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' MOTION TO DISMISS FIRST AMENDED COMPLAINT**

NOW COME Defendants the North Carolina State Board of Elections, Karen Brinson Bell, Alan Hirsch, Jeff Carmon, III, Stacy Eggers, IV, Kevin N. Lewis, and Siobhan O'Duffy Millen (collectively, the "State Board Defendants"), through undersigned counsel, to move for dismissal of Plaintiffs' First Amended Complaint [D.E. 75] pursuant to Fed. R. Civ. P. 12(b)(1) and (6). In support of this motion, State Board Defendants file a Memorandum of Law herewith.

Respectfully submitted this the 4th day of March, 2024.

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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This Memorandum is submitted in support of State Board Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint.

Nature of the Matter Before the Court

On October 10, 2023, Plaintiffs filed a Complaint challenging various provisions of N.C. Session Law 2023-140 ("SB 747"). [D.E. 1]. Plaintiffs filed a First Amended Complaint on February 6, 2024, [D.E. 75], raising the following claims:

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

Counts II:	SB 747's SDR provision violates procedural due process rights as guaranteed by the Fourteenth Amendment to the U.S. Constitution.
Counts III and IV:	SB 747's SDR provision violates the Civil Rights Act of 1965 ("CRA") and the Help America Vote Act ("HAVA").
Counts V:	SB. 747's poll-observer provision violates the Voting Rights Act.
Count VI:	SB 747's SDR and noncitizen-juror removal provisions violate the National Voter Registration Act ("NVRA"), 52 U.S.C. §20507(c)(2)(A).

[D.E. 75 at ¶¶ 61-111].

Plaintiffs' claims challenging the poll-observer and noncitizen-juror removal provision should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Rules of Civil Procedure. All of the claims in the First Amended Complaint, except for those challenging SB 747's same-day-registration mail-verification procedure under the federal Constitution[1] and those challenging the poll-observer provision, should be dismissed for failure to state a claim under Rule 12(b)(6).

Statement of Facts

A. The NVRA, Implementation in North Carolina, and Presuit Notices

Congress passed the NVRA to minimize "purge systems," which "had been used to 'violate the basic rights of citizens,' particularly members of 'minority communities.'" *Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 264 (4th Cir.

[1] In light of the Court's January 21, 2024 Order enjoining SB 747's same-day-registration procedure [D.E. 68], State Board Defendants are not moving to dismiss Plaintiffs' federal constitutional claims challenging SB 747's same-day registration mail verification process in Counts One and Two.

2021) (quoting S. Rep. No. 103-6, 18 (1993)). Thus, Congress designed the NVRA to encourage voter registration and "to ensure that once a citizen is registered to vote, he or she should remain on the voting rolls so long as he or she remains eligible to vote." S. Rep. No. 103-6, at 17 (1993); *see also* 52 U.S.C. §§ 20503-07.

Section 8 of the NVRA includes numerous safeguards to prevent states from improperly removing eligible voters from the rolls, including the requirement that states "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(c)(2)(A).

North Carolina has codified in state law the requirements of the NVRA, which are implemented by the State Board and county boards of elections. *See* N.C.G.S. §§ 163-22(a), -27(d), -28, -33, -82.1(b), -82.2, -82.6(a), -82.7, -82.8, -82.9, -82.2, -82.11, -82.12. North Carolina has adopted a detailed statute that implements the list-maintenance provisions of the NVRA, *see* N.C.G.S. § 163-82.14, and the State Board has designed a detailed policy to instruct county boards on list maintenance, *see* N.C. State Bd. of Elections, North Carolina Voter Registration List Maintenance (updated June 21, 2023), *available at* https://s3.amazonaws.com/dl.ncsbe.gov/Voter_Registration/North_Carolina_List_Maintenance_Policy_Updated_20230621.pdf (last visited Feb. 28, 2024).

Generally, before filing an action alleging a violation of the NVRA, a plaintiff must "provide written notice of the violation to the chief election official of the State involved" and afford the election official an opportunity to correct the violation within ninety days

before filing suit, *id.*, 52 U.S.C. § 20510(b)(1) and (2). If the violation occurred within 120 days before a federal election, a plaintiff need only give the official twenty days to correct the violation. *Id.*, § 20510(b)(2). No presuit notice is required, however, "if the violation occurred within 30 days before the date of an election for Federal office[.]" 52 U.S.C. § 20510(b)(3). The purpose of the notice is to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997).

B. North Carolina's Statewide Election Information Management System

The State Board has a statutory duty to develop, implement, and maintain "a statewide computerized voter registration system to facilitate voter registration and to provide a central database containing voter registration information for each county." N.C.G.S. § 163-82.11(a). This database, the State Election Information Management System, is commonly referred to as "SEIMS." *See, e.g.*, [D.E. 71-1, Numbered Memo 2023-05 (referring to "SEIMS")].

The State Board was required in 2003 to update SEIMS "to meet the requirements" of section 303(a) of HAVA. *See* N.C. Sess. Laws 2003-226, § 6 (revising N.C.G.S. § 163-82.11). That section of HAVA requires, among other things, that "[a]ll voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official." 52 U.S.C. § 21083(a)(1)(A)(vi).

C. Same-Day Registration Procedures[2]

The "applicant who registers" during early voting in North Carolina is allowed to vote a retrievable ballot "after submitting the voter registration application form." N.C.G.S. § 163-82.6B(c). "Within two business days of the individual's registration, the county board of elections in conjunction with the State Board shall[,]" among other things, "update the statewide registration database[.]" *Id.,* § 163-82.6B(d). In addition, a notice is mailed to the address provided on the applicant's registration form, and if that notice is returned as undeliverable before canvass, "the county board *shall not register the applicant* and shall retrieve the applicant's ballot and remove that ballot's votes from the official count." *Id.* (emphasis added).

D. SB 747's Noncitizen-Juror Removal Provision

SB 747 amended North Carolina's list-maintenance laws and others pertaining to jury service to institute a process by which voters can be removed from the voter rolls after seeking to be excused from state-court jury service for the stated reason that they are noncitizens. *See* N.C. Sess. Law 2023-140, sec. 44.(a)-(f), provided at D.E. 75-1, pp. 36-47. Unlike the other provisions in SB 747 discussed in this memorandum, which became effective on January 1, 2024, the noncitizen-juror removal process will not become effective until July 1, 2024, *see* SB 747, sec. 44(f).

Under this process, "[t]he clerk of superior court shall, *at least on a schedule as determined by the State Board of Election*s, communicate information regarding requests

[2] For a detailed description of North Carolina's voter-registration procedures, see Docket Entry 53, pages 2-8.

to be excused from jury duty on the basis that the person is not a citizen of the United States to the State Board of Elections[.]" *Id.*, sec. 44.(d), § 9-6.2(b) (emphasis added). Within thirty days after a superior court clerk submits that information to the State Board, the Board must review the registration and citizenship status of each person listed and must inform the county board of the individuals who are registered to vote and are not determined to be citizens. *Id.*, § 163-82.14(c1)(1). In turn, the county board has thirty days to notify those voters that they will be removed from the voter rolls unless they object within thirty days of the date on which the notice is sent. *Id.*, § 163-82.14(c1)(2). If a voter does not object, their name is removed, and if they do, the county board conducts a voter challenge proceeding to determine whether they should be removed. *Id.* All list maintenance actions by the State Board under N.C.G.S. § 163-82.14, including the non-citizen juror removal process, "shall be nondiscriminatory and shall comply with the provisions of the [VRA] and with the provisions of the [NVRA]." *Id.*, § 163-82.14(a1).

Plaintiffs' counsel sent the State Board's Executive Director a presuit letter dated October 10, 2023, alleging that SB 747's noncitizen-juror removal provision violated the NVRA's ninety-day provision. [D.E. 75-2]. The Board's General Counsel responded on November 3, 2023, informing Plaintiffs' counsel that "the State Board h[ad] no intention of establishing a schedule for the submission of jury-excusal lists from the clerks of superior court that would consequently lead to removals of registered voters in the 90 days prior to a federal election, even assuming for the sake of argument that such removals would be considered 'systematic[]' under the NVRA." [D.E. 75-3 (quoting 52 U.S.C. § 20507(c)(2)(A)].

E. Absentee-Ballot Receipt Deadline

Prior to SB 747, to be accepted by the county board, absentee ballots were required to be "received by the county board not later than 5:00 p.m."[3] on the day of the election; however, ballots received by mail 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." N.C.G.S. § 163-231(b)(1) and (2) (effective until Jan. 1, 2024).

SB 747 changed the deadline for receipt of absentee ballots. Now, 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).

F. 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 prior to SB 747. *See* N.C.G.S. § 163-45(a) (effective until Jan. 1, 2024). Second, observers are expressly prohibited from:

[3] A different ballot-receipt deadline applies to absentee voting by military and overseas citizens. *See* N.C.G.S. § 163-258.12.

> (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. No one is 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). Individuals 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). 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* D.E. 74-1 at 8].

Individuals are prohibited from harassing anyone in the voting place or surrounding buffer zone. N.C.G.S. § 163-4(a). Conduct considered voter intimidation is a crime under both state and federal law. S*ee* N.C.G.S. § 163-274(a)(7); *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. [D.E. 74-1 at 8-10 (providing examples)].

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"). Chief judges can remove observers "who engage[] in prohibited behavior," as well as where "good cause" otherwise exists to justify removal. N.C.G.S. § 163-45.1(j). Precinct judges have the authority to call upon law enforcement to assist them and to order the arrest of any person violating these laws. *See* N.C.G.S. § 163-48.

Finally, section 163-45.1(g) provides that poll observers are not to be prohibited from taking notes; listening to conservations 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* D.E. 74-1 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* D.E. 74-1].

Questions Presented

1. Whether Plaintiffs have standing to challenge SB 747's poll-observer provision.

2. Whether Plaintiffs have standing to challenge SB 747's noncitizen-juror removal provision.

3. Whether Plaintiffs' claims, except those challenging SB 747's SDR mail-verification procedure under the federal Constitution and those challenging SB 747's poll-observer provision, 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[s] . . . '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. *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. PORTIONS OF PLAINTIFFS' AMENDED COMPLAINT SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. SB 747's Poll-Observer Provision.

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 fail to establish either associational or organizational standing to challenge that provision.

To establish associational standing under Article III of the United States Constitution, organization-plaintiffs must establish, among other criteria, that "its members would have standing if they sued individually[.]" N.C. *State Conf. of the NAACP v.*

Raymond, 981 F.3d 295, 301 (2020) (cleaned up). For associational standing, organizational-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).

Regarding organizational standing, it "is not met simply because an organization makes a unilateral and uncompelled choice to shift its resources away from its primary objective to address a government action." *Raymond*, 981 F.3d at 301 (cleaned up).

Plaintiffs cannot satisfy the standard for either associational or organizational standard. Plaintiffs' allegations of injury are speculative at best and, in light of their speculative nature, Plaintiffs' choice to shift resources is clearly unilateral and uncompelled. They contend, for example, that SB 747 explicitly permits "intrusive activities" by observers, including by "*potentially*" getting "uncomfortably close to voters[,]" which "will no doubt be disconcerting to many voters (particularly in the COVID

era)," and "*will surely*" lead some voters to "choose not vote"; and will allow them be "so intrusive that it is *highly likely* to intimidate voters." [D.E. 75 at ¶¶ 2, 13, 56, 72, 101]. But SB 747 does not repeal or invalidate the myriad laws described above that prohibit and criminalize the *potential* harms to voters identified by Plaintiffs, nor do Plaintiffs allege that the State Board Defendants will fail to enforce those laws.

Accordingly, Plaintiffs' allegations about SB 747 are too speculative to establish either associational or organizational standing.

Moreover, Plaintiffs do not satisfy the traceability prong needed for associational standing. This is because they fail to allege injuries that are traceable to the actions of State Board Defendants and, instead, allege injuries resulting "from the independent action of some third party not before the court"—namely, rogue poll observers defying preexisting state and federal laws prohibiting voter interference and intimidation. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

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).

B. SB 747's non-citizen juror removal provision.

1. Plaintiffs lack Article III standing.

Plaintiffs' alleged injury regarding the noncitizen-juror removal provision is insufficient to confer Article III standing. Assuming for the sake of argument that removal of noncitizens from the voter rolls per the procedures in SB 747 would be considered "systematic[]" under the NVRA, it is speculative at best to assume that such removals would occur within ninety days prior to a federal election, and thus violate the NVRA. *See*

52 U.S.C. § 20507(c)(2)(A). As the State Board's General Counsel already explained to Plaintiffs in response to their presuit letter, "the NVRA's 90-day provision will not necessarily be implicated by these new list maintenance procedures." [D.E. 75-2, p. 1]. Plaintiffs' claim is predicated on allegations of potential NVRA violations that are contingent on events that have not occurred and may never occur. This is because the schedule for removal of noncitizens from the voter list based upon juror excusals is wholly dependent on future action by the State Board. Specifically, SB 747, sec. 44.(b), § 9-6.2(b), provides that "the clerk of superior court shall" provide the noncitizen-juror list to the State Board of Elections "*at least on a schedule as determined by the State Board*[.]" SB 747, sec. 44.(d) § 9-6.2(b) (emphasis added).

A claim that a challenged act "'could very likely' cause [] harm at some point in the future" is insufficient to establish an injury in fact. *Clapper*, 568 U.S. at 409 (cleaned up). As State Board General Counsel points out in its response to the presuit letter, it is possible for the State Board to comply with SB 747, sec. 44, without violating the NVRA's ninety-day provision, and the Board has no intention of scheduling submission of the jury-excusal list that would lead to removals ninety days prior to a federal election. [D.E. 75-3, pp. 1-2]. Because Plaintiffs' alleged injury is neither actual nor imminent, and is in fact conjectural, hypothetical, and *unlikely* to occur, *see Matherly*, 859 F.3d at 277, Plaintiffs do not have Article III standing.

2. Plaintiffs have no statutory standing.

As noted above, the purpose of the NVRA's notice requirement is to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation."

Miller, 129 F.3d at 838. Accordingly, an NVRA notice must be provided by "[a] person who is aggrieved by a violation," 52 U.S.C. § 20510(b)(1), not a person who *may be* aggrieved upon some future occurrence. Simply stated, the plain language of the NVRA does not envision prophylactic notice of violations.

As explained above, no NVRA violation has occurred, allegations that one will are speculative at best, and Plaintiffs' own allegations and attachments to their Amended Complaint indicate that a violation is not likely and that the state actor here, the State Board, will actually take steps to prevent a violation. These were also the circumstances that existed when Plaintiffs sent their presuit notice on October 10, 2023, the day SB 747 was passed and long before the effective date of its noncitizen-juror removal provision, July 1, 2024. Despite receiving a response to their presuit letter from the State Board that made it clear that the removal schedule is dependent on events that have yet to occur and that a violation is unlikely to happen [D.E. 75-3], Plaintiffs allege in their Amended Complaint that because the State Board did not correct the violation they cited in their presuit letter, they have a statutory right to bring their challenge. [D.E. 75 at ¶ 110]. Plaintiffs' allegation ignores that there was no violation for the State Board to correct. It follows that the presuit notice here was at most a prophylactic warning not to violate the law, not a notice of an actual violation, and it therefore failed to establish statutory standing.

3. Plaintiffs' claim is not ripe.

Plaintiffs' claim challenging S.B. 747's noncitizen-juror removal provision is also subject to being dismissed because it is not ripe. "A claim is not ripe for adjudication if it

rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (cleaned up).

Under the first prong of the test for ripeness, a case is fit for judicial review if "the issues to be considered are purely legal ones," and the action "giving rise to the controversy is final and not dependent upon future uncertainties." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208-09 (4th Cir. 1992). Under the second prong, hardship "is measured by the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law." *Id.* Plaintiffs cannot satisfy either prong.

First, the issues alleged are not yet fit for a judicial decision because Plaintiffs' allegations are wholly speculative at this point. In other words, whether an injury will occur at all here is "dependent upon future uncertainties." *Id.*, at 209.

Second, Plaintiffs' allegations are so speculative that they cannot demonstrate an immediate threat of harm. In other words, withholding the court's consideration of these claims would not impose a hardship on Plaintiffs. Plaintiffs' claim challenging SB 747's noncitizen-juror removal provision should therefore be dismissed as not ripe.

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

Plaintiffs' Amended 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. In considering this claim, the Court is 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 v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takshi*, 504 U.S. 428, 434 (1992)).

1. SB 747's SDR Provision

a. That Portion of SB 747's SDR Provision Requiring the Showing of 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. 75 at ¶ 65]: *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 SDR is itself a qualifying photo ID.

b. Opportunity to Challenge the County Board's Initial Review

Plaintiffs next allege that SB 747's SDR provision violates the First and Fourteenth Amendments because it does not expressly 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.75 at ¶ 67]. 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).

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. 75 at ¶ 69].

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 uses domestic mail and votes an absentee ballot. 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 Feb. 27, 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 does not violate the federal Constitution.

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

Plaintiffs contend in Count Two that SB 747's SDR provision fails to provide procedural due process as guaranteed by the Fourteenth Amendment because the SDR 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. 75 at ¶¶ 75-87]. 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.

C. Counts Four and Five: CRA and HAVA.

For the reasons discussed in the PI Response, with the exception of any arguments that Plaintiffs' claims should have been brought under 42 U.S.C. § 1983, and the Court's Preliminary Injunction Order, Plaintiffs' claims in Counts Four and Five that SB 747's SDR provision violates the CRA, 52 U.S.C. § 10101(a)(2)(A), and HAVA, 52 U.S.C § 21082, fail to state a claim. [D.E. 53 at 15-21; D.E. 68 at 37-45].

D. Counts Six and Seven: NVRA

1. SB 747's SDR Mail-Verification Process

Plaintiffs contend that SB 747's SDR mail-verification process violates section 8 of the NVRA. They allege that by requiring county boards to add individuals who register and vote during early voting to SEIMS, and later removing their names from SEIMS if they fail mail verification prior to canvass, the provision effectively mandates systematically removing those individuals from the voter rolls within ninety days of a federal election. [D.E. 75, ¶ 106]; 52 U.S.C. § 20507(c)(2)(A). Thus, according to Plaintiffs, SDR applicants who pass only the initial review by the county board are nonetheless eligible, registered voters, just by virtue of having their names entered into SEIMS. Under Plaintiffs' reading of the SDR statute, this would be true even if the residential address individuals provide on their application cannot be confirmed through mail verification and the county board does not ever actually register them.

Plaintiffs fail to allege that they sent a NVRA presuit notice regarding their SDR mail-verification claim and, instead, assert that none was required here. [D.E. 75 at ¶ 107]. Even assuming arguendo that were true, Plaintiffs claim should still be dismissed

for failure to state a claim because it is based upon a misapprehension of both the NVRA and the current SDR statute.

As indicated in the Statement of Facts above, one way the NVRA prevents improper removal of eligible voters is to require states to "complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(c)(2)(A). However, this prohibition on removal applies to registered voters—a classification that does not apply to SDR applicants whose addresses have not yet been verified. *See* S. Rep. No. 103-6, at 19 (noting that one of the NVRA's "guiding principles" is "that *once* registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction" (emphasis added)).

Section 163-82.6B(d) states, in no uncertain terms, that if an applicant fails mail-verification, "the county board *shall not register* the applicant." (Emphasis added). Thus, under N.C.G.S. § 163-82.6B(d), applicants are not registered by the county board until the address they provide is verified through SDR's mail-verification process. SDR mail verification is thus a necessary precondition to being registered, and SDR applicants are just that, "applicants," until they pass the address-verification process.

Having never been converted from "applicants" into registered "voters," SDR applicants who are removed from SEIMS after failing address-verification do not fall within the scope of the NVRA. *See* 52 U.S.C. § 20507(c)(2)(A). There is thus no NVRA violation.

At least one federal district court has rejected a comparable challenge brought under the NVRA to a similar procedure. In *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1262 (D. Colo. 2010), the plaintiffs challenged a Colorado law, referred to as the state's "20-day Rule," dictating that a new voter should not be registered if, within twenty days of mailing a registration notification to the address on the registration application, the notice is returned as undeliverable. The *Buescher* plaintiffs alleged the 20-day Rule violated a provision of the NVRA providing the exclusive means for removals based upon a change of address. Prior to the notice being mailed, the voter's information was entered into Colorado's statewide electronic voter database, and the voter's registration status was marked as "active 20-day" in the database. *Id.*

The district court in *Buescher* rejected the plaintiffs' argument that "a voter's mere presence" in the database and "active 20-day" registration status meant the voter was "'eligible' to cast a vote" and was thus not subject to "removal from the official list of eligible voters" under the NVRA. *Id.* at 1276 (cleaned up). According to the court, this was because, among other things, the NVRA presupposes that the voter subject to removal initially met the state's residency requirement but later became subject to removal because a subsequent change in residence rendered the voter ineligible. *Id.* at 1278. *But see U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 383–84 (6th Cir. 2008) (denying request to stay an order preliminarily enjoining a state law that required removal of a new voter's information from the voter rolls where the confirmation mailer was returned as undeliverable and the voter was able to cast a ballot prior to its return).

The decision in *Buescher* arose based upon a challenge brought under a different NVRA provision. Its reasoning is nonetheless applicable here. Like in *Buescher*, an individual's "mere presence" in SEIMS does not render him eligible, and thus, that voter is not being removed as contemplated by the NVRA when the county board does not register the voter for failing mail verification. 750 F. Supp. at 1276.

In support of their claim to the contrary, Plaintiffs cite this Court's decision in *N.C. State Conference of the NAACP v. Bipartisan State Bd. of Elecs. & Ethics Enf't*, No. 1:16-cv-1274, 2018 U.S. Dist. LEXIS 134228 (M.D.N.C. Aug. 8, 2018). [D.E. 75, ¶ 107]. In that case, the plaintiffs alleged that within 90 days of a federal election, a group of citizens challenged several voters' registrations because their residency changed such that they became ineligible to vote. There, the State Board Defendant conceded a NVRA violation, and the Court entered a permanent injunction based on an interpretation of the NVRA that prohibited voter challenges from being brought without individualized knowledge of the voter's circumstances within 90 days of a federal election. *NAACP*, 2018 U.S. Dist. LEXIS 134228, at *37-38.

Prior to the decision in *NAACP*, the ballots of same-day registrants who failed mail verification were removed and their names omitted from the voter rolls using a voter challenge process. *See* N.C.G.S. § 163-82.7(g)(2) & 89. In light of *NAACP*'s use of broad language to prohibit "challenges," and some of the content of the pre-SB 747 SDR statute, the State Board was instructing county boards that a same-day registrant's ballot could not be challenged, and that their name could not be removed from the voter roll

within 90 days of a federal election, on the basis of undeliverable mail, without individualized evidence that the voter was ineligible. [*See* D.E. 54-3 at 8, and 54-4].

Unlike the pre-SB 747 SDR statute, the current statute is consistent with the decision in *NAACP*, despite what Plaintiffs contend in their Amended Complaint. [*See* D.E. 75 at ¶ 107]. This is because there are substantive differences in the language of the prior SDR statute, N.C.G.S. § 163-82.6A, and the current one, N.C.G.S. § 163-82.6B, indicating that post-SB 747, the legislature does not consider SDR applicants registered until they pass SDR mail verification. For instance, the current SDR statute consistently refers to individuals seeking to register and vote during early voting as "applicant[s]." N.C.G.S. § 163-82.6B. More importantly, it expressly provides, unlike before, that if the applicant fails mail verification, "the county board *shall not register* the applicant," *id.* (emphasis added), establishing that the applicant has not yet been registered under state law.

2. SB 747's Noncitizen-Juror Removal Provision

As discussed above, Plaintiffs' allegations concerning SB 747's noncitizen-juror removal provision are highly speculative and thus insufficient to satisfy Article III standing. For that same reason, they also fail to state a claim. *See Twombly*, 550 U.S. at 555 (providing that facts alleged must be sufficient "to raise a right to relief above the speculative level").

Conclusion

State Board Defendants respectfully request that Plaintiffs' First Amended Complaint be dismissed.

This the 4th day of March, 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 4th day of March, 2024.

/s/ Terence Steed
Terence Steed
Special Deputy Attorney General