

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' SURREPLY IN OPPOSITION TO LEGISLATIVE
INTERVENORS' MOTION TO DISMISS**

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INTRODUCTION

This Court preliminarily enjoined the Undeliverable Mail Provision on January 21, 2024. *See* Mem. Op. & Order on Mot. for Prelim. Inj. at 93–94, ECF No. 68. Eight days later, on January 29, the State Board issued a revised Numbered Memo requiring county boards to provide voters with notice and an opportunity to cure before disqualifying a voter’s ballot due to failed mail verification. Numbered Memo 2023-05 at 5–9, ECF No. 72-1. Unless superseded by legislation, the Numbered Memo’s procedures will remain in place until 60 days after the start of the next regular legislative session, which is scheduled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). In their Reply in Further Support of Motion to Dismiss, ECF No. 75, Legislative Intervenors assert—for the first time—that the State Board’s issuance of the revised Numbered Memo 2023-05 deprives this Court of subject-matter jurisdiction. Plaintiffs submit this brief surreply to address that new and implausible contention.

ARGUMENT

The Court continues to have subject-matter jurisdiction over this action.

First, Numbered Memo 2023-05’s SDR procedures are at most stopgap measures that could not deprive the Court of jurisdiction because Numbered Memo 2023-05 will expire, at the latest, sometime in 2025. *See* N.C. Gen. Stat. § 163-22.2 (providing authority to State Board to issue interim rules and regulations, which

“shall become null and void 60 days after the convening of the next regular session of the General Assembly”); Numbered Memo 2023-05 at 1 n.2, ECF No. 72-1 (citing § 163-22.2 as the State Board’s authority to adopt a notice and cure procedure for same-day registrants). And case law uniformly confirms the commonsense principle that *temporary* measures enacted in response to litigation do not strip a court of subject-matter jurisdiction over that litigation. *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 20 (2020) (per curiam); *Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 189–92 (4th Cir. 2018); *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013); *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 800 (4th Cir. 2001). To the contrary, jurisdiction, when “properly acquired, may abate” on the grounds Legislative Intervenors propose only when (i) “it can be said with assurance that there is no reasonable expectation that the alleged violation will recur” and (ii) “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (cleaned up). Events must make it “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur,” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 189 (2000), a “heavy burden” that “lies with the party” contesting jurisdiction, *id.*

Here, the Numbered Memo bringing North Carolina election administration into compliance with the U.S. Constitution is temporary, and so plainly cannot

satisfy these standards. Rather, dismissal on the grounds Legislative Intervenors propose—as opposed to entry of a permanent injunction and final judgment—would be warranted, if at all, only after the relevant lawmaking body amended the offending law to comply with the requirements of due process and promised that it will not revert. *See, e.g., Reyes v. City of Lynchburg*, 300 F.3d 449, 453 (4th Cir. 2002); *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006). The North Carolina Legislature has yet to take either of those steps. Dismissal would therefore be, at best, premature.¹

Second, Numbered Memo 2023-05 bears only on Plaintiffs’ procedural due-process claim; it does not and cannot resolve Plaintiffs’ broader *Anderson–Burdick* claim. *See* Complaint ¶¶ 93–98, ECF No. 1. Plaintiffs continue to maintain that North Carolina’s entire address-verification regime for same-day registrants violates the Constitution because it does not effectively verify a voter’s *residency*; instead, it verifies only a voter’s ability to receive mail at the provided address. *See id.* ¶ 96. Notably, the Court’s preliminary injunction order acknowledged this very defect. *See* Mem. Op. & Order on Mot. for Prelim. Inj. at 73–75, ECF No. 68. Because the

¹ Moreover, Legislative Intervenors’ argument is self-defeating: If Legislative Intervenors’ motion were granted, the Court’s preliminary injunction presumably would dissolve upon dismissal of the case. That would, in turn, deprive the State Board of its authority under § 163-22.2 to promulgate stopgap procedural safeguards for same-day registrants—immediately reimposing all of Plaintiffs’ injuries. Legislative Intervenors do not acknowledge, never mind resolve, this tension.

Undeliverable Mail Provision does not bear on voter qualifications, it serves no legitimate state interest at all, meaning that the substantial burdens it imposes on voters violate the First and Fourteenth Amendments *no matter the procedural protections afforded to voters*. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (explaining that a burden on the right to vote must be “necessary” to further the alleged state interest). Numbered Memo 2023-05 does not redress this harm: It neither ties address verification specifically to residency nor eliminates all the provision’s burden on voters. The Court thus continues to have subject-matter jurisdiction over this action because, at a minimum, Plaintiffs’ Count II presents a live and continuing case or controversy.

CONCLUSION

For the foregoing reasons and those given in Plaintiffs’ Response in Opposition, ECF No. 74, Legislative Intervenors’ motion to dismiss should be denied.

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Respectfully submitted,

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**Special Appearance pursuant to
Local Rule 83.1(d)*

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