

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:23-CV-861**

VOTO LATINO; *et al.*,

Plaintiffs,

v.

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

Defendants.

**REPLY IN FURTHER SUPPORT OF
MOTION TO DISMISS**

Plaintiffs' Response in Opposition to Legislative Intervenors' Motion to Dismiss misses the boat entirely. First, Plaintiffs accuse Legislative Intervenors (at p. 2) of making arguments foreclosed by this court's Preliminary Injunction Order. [D.E.68]. But this ignores that Legislative Intervenors filed their timely motion four days before the Order was issued. Second, despite repeatedly relying on the Preliminary Injunction Order, Plaintiffs make only a single passing reference to Numbered Memo 2023-05. But this single reference speaks volumes, as Plaintiff's admit that the Numbered Memo remains in effect absent superseding legislation through this election cycle. [Resp. P. 1-2]. Third, Plaintiffs' espouse a clearly erroneous reading of the law regarding individuals who use SDR to update their address, which Legislative Intervenors are obligated to correct. Plaintiffs' Complaint should be dismissed.

ADDITIONAL PROCEDURAL BACKGROUND

On January 21, 2024 the Court issued an Order (the “PI Order”) that preliminarily enjoined Defendants from “utilizing the procedures of N.C. Gen. Stat. §163-82.6B(d) to remove from the official count the votes of the ballot of any voter who has provided contact information in the registration process and whose first notice required under N.C. Gen. Stat. §163-82.7(c) is returned by the Postal Service as undeliverable before the close of business on the business day before the canvass, without first providing such voter notice and an opportunity to be heard[.]” [D.E. 68 at pp. 93-94]. The PI Order was limited to granting injunctive relief regarding the undeliverable mail provision of S.B. 747 §10(a), which is the only provision of SB 747 that Plaintiffs’ challenge.

On January 29, 2024, the North Carolina State Board of Elections (“NCSBE”) issued an updated Numbered Memo 2023-05, *see* D.E. 72, 72-1, in direct response to the PI Order, which resolves Plaintiffs’ concerns regarding the undeliverable mail provision.

ARGUMENT

I. The Court no longer has Article III subject matter jurisdiction to resolve Plaintiffs’ claims.

Since the NCSBE Defendants issued the updated Numbered Memo 2023-05 on January 29, 2024, *see* D.E. 72, 72-1, there is no longer a live case or controversy that the Court can redress. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (discussing U.S. Const. art. III, §§ 1, 2); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (“In sum, under Article III, a federal court may resolve only ‘a real controversy with real impact

on real persons.” (internal quotation omitted)). Numbered Memo 2023-05 establishes “a process that provides a notice and opportunity to cure for same-day registrants whose first notice is returned as undeliverable” in direct response to the PI Order. [D.E. 72 at pp. 1-2]. As such, Plaintiffs’ claims the undeliverable mail provision do not present a live case and controversy, and any further adjudication would result in an advisory opinion. *See TransUnion LLC*, 594 U.S. at 423-24. Plaintiffs’ claims should be dismissed.¹

II. Plaintiffs’ Arguments Regarding Voters who Utilize SDR are Erroneous.

Assuming *arguendo* that a live case and controversy still exists, Plaintiffs argument that North Carolina law “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” is wholly incorrect and requires correction to avoid public confusion. Plaintiffs’ mis-reading of the law is evident by their use of the word “registrant” when referring to someone that updates their address. A voter who is using SDR to update their address is not a “registrant” because that person is *already* a registered voter. Unlike the process now governed by SB 747 and Numbered Memo 2023-05 for applicants who are not registered, individuals who are already registered and use Early Voting to change their address do not go through the same mail verification process as those seeking to register for the first time.

Plaintiffs’ confusion likely stems from the fact that voters who update their address during Early Voting do go through a mail verification process, but this is a separate process,

¹ To the extent that Plaintiffs’ argue that dismissal is inappropriate because the General Assembly could act to address this issue in the future, (Resp. 1-2) that is unconvincing. The General Assembly could act on any topic and any time in the future. But speculative future action, is not reason for this Court to maintain jurisdiction over a complaint addressing the undeliverable mail provision, which no longer require a court for redress.

unaltered by SB 747, that recognizes that an individual updating their address, is already a registrant. Under the change of address process, the voter's new address is recorded and then the county board of elections sends a non-forwardable first class verification notice. § 163-82.15; 08 NCAC 10B .0103. The new address is considered verified after 15 days unless the notice is returned and the voter remains active. *Id.* If the postal service returns the first notification as undeliverable, but provides a forwarding address, the county board mails an address correction notice to the forwarding address, including a postage prepaid return card. *Id.* Again the voter is considered verified 15 days after unless the notice is returned as undeliverable. If the first confirmation notice is returned by the postal service without a forwarding address, the county board sends a forwardable first-class confirmation notice to the voter's old address (the one in the system prior to the update), including a postage prepaid return card. *Id.* If the return card is returned as non-deliverable or is not returned within 30 days by the voter, the voter's status is changed to inactive. *Id.* At no time during this process is the voter removed from the registration rolls. Only if the voter fails to show up to vote in future elections prescribed by the list maintenance procedures would the voter then be eligible to be removed. *See* §163-82.14.

CONCLUSION

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

Respectfully submitted this the 5th day of March, 2024.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/ Phillip J. Strach

Phillip J. Strach

N.C. State Bar No. 29456

Thomas A. Farr

N.C. State Bar No. 10871

Alyssa M. Riggins

N.C. State Bar No. 52366

Cassie A. Holt

N.C. State Bar No. 56505

Alexandra M. Bradley

N.C. State Bar No. 54872

301 Hillsborough Street, Suite 1400

Raleigh, NC 27603

Telephone: (919) 329-3800

Facsimile: (919) 329-3779

phil.strach@nelsonmullins.com

tom.farr@nelsonmullins.com

alyssa.riggins@nelsonmullins.com

cassie.holt@nelsonmullins.com

alex.bradley@nelsonmullins.com

Counsel for Legislative Intervenors

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 1013 words as counted by the word count feature of Microsoft word.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

By: s/ Phillip J. Strach
Phillip J. Strach
N.C. State Bar No. 29456

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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 5th day of March, 2024.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/ Phillip J. Strach

Phillip J. Strach
N.C. State Bar No. 29456

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