UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

VOTO LATINO, et al.,

Plaintiffs,

v.

ALAN HIRSCH, in his official capacity as Chair of the State Board of Elections, et al.,

Defendants.

Case No. 1:23-cv-861-TDS-JEP

PLAINTIFFS' RESPONSE IN OPPOSITION TO LEGISLATIVE INTERVENORS' MOTION TO DISMISS

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INTRODUCTION

The Undeliverable Mail Provision requires the automatic disenfranchisement of any same-day registrant who has a single address verification notice returned as undeliverable—regardless of the reason why it is returned—without any notice or opportunity to prove their qualifications to vote. *See* N.C. Gen. Stat. § 163-82.6B(d). Given the substantial risk of erroneous disenfranchisement and the lack of process afforded by this system, this Court preliminarily enjoined the Undeliverable Mail Provision on January 21, 2024. *See* Mem. Op. & Order on Mot. for Prelim. Inj. at 93, ECF No. 68. In so doing, the Court determined that at least two Plaintiffs—Voto Latino and Down Home North Carolina—had established standing,[1] and that Plaintiffs are likely to succeed on the merits of their procedural due process claim. *Id.* at 31–33.

On January 29, eight days after this Court issued its Order, the State Board issued a revised Numbered Memo that requires county boards to provide voters with notice and an opportunity to cure *prior* to removing their ballots from the count due to failed mail verification. Numbered Memo 2023-05 at 5–9, ECF No. 72-1. That Numbered Memo will not expire until there is superseding legislation, or until 60

[1] Since two Plaintiffs established standing, the Court did not assess standing for the other Plaintiffs. ECF No. 68 at 32. Only one plaintiff needs to have established standing for the case to proceed. *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 681 (4th Cir. 2020).

days after the next regular legislative session, which is scheduled to begin in January 2025. *See id*. at 1 n.2 (citing N.C. Gen. Stat. § 163-22.2).

Nevertheless, Legislative Intervenors have moved to dismiss this case, making many of the same meritless arguments—that Plaintiffs lack standing and have failed to state a claim—that this Court effectively rejected at the preliminary injunction stage.[2] *See* Mot. to Dismiss, ECF No. 65; *see also* Mem. in Supp. Of Mot. to Dismiss, ECF No. 66 (the "Brief" or "Br."). And, just as before, Legislative Intervenors rely on misunderstandings of North Carolina election law and the applicable legal standard. This Court should deny Legislative Intervenors' motion. Plaintiffs have pled sufficient facts to allege standing and to support both of their constitutional claims.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the "legal sufficiency of the complaint." *E. Shore Markets, Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). The Court must accept as true all well-pleaded facts in the complaint and view those facts "in the light most favorable to the plaintiff." *Id.* A motion to dismiss must be denied unless "it appears certain that the plaintiff cannot prove *any* set of facts" in support of their claim. *Martin v. Duffy*, 858 F.3d 239, 248 (4th Cir.

[2] State Board Defendants and the Republican Intervenors each filed an Answer to Plaintiffs' Complaint. *See* State Bd. Defs.' Answer, ECF No. 73; Intervenors' Proposed Answer, ECF No. 16-1.

2017) (emphasis added) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)). Importantly here, a motion to dismiss "is analyzed [under] a lower standard" than a preliminary injunction. *Fresenius Kabi USA, LLC v. Fera Pharms., LLC*, No. 15-CV-3654, 2016 WL 5348866, at *10 (D.N.J. Sept. 23, 2016); *see also Action NC v. Strach*, 216 F. Supp. 3d 597, 628 (M.D.N.C. 2016) (explaining that "the preliminary injunction stage carries a higher burden" than the pleading stage).

A motion to dismiss under Rule 12(b)(1) is subject to the same procedural standard as a Rule 12(b)(6) motion if the movant contends that the complaint "fails to allege facts upon which subject matter jurisdiction can be based." *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (quoting *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir.1982)). Accordingly, the Court must accept as true all well-pleaded facts and view them in the light most favorable to Plaintiffs in resolving Intervenors' challenge to Plaintiffs' standing allegations. *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017).

ARGUMENT

I. Plaintiffs have properly alleged standing.

This Court has already found that Voto Latino and Down Home made a "clear showing that [they are] likely to succeed at trial" on all the elements of standing. ECF No. 68 at 31–33, 36 (quoting *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017)). All of the Court's conclusions are adequately supported by allegations

made in the Complaint, Compl. ¶¶ 17–32, ECF No. 1, and Plaintiffs' Complaint thus satisfies the "lower standard of Rule 12(b)(6)." *Miller v. Marshall*, No. 2:23-CV-00304, 2023 WL 4606962, at *15 (S.D. W. Va. July 18, 2023). Indeed, as a practical matter, while plaintiffs may survive a motion to dismiss and later be denied preliminary relief, the reverse rarely happens. *See*, *e.g.*, *Swanson Grp. Mfg. LLC v. Jewell*, 195 F. Supp. 3d 66, 79 (D.D.C. 2016) (holding plaintiff "survives the motion to dismiss but fails to satisfy the high burden required to obtain a preliminary injunction"); *Action NC*, 216 F. Supp. 3d at 628 (explaining that "the preliminary injunction stage carries a higher burden" than the pleading stage).

To establish standing, a plaintiff must allege an injury in fact that is fairly traceable to the defendant's conduct and that can be redressed by a favorable ruling. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 619–20 (4th Cir. 2018). Here, Plaintiffs' well-pleaded allegations satisfy this standard.

A. Plaintiffs have adequately alleged injuries in fact.

Plaintiffs have sufficiently pleaded that the Undeliverable Mail Provision will injure them. The Undeliverable Mail Provision injures the organizational Plaintiffs directly because it "perceptibly impairs [each] organization's ability to carry out its mission and consequently drains the organization's resources." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020) (cleaned up) (quoting

Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)). Legislative Intervenors argue that the organizational Plaintiffs' missions of "encouraging voter participation" are not sufficiently connected to the diversion of resources caused by the Undeliverable Mail Provision. That is incorrect. The organizational Plaintiffs' missions are to ensure the enfranchisement of their constituencies, ECF No. 1 ¶¶ 17–19, 22–24, 28, and their missions would be significantly undermined, if not nullified, if their constituencies are disenfranchised as a result of the Undeliverable Mail Provision—as they have alleged would happen absent relief, *id.* ¶¶ 18–30. That is because the organizational Plaintiffs' advocacy and educational efforts are rendered meaningless if the voters they reach are subsequently disenfranchised. *See, e.g.*, *Democracy N.C. v. N.C. State Bd. Of Elections*, 476 F. Supp. 3d 158, 183 (M.D.N.C. 2020) (holding voter encouragement mission harmed by barriers to registration); *see also Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) ("The right to vote includes the right to have the ballot counted.").

The organizational Plaintiffs have also properly alleged that they will have to divert finite resources to counteract the harms created by the Undeliverable Mail Provision. These resource expenditures go beyond merely "educat[ing] voters on a new law," as Legislative Intervenors suggest. Br. At 7. Specifically, Voto Latino alleges that it will have to shift strategic priorities to register more voters prior to the deadline and engage in other voter outreach efforts designed to mitigate the impact

of the Undeliverable Mail Provision. ECF No. 1 ¶ 19. Similarly, the Taskforce will have to devote limited volunteer time to counteracting the Undeliverable Mail Provision's disproportionate effect on young people. *Id.* ¶ 26. And Down Home will have to overhaul its programming to emphasize registration prior to the registration deadline and educate voters on how to mitigate the risk that verification cards will be returned as undeliverable. *Id.* ¶ 29.

For each organizational Plaintiff, the resources necessary to undertake those efforts will be diverted from other important programs. *See* ECF No. 1 ¶ 19 (Voto Latino diverting resources from issue advocacy, digital advertisement, and GOTV programs); *id.* ¶ 26 (Taskforce diverting resources from voter education and GOTV efforts); *id.* ¶ 29 (Down Home diverting resources from electoral and grassroots community organizing). These allegations go well "beyond merely educating voters and responding to inquiries." ECF No. 68 at 29. The Undeliverable Mail Provision undermines the organizational Plaintiffs' missions, will harm their constituents, and will require harmful resource diversion. The Undeliverable Mail Provision is not an inconsequential update to the state's election laws that voters merely need to be educated on; it is a change in the law that requires the disenfranchisement of certain same-day registrants even under circumstances where the voter has done everything correctly.

The Watauga County Voting Rights Task Force (the "Taskforce") and Down Home North Carolina have also sufficiently pleaded associational standing on behalf of their members. At the pleading stage, Plaintiffs need not specifically identify a member who would have standing if the allegations plausibly show that "individual members [of the organization] would be sufficiently burdened to sue in their own right." *Lee v. Va. State Bd. of Elections*, 155 F. Supp. 3d 572, 578 (E.D. Va. 2015), *on reconsideration*, No. 3:15CV357-HEH, 2016 WL 6921611 (E.D. Va. Feb. 2, 2016). This is because this Court must presume that Plaintiffs' general factual allegations about injuries to their members "embrace those specific facts that are necessary to support their claim." *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). Indeed, Down Home followed the precise path contemplated by *Bennett*: at the pleading stage, it made general allegations about its members; then, at the preliminary injunction stage, it identified multiple specific members—at least one of whom would have standing in her own right. *See* ECF No. 68 at 32–33. And even if Plaintiffs were required to name a specific member in their Complaint—and they are not—the Taskforce has done so, because Plaintiff Sophie Mead is a member of the Taskforce, and she too has standing.[3] ECF No. 1 ¶¶ 31–32.

[3] Legislative Intervenors incorrectly claim that the Taskforce does not bring claims on behalf of its members. Br. at 7 n.7. This misapprehension seems to arise from an

Indeed, Mead has alleged a concrete and particularized injury. Mead intends to move to another county in North Carolina shortly before the 2024 election and to use same-day registration to update her address when she votes. *Id.* ¶ 32. In the 2022 election, she used same-day registration to update her address and her ballot was challenged because her mail verification card was returned as undeliverable due to poll worker error. *Id.* ¶¶ 31–32. Mead is significantly concerned that when she uses same-day registration in the 2024 election, her mail verification card will similarly be returned as undeliverable, and her ballot will not be counted as a result.

Legislative Intervenors' argument that Plaintiff Mead's injuries are "speculative" misconstrues the applicable legal standard and the facts she has pled. Br. at 6. Mead's injury is far from "hypothetical." It is guaranteed that, absent relief, she will be subjected to the Undeliverable Mail Provision when she uses same-day registration this fall. Legislative Intervenors are simply wrong, as a matter of law, when they contend that the Undeliverable Mail Provision will not apply to Mead because she is a prior registrant who will use same-day registration to update her

overreading of the word "constituencies" as used in Plaintiffs' Complaint. *Id.*; *compare* ECF No. 1 ¶ 22. But some of the Taskforce's constituents are also members, including Plaintiff Mead. *Id.* ¶ 31 ("Plaintiff Sophie Jae Mead is a senior at Appalachian State University and a member of the Watauga County Voting Rights Task Force."). And Legislative Intervenors' overemphasis on word choice "exalt[s] form over substance" in direct contravention of how the Supreme Court instructs the application of associational standing. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 345 (1977).

address. The Undeliverable Mail Provision applies not only to new registrants but also to voters who update their addresses using same-day registration. *See infra* at Section II.A. In addition, Mead is legitimately concerned about errors that have *already* threatened her right to vote in the past. ECF No. 1 ¶ 31. As such, Mead's allegations are clearly distinct from those made by the plaintiff in *Matherly*, where a prisoner speculated that the guards' laughter at verbal harassment "could very likely lead to a physical confrontation." *Matherly v. Andrews*, 859 F.3d 264, 277 (4th Cir. 2017).

Moreover, the injury alleged by Mead is generally considered sufficient not only to allege that a voter has standing at the pleading stage, but also to support a finding that the voter has standing at later stages of litigation where the plaintiff's burden is significantly higher. *See N.C. State Conf. of NAACP v. N.C. State Bd. of Elections*, 283 F. Supp. 3d 393, 404 (M.D.N.C. 2017) (holding that voter sufficiently alleged injury based on previous challenge to registration and risk of similar registration challenge in future elections); *Action NC*, 216 F. Supp. 3d at 631 (finding that plaintiffs "demonstrated a likelihood of success in establishing standing" at preliminary injunction stage based on "reasonable expectation that Individual Plaintiffs will conduct a covered DMV transaction in the future and thus could experience the same alleged transmission issue which they believe caused their votes not to be counted in 2014"); *see also Arcia v. Fla. Sec'y of State*, 772 F.3d 1335,

1341 (11th Cir. 2014) (holding that plaintiffs had standing because there was a "realistic probability that they would be misidentified due to unintentional mistakes in the Secretary's data-matching process"). Indeed, this Court has already found that similar allegations are sufficient to demonstrate a "concrete and imminent risk of harm" in this case with respect to a different plaintiff. ECF No. 68 at 33 ("This individual identified by Down Home NC would have standing, as she faces a concrete and imminent risk of harm").

B. Plaintiffs' alleged injuries are traceable to Defendants' enforcement of the Undeliverable Mail Provision and will be redressed by relief against them.

The harms that Plaintiffs allege—disenfranchisement of their members and constituencies, harm to their missions, and diversion of their organizational resources—are directly traceable to the Undeliverable Mail Provision, and Plaintiffs allege precisely that in their Complaint. ECF No. 1 ¶¶ 17–32. Plaintiffs' Complaint indicates that several voters in Watauga County had their ballots challenged as a result of failed mail verification due to postal service and election official error in the 2022 general election, including Ms. Mead. *Id.* ¶¶ 25, 31. Had the Undeliverable Mail Provision been in effect at the time, those voters would have been disenfranchised without notice or opportunity to contest their disenfranchisement. ECF No. 68 at 61–63. Furthermore, as this Court has already noted, in the last four even-year elections, 5,037 same-day registrants have failed the address verification

process under the two-card system—all of whom would be disenfranchised without notice or opportunity to be heard under the Undeliverable Mail Provision. *Id*. at 64. Nothing further is required to allege traceability. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (holding traceability is satisfied when the challenged statute "is at least in part responsible" for the alleged injury). Legislative Intervenors' argument that Plaintiffs have not sufficiently alleged traceability is based on their misunderstanding of the operation of the Undeliverable Mail Provision. *See infra* at Section II.A.

Plaintiffs' alleged injuries will be redressed by a favorable ruling permanently enjoining the Undeliverable Mail Provision's enforcement. "An injury is redressable if it is likely, as opposed to merely speculative the injury will be redressed by a favorable decision[,]" but still "no explicit guarantee of redress to a plaintiff is required to demonstrate" standing. *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 755 (4th Cir. 2013) (cleaned up). Legislative Intervenors mistakenly suggest that an injunction against the Undeliverable Mail Provision would simply result in ballots being rejected after two undeliverable verification cards instead of one. Br. at 10. But that is a misreading of the law. If the Undeliverable Mail Provision is permanently enjoined, same-day registrants would fall back under the protection of N.C. Gen. Stat. § 163-82.7(g)(3). That provision requires a voter's ballot *to be counted* if the ballot is cast before the verification card is returned, unless the ballot

is independently challenged.[4] *See infra* at Section II.A. As an alternative remedy, Plaintiffs have requested that voters be afforded notice and an opportunity to cure prior to the removal of their ballots from the count. Br. at 10. The State Board's revised Numbered Memo 2023-05—which was re-issued after this Court granted Plaintiffs' Motion for Preliminary Injunction—creates such a notice and cure process, which is further proof that such a remedy did not previously exist under North Carolina law, as Legislative Intervenors wrongly suggest. ECF No. 72-1 at 5–9.

C. Legislative Intervenors' prudential standing arguments have no merit.

Legislative Intervenors raise "prudential standing" as a basis for this Court to decline jurisdiction. Br. at 10–11. But in *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), the Supreme Court "cast doubt on the entire doctrine of prudential standing." *N.Y. State Citizens' Coal. for Child. v. Poole*, 922 F.3d 69, 75 (2d Cir. 2019). *Lexmark* held that once Plaintiffs have established Article III standing, a Court's obligation to decide that case or controversy is "virtually unflagging," and it cannot "limit a cause of action that Congress has created merely because 'prudence' dictates." *Lexmark Int'l, Inc.*, 572

[4] Indeed, the State Board Defendants agree that, under the prior law, a voter who failed mail verification after casting their ballot could only have their ballot rejected via the challenge procedure. State Bd. Defs.' Resp. to Pls.' Mot. for Prelim. Inj. at 6, ECF No. 54.

U.S. at 126, 128. Given the Supreme Court's rejection of the prudential standing doctrine, it is not surprising that Legislative Intervenors' motion does not cite to a single case that post-dates *Lexmark*. Br. at 10–11. Indeed, Plaintiffs are not aware of any Fourth Circuit decision rejecting a plaintiff's claim on third-party standing grounds since *Lexmark*. *Cf. Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 216 (4th Cir. 2020), *as amended* (Aug. 31, 2020) (finding third-party standing elements satisfied without acknowledging *Lexmark*). Instead, the Fourth Circuit has "expressly acknowledge[d]" that the status of third-party standing is questionable after the Supreme Court "pushed back on" prudential standing in *Lexmark*. *United States v. Under Seal*, 853 F.3d 706, 722 n.5 (4th Cir. 2017) (citing *Lexmark*, 572 U.S. 118). Given *Lexmark*, this Court should decline to entertain extra-constitutional limits on its jurisdiction.

But even if the doctrine of third-party standing provided a valid legal basis to grant a motion to dismiss, it would not apply to Down Home and the Taskforce, the two organizational Plaintiffs that have associational standing. As the Fourth Circuit has recognized, third-party standing and associational standing are distinct doctrines. *See A Helping Hand, LLC v. Baltimore Cnty.*, 515 F.3d 356, 363 n.3 (4th Cir. 2008). Because organizations must show that at least one of its members would have standing in their own right to satisfy associational standing, it is a form of "representative standing" where the organization stands in the shoes of its members.

Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353, 365 (3d Cir. 2015). As a result, these organizational Plaintiffs "need not establish third-party standing." *La Union del Pueblo Entero v. Ross*, 353 F. Supp. 3d 381, 392 (D. Md. 2018); *see also Hisp. Nat'l L. Enf't Ass'n NCR v. Prince George's Cnty.*, No. CV TDC-18-3821, 2019 WL 2929025, at *4 (D. Md. July 8, 2019) (holding that organizations asserting standing on behalf of their members "do not need [to] satisfy the third-party standing exception to the prudential rule against asserting the rights of others").

In any event, all of the organizational Plaintiffs—including Voto Latino—satisfy the "quite forgiving" standard for vindicating the rights of third parties. *Maryland Shall Issue, Inc.*, 971 F.3d at 215. The organizational Plaintiffs need only show (1) "a close relationship" with the third party and (2) a "hindrance" to that party's ability to assert their own rights. *Id.* at 215–16. The scope of the term "close relationship" is broad and has even been held to encompass a seller's relationship with its customers. *Id.*

Given that organizational Plaintiffs are directly in contact with their members and constituencies—providing education, advocacy, and assistance with navigating the electoral process—they are well within the bounds of the "close relationship" standard. ECF No. 1 ¶¶ 18–19, 22–24, 28–30. And it would be significantly more burdensome for these individuals to engage in and maintain individual civil litigation

to protect their rights than for the organizational Plaintiffs to engage in litigation on their behalf. *Id.* ¶¶ 20–21, 27, 30.

II. Plaintiffs have sufficiently alleged valid constitutional claims.

Legislative Intervenors' argument that Plaintiffs have failed to state a claim is based on their erroneous belief that same-day registrants will be provided with notice before their ballots are removed from the count. But Legislative Intervenors defend an imaginary law. The statutory text of the Undeliverable Mail Provision is clear: "[n]otwithstanding any other provision of [law]," county boards "shall retrieve the applicant's ballot and remove that ballot's votes from the official count." N.C. Gen. Stat. § 163-82.6B(d). In other words, whatever notice and cure procedures may exist with respect to other features of North Carolina law, they explicitly do not apply to protect the ballots of same-day registrants who fail mail verification. On those facts—which *accurately* describe the law—it is clear that Plaintiffs have sufficiently alleged that the Undeliverable Mail Provision violates the First and Fourteenth Amendments. For that reason, Legislative Intervenors' invocation of the constitutional avoidance doctrine is unavailing. Br. at 20–22. That doctrine only "operates in ambiguity; it doesn't let [courts] rewrite clear statutory language." *Canaan Christian Church v. Montgomery County*, 29 F.4th 182, 202 (4th Cir. 2022) (Richardson, J., concurring) (citing *United States v. Locke*, 471 U.S. 84, 96 (1985)). Given the clear statutory command that the Undeliverable Mail Provision operates

irrespective of all other provisions of election law, this Court cannot usurp the role of the General Assembly for the sake of avoiding its own role in deciding constitutional controversies.

A. Legislative Intervenors' motion is based on multiple misinterpretations of North Carolina election law.

First, Legislative Intervenors claim that same-day registrants will receive notice and an opportunity to be heard under N.C. Gen. Stat. § 163-82.7(b) before their ballots and registration applications are rejected. Br. at 3, 14. That is not true—either under the terms of the statute or the practices implemented by election officials pursuant to State Board guidance. Again, the statutory text is clear: the notice and hearing procedures under subsection 82.7(b) are exclusively reserved for a "determination pursuant to subsection (a)," which concerns the "tentative determination" of whether the applicant is qualified. N.C. Gen. Stat. § 163-82.7(a)–(b). The procedures under 82.7(b) do not apply—and have never been applied—to voters who fail mail verification. The State Board Defendants' Numbered Memo is consistent with Plaintiffs' interpretation of the law; it affirmatively instructs county officials *not* to apply subsection 82.7(b) to same-day registrants. *See, e.g.*, ECF No. 72-1 at 6 (instructing officials to challenge the ballot if the voter appears unqualified).

Second, Legislative Intervenors claim that same-day registrants will receive notice and an opportunity to be heard under the challenge procedures provided by

N.C. Gen. Stat. § 163-89. Br. at 3, 10. Again, this contention is not supported by statutory language or existing practice. Legislative Intervenors rely on 163-87.2(g)(2) to support their interpretation, *id.* at 21, but that provision authorizes challenges only to persons who "voted by absentee ballot." N.C. Gen. Stat. § 163-82.7(g)(2). As this Court has recognized, after S747, same-day registrants no longer vote by absentee ballot, and instead cast a "retrievable ballot." ECF No. 68 at 12. Moreover, this Court has already recognized that State Board Defendants "do not intend to offer any notice or opportunity to be heard via 163-89 or any other provision, absent a court order." *Id.* at 67. Indeed, even if the challenge procedure *could theoretically* apply to same-day registrants, it could not operate as a substitute for the Undeliverable Provision's superseding command that the ballots of same-day registrants who fail mail verification must be removed from the count "[n]otwithstanding any other provision of [law.]" N.C. Gen. Stat. § 163-82.6B(d).

Third, Legislative Intervenors claim that providing notice and an opportunity to be heard would treat same-day registrants "better than timely registrants who likewise receive no notice if they fail mail verification." Br. at 9 (emphasis omitted). But, as the Court already observed, the "statutory scheme does not bear this out." ECF No. 68 at 77–78. When assessing the treatment of same-day registrants, the appropriate comparator is timely registrants who fail mail verification *after* having already cast a ballot—which can occur if a voter registers shortly before the deadline.

These timely registrants who have already voted do not need additional procedures because their votes are *always* counted, unless independently challenged, and county officials must "treat the person as a registered voter." N.C. Gen. Stat. § 163-82.7(g)(3). And, of course, timely registrants who fail mail verification in advance of voting may rely on same-day registration to vote. Only same-day registrants who fail mail verification under the Undeliverable Mail Provision are disenfranchised without recourse.

Finally, Legislative Intervenors repeatedly claim that the Undeliverable Mail Provision does not apply to previously registered voters who avail themselves of same-day registration to update the address in their registration record, not to register to vote for the first time. Br. at 6, 7, 14. This argument turns on Legislative Intervenors' overreading of the word "applicant" to mean only same-day registrants registering to vote for the first time.

North Carolina law, however, does not draw a distinction between same-day registrants who are registering for the first time and same-day registrants who are updating their address. To the contrary, the statutory text compels the conclusion that *all* same-day registrants are "applicants": only "[a]n applicant who registers under this section" is permitted to vote a retrievable ballot. N.C. Gen. Stat. § 163-82.6B(c). Legislative Intervenors' reading would produce the absurd result that voters updating their address could *not* register and vote same-day, because only

"[a]n applicant" is authorized to cast a ballot. *Id.* Moreover, the State Board Defendants' Numbered Memo 2023-05 makes no distinction between new registrants and those updating their addresses. *See* ECF No. 72-1 at 6–8. This is consistent with the practice under North Carolina law generally—which denies the registration of a voter updating their address if they fail mail verification. N.C. Gen. Stat. § 163-82.15(b). It also mirrors Ms. Mead's experience having her ballot challenged after using same-day registration to update her address and subsequently failing mail verification. ECF No. 1 ¶ 31.[5]

B. Plaintiffs have stated a procedural due process claim.

Plaintiffs' Complaint alleges that the Undeliverable Mail Provision threatens to deprive same-day registrants of their right to vote—through no fault of their own—without any notice or opportunity to be heard, ECF No. 1 ¶¶ 67–78, and that this significant risk of disenfranchisement is not justified by any legitimate state interest, *id.* ¶¶ 68–69, 79–82. Plaintiffs have thus sufficiently alleged the elements of a procedural due process claim under the Fourteenth Amendment: (i) a cognizable interest; (ii) the deprivation of that interest by state action; and (iii) that the procedures employed were constitutionally inadequate. *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 145 (4th Cir. 2009).

[5] In any event, Plaintiffs have alleged that the Undeliverable Mail Provision will harm both new registrants and voters who require the use of same-day registration to update their address. ECF No. 1 ¶¶ 30–31.

Legislative Intervenors apparently concede that the right to vote is a protected interest under the Due Process Clause. Br. at 12. They subsequently argue, however, that the Undeliverable Mail Provision does not implicate a protected interest because same-day registration merely implicates a "statutory right" subject to the prescribed verification process. Br. at 12–13. But it does not matter whether voters have other voting methods available, or that same-day registration is a creature of statute. Now that same-day registration has been established, voters rely on it to exercise their right to vote, and once the state has authorized a method of voting by statute, it "must afford appropriate due process protections." *Democracy N.C.*, 476 F. Supp. 3d at 227; *see also Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018) ("Having induced voters to vote by absentee ballot, the State must provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted."). The Undeliverable Mail Provision unquestionably threatens to deprive voters of that right, as it commands election officials to remove voters' ballots from the official count. N.C. Gen. Stat. § 163-82.6B(d).

For the third element of a procedural due process claim, the Court must balance the Plaintiffs' interest in additional procedural safeguards against the State's interest in denying them.[6] Accordingly, Plaintiffs have alleged that the

[6] The Fourth Circuit has not spoken decisively on what test courts should apply to analyze the third element of a procedural due process claim when the right to vote is

Undeliverable Mail Provision will erroneously disenfranchise eligible voters, ECF No. 1 ¶¶ 67–77, and that the lack of procedural safeguards does not serve any legitimate state interest, *id.* ¶¶ 79–82.

C. Plaintiffs have stated an undue burden on the right to vote claim.

Plaintiffs have also stated a claim that the Undeliverable Mail Provision imposes an undue burden on the right to vote. Legislative Intervenors' arguments to the contrary do not challenge the sufficiency of the allegations in the Complaint. Instead, Intervenors ignore the legal standard altogether, and skip to the merits of Plaintiffs' claims, disputing the relative magnitude of the burdens the Undeliverable Mail Provision inflicts on voters and defending the state's interests. Br. at 17–19. It is well-settled that such fact-intensive inquiries are not a proper basis for a motion to dismiss—where "all disputed facts" must be resolved in Plaintiffs' favor. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs, Inc.*, 334 F.3d 390, 396 (4th Cir. 2003).

Plaintiffs have properly alleged—and provided a robust record showing—that the Undeliverable Mail Provision (1) fails to serve the state's purported interest in

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implicated. At the preliminary injunction stage, this Court applied a balancing test adapted from the *Anderson-Burdick* framework. ECF No. 68 at 52. Plaintiffs maintain that the balancing test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is the more appropriate framework. But neither framework alters the necessary elements of a procedural due process claim—which Plaintiffs have sufficiently pleaded.

verifying a voter's residential address, ECF No. 1 ¶¶ 79–82, and (2) imposes the severe burden of disenfranchisement on same-day registrants through no fault of their own, *id.* ¶¶ 67–77. Indeed, this Court has already determined that Plaintiffs are likely to show that the Undeliverable Mail Provision—without additional procedural safeguards—imposes a "substantial burden" on voters using same-day registration. ECF No. 68 at 61.

Because Plaintiffs' detailed allegations are sufficient to withstand a motion to dismiss, Legislative Intervenors resort to distorting Plaintiffs' allegations. For example, Legislative Intervenors' argument about voters' own errors is a meaningless distraction. Br. at 17–19. What Plaintiffs actually allege—and have shown—is that voters will be disenfranchised because of errors by election officials or poll workers, through no fault of their own. ECF No. 1 ¶¶ 67–77. Similarly, as discussed, Legislative Intervenors' insistence that some or all same-day registrants will be provided with notice and an opportunity to be heard is simply inaccurate. *See supra* at Section II.A.

Finally, Legislative Intervenors' arguments about the reliability of mail also miss the mark. *First*, these arguments dispute Plaintiffs' factual allegations, but such disputes do not justify dismissal under Rule 12(b)(6). *See Carefirst of Maryland, Inc.*, 334 F.3d at 396. *Second*, they misconstrue the use of mail in other contexts. For instance, the use of mail verification in the National Voter Registration Act

("NVRA") *supports* rather than undermines Plaintiffs' claims: unlike the Undeliverable Mail Provision—which decisively disenfranchises voters based on only a single undelivered piece of mail, with no other process—the NVRA requires both an undelivered piece of mail *and* inactivity by the voter for two election cycles before they can be removed from the rolls. 52 U.S.C. § 20507(d)(2). These additional procedural safeguards under the NVRA illustrate that reliance on mail verification alone is unreliable.

CONCLUSION

For the foregoing reasons, Legislative Intervenors' motion to dismiss should be denied.

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Respectfully submitted,

/s/ *Aria C. Branch*

Narendra K. Ghosh
Paul E. Smith
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27217
Telephone: (919) 942-5200
nghosh@pathlaw.com
psmith@pathlaw.com

Aria C. Branch*
Jyoti Jasrasaria*
Meaghan M. Mixon*
William K. Hancock*
Samuel T. Ward-Packard*
ELIAS LAW GROUP LLP
250 Mass. Ave. NW, Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490
abranch@elias.law
jjasrasaria@elias.law
mmixon@elias.law
whancock@elias.law
swardpackard@elias.law

*Special Appearance pursuant to Local Rule 83.1(d)

Counsel for Plaintiffs

CERTIFICATE OF WORD COUNT

I certify that this brief complies with the requirements of Local Rule 7.3. This response contains 5,468 words exclusive of the cover page, caption, table of contents, signature lines, and this certificate.

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/s/ *Aria C. Branch*