIMS IN COUNTS THREE AND SEVEN ARE BARRED BY SOVEREIGN IMMUNITY.

In Counts Three and Seven, Plaintiffs allege that SB 747’s same-day registration and poll-observer provisions violate the North Carolina Constitution’s Law of the Land

and Free Elections Clauses and request that the Court enjoin the State Board from enforcing the challenged provisions on that basis. [D.E. 1, ¶¶ 78-81, 97-100; pp. 34-35]; *see also* N.C. Const. art. I, §§ 10, 19.

The Eleventh Amendment guarantees that “nonconsenting States may not be sued by private individuals in federal court.” *Board of Trs. v. Garrett*, 531 U.S. 356, 363 (2001). Federal courts are without jurisdiction to enjoin state officials based on state law. *See Penhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 124-25 (1984). Congress may abrogate states’ sovereign immunity, or a state may waive it, but that has not happened here, nor has a waiver been alleged. Accordingly, Counts Three and Seven should be dismissed as barred by sovereign immunity.

III. THE COMPLAINT SHOULD BE DISMISSED IN PART FOR FAILURE TO STATE A CLAIM.

Plaintiffs’ Complaint should be dismissed in part for failure to state a claim under Rule 12(b)(6).

A. Count One, in part: First and Fourteenth Amendment

Plaintiffs allege in Count One that several of SB 747’s provisions violate the United States Constitution’s First and Fourteenth Amendments, in that they unduly burden the fundamental right to vote.

The analysis applicable to Plaintiffs’ Count One is based on the U.S. Supreme Court’s decisions in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takshi*, 504 U.S. 428, 434 (1992). Under what is commonly referred to as the *Anderson-Burdick* test, courts are required 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).

1. SB 747’s Same-Day Registration Provision

As noted above, the Court’s PI Order enjoined the mail-verification procedure in SB 747’s same-day registration provision to the extent it required removal of ballots from the vote count where a same-day registrant’s first notice is returned as undeliverable without giving the registrant notice and an opportunity to be heard. [D.E. 68 at 93-94]. Plaintiffs challenge that mail-verification process in Count One, but in light of the PI Order, that portion of Count One challenging mail verification is not discussed here. Those portions of Count One challenging other parts of SB 747’s same-day registration provision, however, should be dismissed as explained below.

a. That Portion of SB 747’s Same-Day Registration Provision Requiring Registrants to Show a HAVA Document and Photo ID

Plaintiffs allege that SB 747 severely burdens the right to vote by requiring same-day registrants to provide “*both*” a HAVA document listing their current name and residential address *and* a photo ID. [D.E. 1 at ¶ 56 (emphasis added)]; *see also* N.C.G.S. § 163-82.6B(b)(3). This allegation fails to state a claim. North Carolina requires *all* voters to present photo IDs when voting, and that requirement was not imposed or changed by SB 747. *See generally* N.C.G.S. §§ 163-166.16, -227.2(b) (now -166.40(c)); [*see also* D.E. 68 at 11 & n.10]. It is not unreasonable or unduly burdensome for SB 747 to impose the same photo-ID requirement on same-day registrants that state law imposes on every other kind

of voter. Moreover, it is not unduly burdensome to require same-day registrants to provide a document confirming their address, given the State's interest in verifying their eligibility to vote. Notably, as was the case prior to SB 747, a separate photo ID is *not* required if the document presented to show proof of residency for same-day registration is itself a qualifying photo ID. In other words, it remains the case that a single photo ID with their current address can meet both requirements.

b. Opportunity to Challenge the County Board's Initial Review as Provided for in SB 747's Same-Day Registration Provision

Plaintiffs next allege that SB 747's same-day registration provision violates the First and Fourteenth Amendments because it does not allow registrants to appeal a county board's decision to reject a registration application based upon its initial review of the registration form. [D.E.1 at ¶ 58]. This allegation fails because, as pointed out by State Board Defendants in the PI Response, a process *does* exist for challenging the rejection of registration based upon the county board's initial review. [See D.E. 53 at 12]; *see also* N.C.G.S. §§ 163-89, -182.5(a); [D.E. 54-3 (Numbered Memo 2022-05)].

2. SB 747's Absentee-Ballot Deadline

Plaintiffs contend that SB 747's provision changing the absentee-ballot deadline imposes a significant burden on the right to vote, for which there is no sufficiently weighty state interest to justify the burden. [D.E. 1 at ¶ 59].

Here again, Plaintiffs fail to state a claim. Where "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 (quoting *Anderson*, 460 U.S. at 788).

No one disputes that, to administer an election, there must be a clear deadline for absentee ballots. North Carolina’s decision to change the state deadline is constitutional. The new absentee-ballot deadline is nondiscriminatory, as it applies to everyone who votes an absentee ballot (unless the deadlines for their ballots are governed by the separate procedures for military and overseas citizens’ ballots, *see* N.C.G.S. § 163-258.12). The deadline is also reasonable, particularly considering that, nationwide, “the most common deadline for absentee/mail ballots to be returned by any method is by the close of polls on Election Day.” *See* Nat. Conf. of State Legislatures, “Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots,” available at <https://www.ncsl.org/elections-and-campaigns/table-11-receipt-and-postmark-deadlines-for-absentee-mail-ballots> (last visited Jan. 19, 2024) (providing that, as of July 2022, thirty states “require absentee/mail ballots returned by mail to be received on or before Election Day”).

The State’s standard regulatory interests in ensuring the orderly administration of elections, finality, and certainty justify the imposition of the Election Day deadline for the return of absentee-ballots. *See generally Anderson*, 460 U.S. at 788. As a result, North Carolina’s absentee-ballot deadline satisfies the *Anderson/Burdick* test and does not violate the United States Constitution. Plaintiffs’ contention to the contrary fails to state a claim.

B. Count Two, in part: United States Constitution’s Due Process Clause.

Plaintiffs contend in Count Two that SB 747’s same-day registration provision fails to provide procedural due process as guaranteed by the Fourteenth Amendment to the

United States Constitution. Plaintiffs allege in support of Count Two that the same-day registration provision does not provide notice of rejection to registrants during the county board's initial registration review or a process to contest erroneous rejections based on that review. [D.E. 1 at ¶¶ 65-77]. As noted in the PI Response, the State Board *does* provide a process for voters to contest rejections during initial review. [See D.E. 53 at 12]; *see also* N.C.G.S. §§ 163-89, -182.5(a); [D.E. 54-3]. Thus, Plaintiffs' contentions to the contrary fail to state a claim.

Plaintiff also allege in Count Two that SB 747's same-day registration mail-verification process violates due process, but that portion of Count Two is not discussed here in light of the Court's PI Order.

C. Counts Four and Five: Civil Rights Act of 1965 and Help America Vote Act.

For the reasons discussed in the PI Response and the PI Order, Plaintiffs' claims in Counts Four and Five that SB 747's same-day registration provision violates the Civil Rights Act of 1965, 52 U.S.C. § 10101(a)(2)(A), or the Help America Vote Act, 52 U.S.C. § 21082, fail to state a claim. [D.E. 53 at 15-21; D.E. 68 at 37-45].

Conclusion

For these reasons, State Board Defendants respectfully request that Plaintiffs' Complaint be dismissed.

This the 30th day of January, 2024.

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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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.

This the 30th day of January, 2024.

/s/ Terence Steed
Terence Steed
Special Deputy Attorney General

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