IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DEMOCRATIC NATIONAL COMMITTEE; NORTH CAROLINA DEMOCRATIC PARTY Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY EGGERS IV, KEVIN N. LEWIS, and SIOBHAN O'DUFFY MILLEN, in their official capacities as members of the North Carolina State Board of Elections	§	Case No. 1:23-CV-862-TDS-JEP **INTERVENORS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT** **Fed. R. Civ. P. 12(b)(1) and (b)(6)**

NOW COME, The Republican National Committee, the North Carolina Republican Party, Brenda M. Eldridge, and Virginia Ann Wasserberg (collectively, "Intervenors"), 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, Intervenors file a Memorandum of Law herewith.

Dated: March 5, 2024

Respectfully submitted,

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DEMOCRATIC NATIONAL COMMITTEE; NORTH CAROLINA DEMOCRATIC PARTY Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections; ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY EGGERS IV, KEVIN N. LEWIS, and SIOBHAN O'DUFFY MILLEN, in their official capacities as members of the North Carolina State Board of Elections	§	Case No. 1:23-CV-862-TDS-JEP **INTERVENORS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER

The Republican National Committee, the North Carolina Republican Party, Brenda M. Eldridge, and Virginia Ann Wasserberg (collectively, "Intervenors"), offer this memorandum in support of their Motion to Dismiss Plaintiffs' First Amended Complaint [D.E. 75] under Fed. R. Civ. P. 12(b)(1) and (b)(6). Intervenors concur in the arguments presented by the Legislative Defendants in their memorandum in support of their own Motion to Dismiss [D.E. 82], which is incorporated by reference herein, and present this additional analysis to aid the Court's consideration of the questions presented.

INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER
STATEMENT OF FACTS

The factual and procedural history of this case have been described at length in connection with the parties' briefing regarding S.B. 747's undeliverable mail provision. Intervenors incorporate by reference the Statement of Facts contained in Legislative Defendants' Memorandum in Support of Motion to Dismiss, [D.E. 82] at 1-4.

STATEMENT OF QUESTIONS PRESENTED

1. Does the Court have Article III subject matter jurisdiction to resolve Plaintiffs' claims?

2. Even if the Court has subject matter jurisdiction, have Plaintiffs pleaded facts sufficient to state a claim upon which relief can be granted?

ARGUMENT

1. Now that the North Carolina State Board of Elections ("NCSBE") has issued the updated Numbered Memo 2023-05 – which provides for notice and opportunity to be heard when a same-day voting registrant's first notice of registration is returned as undeliverable – the instant matter no longer presents a live case or controversy. Rather, all that remains of Plaintiffs' live petition is (1) an attack on a strawman version of S.B. 747 and (2) speculative predictions of future injuries. Despite the NCSBE Defendants having quickly addressed Plaintiffs' concerns over the state's same-day voter registration procedures – procedures that were already more generous than in the majority of states – Plaintiffs continue to claim constitutional harm, details to be supplied at a later date. However, broad, unparticular allegations of harm are insufficient to satisfy Plaintiffs'

"injury in fact" requirement for Article III standing, *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009), which is just one of the problems undermining Plaintiffs' due-process claim.

This case also does not fall within the voluntary-cessation exception to mootness, as there is no likelihood that the NCBSE will seek to undo its work with respect to same-day voter registration. As this Court explained in *Guill v. Allen*, No. 1:19CV1126, 2023 WL 6159978 (M.D.N.C. Sept. 21, 2023), the voluntary-cessation exception is predicated on the existence of a "reasonable chance" that the complained-of behavior will resume. *Id.* at *22 (internal quotation omitted). Where, as here, Defendants acted quickly to amend same-day voting procedures, all Plaintiffs can offer is "[s]peculation that others in the future may wish to change the policy," which is insufficient. *Id.* at *25.

2. Plaintiffs' two challenges to S.B. 747's poll observer provisions (§§7(a)-(b)) lack merit. Plaintiffs contend that these provisions violate Section 11 of the Voting Rights Act and fail under the *Anderson-Burdick* framework. *See* Am. Compl. [D.E. 75] ¶¶ 71-74; 99-102. Neither position states a claim.

First, the Voting Rights Act provides that "[n]o person . . . shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). S.B. 747 does not conflict with this in any way. On its face, the statute states that poll observers must not, *inter alia*, "[i]mpede the ingress or egress of any voter into the voting place," "[l]ook at, photograph, videotape, or otherwise record the image of any voter's marked ballot," "[i]nhibit or interfere with any election official in the performance of his or her duties," or "[e]ngage in electioneering." N.C. Gen. Stat. § 163-

45.1(h)(1)-(4). Nothing in the statute supports Plaintiffs' allegations that, by consequence of S.B. 747, voters will be subject to intimidation. *See, e.g.*, Am. Compl. [D.E. 75] ¶¶ 8, 13, 101. Plaintiffs reason that S.B. 747 allows observers to move about polling places and propose there are "few if any clear limits." *Id.* ¶ 56. Even setting aside the clear limits quoted above, it does not follow from Plaintiffs' assertion that observers will engage in intimidation, which the Voting Rights Act itself clearly forbids.

As the Legislative Defendants have explained, *see* [D.E.82 at 8-10], many statutes regulate the conduct of North Carolina poll observers, preventing observers from engaging in such behavior as harassing or interfering with voters or election officials and enabling action against observers who break the rules. Moreover, S.B. 747 itself allows for the regulation of a poll observer's movement if the observer "interfere[s] with the privacy of any voter or the conduct of the election." S.B. 747 §7.(b). Plaintiffs point to no *actual* injury caused by poll workers, in spite of the fact that North Carolina's early voting period under S.B. 747 concluded just last week, on March 2, 2024, ahead of primary election day on March 5, 2024 (Super Tuesday). Rather, their theory of harm, *see* [D.E. 75] at ¶25 appears to be based on some future poll worker violating the applicable rules *and* local officials failing to take action. There simply is no injury allegedly suffered by Plaintiffs that is fairly traceable to S.B. 747, *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013) (holding injury was not fairly traceable to challenged statute "in light of the attenuated chain of inferences necessary to find harm"), nor are claims of harm predicated on *future* bad acts by third parties ripe. *See Doe v. Va. Dept. of State Police*, 713 F.3d 745, 758-59 (4th Cir. 2013) ("Where an injury is contingent upon a decision to be made by a

third party that has not yet acted, it is not ripe as the subject of decision in a federal court."). Finally, given the multitude of statutes regulating poll observers, *supra*, Plaintiffs' requested relief – permanently enjoining S.B. 747 §§7(a)-(b) – would be meaningless. In sum, this Court lacks Article III subject matter jurisdiction over Plaintiffs' claims related to S.B. 747 §§7(a)-(b).

Moreover, Plaintiffs fail to plead sufficient facts which, accepted as true, state a claim of relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facial challenge to a law such as S.B. 747 "must fail where the statute has a 'plainly legitimate sweep.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) (internal quotation omitted). The "flaw" in Plaintiffs' argument is that their assertions "depend, not on any facial requirement" of S.B. 747, "but on the possibility" of what may (or may not) occur under future circumstances. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 454 (2008). Even assuming North Carolina law did not already prohibit voter intimidation, there is no basis to infer from the absence of such a state prohibition that poll observers will in *every instance* intimidate voters. Far from being plausibly stated in the Amended Complaint, such a notion is facially implausible. If poll observers do in fact violate the Voting Rights Act in specific instances, Voting Rights Act relief will remain available on an as-applied basis, but Plaintiffs' facial claim must be dismissed.

Second, the same fatal flaw defeats Plaintiffs' challenge under the *Anderson-Burdick* framework. This Court cannot "strike down" S.B. 747 "on its face based on the mere possibility" of intimidation. *Id.* at 455. Even assuming for the sake of argument the

unlikely scenario of *some* intimidation, the Court is to analyze a "broad application to all [North Carolina] voters," and under that calculus, there is "only a limited burden on voters' rights." *Crawford*, 553 U.S. at 202 (citation omitted). By comparison, the State's interest in enabling observation of the voting process is weighty. Poll observers provide an invaluable service in promoting the integrity and transparency of elections, *see, e.g.*, *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979) ("[T]he poll-watcher's function is to guard the integrity of the vote."), which is no doubt why they are permitted in some fashion in nearly every state. *See* Nat'l Conference of State Legislatures, *Poll Watchers, and Challengers*, available at: https://www.ncsl.org/elections-and-campaigns/poll-watchers-and-challengers. It is true that poll observers in North Carolina, like those in many other states, are partisan in partisan elections; however, because Democrats and Republicans are equally able to place their selected observers in the voting place, the presence of poll observers serves both to help prevent voting fraud/impropriety and to enhance public confidence in the ultimate outcome of elections.

As discussed above, the presence of poll observers is designed to thwart potential voting fraud/misconduct, help maintain the integrity of elections, and boost public confidence in electoral outcomes. As this Court itself has already held, *see* [D.E. 68] at 71, "North Carolina unquestionably has a legitimate and strong interest in ensuring the integrity of its elections, ensuring that only legitimate ballots are counted, and in preventing voter fraud." *See Purcell v. Gonzales,* 549 U.S. 1, 4 (2006) (same); *Crawford*, 553 U.S. at 196. Moreover, "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."

Crawford, 553 U.S. at 197. As a facial challenge to a statute can only succeed if a plaintiff establishes "that no set of circumstances exists under which the [law in question] would be valid," Plaintiffs' challenge to S.B. 747 §§7(a)-(b) must fail as a matter of law. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

3. Plaintiffs' challenges to S.B. 747's absentee ballot deadline (§35) are similarly infirm. As the Legislative Defendants make clear, *see* [D.E. 82] at 10-11, Plaintiffs have pleaded no facts demonstrating "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Disability Rights South Carolina v. McMaster*, 24 F.4th 893, 901 (2022). Rather, Plaintiffs rest their claims on the future, speculative conduct of third parties who choose to mail in their ballots late. *See Doe,* 713 F.3d at 758-59 (noting issue is not ripe when alleged injury is contingent upon a decision to be made by a third party that has not yet acted).

But more importantly, Plaintiffs' claims fail even if they could somehow plead a non-speculative injury. That is because, "[t]o state the obvious, a State cannot conduct an election without deadlines." *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring). The Constitution contemplates voting deadlines by delegating to Congress the times of federal elections, *see* U.S. Const. Art. I, § 4, cl. 1, and Congress has responded by establishing a national election date of the first Tuesday after the first Monday of November, *see* 2 U.S.C. §§ 1, 7; 3 U.S.C. § 1. States are, in fact, prohibited from conducting federal elections at other times. *See Foster v. Love*, 522 U.S. 67, 74 (1997). Likewise, states have authority to set the times of their own elections by virtue of the Tenth Amendment, *cf. Oregon v. Mitchell*, 400 U.S. 112, 124–25 (1970)

(opinion of Black, J.); *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020). A ballot-receipt deadline of the election day Congress set cannot plausibly violate the Constitution. Moreover, there is no cognizable burden to such a deadline under the *Anderson-Burdick* test, as all receipt deadlines impose the *same* burden of compliance. A deadline of 7:00 pm the first Tuesday after the first Monday in November is no more or less burdensome than a deadline of the second Tuesday after the first Monday in November. Any other view would prove too much: if a later deadline is less burdensome than an earlier, there would be no reason that later deadline itself could stand when compared to an even later deadline.[1]

As the State Board Defendants correctly point out, *see* [D.E. 80] at 19, S.B. 747 is hardly an outlier, as the most common deadline for absentee/mail ballots to be returned by any method is the close of polls on Election Day, and as of July 2022, a healthy majority of states required absentee/mail ballots to be received on or before Election Day. It has "long [been] recognized that a State's reasonable deadlines for registering to vote, requesting absentee ballots, submitting absentee ballots, and voting in person generally raise no federal constitutional issues under the traditional *Anderson-Burdick* balancing test." *Wisc. State Legislature*, 141 S. Ct. at 33. Regardless of the manner in which they choose to vote, "voters need to vote on time," and "the right to vote is not substantially burdened by a requirement that voters act in a timely fashion if they wish to cast an absentee ballot." *Id.*

[1] By comparing the deadline of S.B. 747 against a prior deadline in North Carolina law, Plaintiffs are improperly seeking to use the *Anderson-Burdick* test as a retrogression standard of the type utilized in Section 5 of the Voting Rights Act when it was operative. The *Anderson-Burdick* test does not work that way.

As Justice Kavanaugh noted in *Wisconsin State Legislature*, the Supreme Court was forced to issue numerous stays against injunctions that used the COVID-19 pandemic to rewrite states' neutral election rules. *See id.* (listing cases). The instant litigation represents Plaintiffs yet again trying to substitute their preferences for those of the North Carolina General Assembly, and without even the fig leaf of a pandemic. The State has a substantial interest in ensuring the orderly administration of final, certain, and trustworthy elections, and the requirement that voters "act in a timely fashion if they wish to express their views in the voting booth" does not violate the Constitution. *Burdick v. Takashi*, 504 U.S. 428, 438 (1992).

4. As to Plaintiffs' Civil Rights Act claim, Legislative Defendants have demonstrated why Plaintiffs lack a cause of action. *See* [D.E. 82] at 17; *see also* [D.E. 51] at 12-13. In addition, this Court has already held that "the CRA is not intended to prevent states from providing different procedures for different methods of voting." [D.E. 68] at 40. Its holding was correct. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007) (Posner. J.), *aff'd*, 553 U.S. 181 (2008).

The Civil Rights Act provides in relevant part that, "in determining whether any individual is qualified" to vote, officials may not "apply any standard, practice or procedure different" from those "applied . . . to other individuals within the same county . . . who have been found" qualified to vote. 52 U.S.C. §10101(2)(A). The key comparison is between "any individual" and "other individuals." The provision requires "the application of uniform standards, practices, and procedures to all persons seeking to vote in Federal

elections," H.R. Rep. No. 88–914 (Nov. 20, 1963), 1964 U.S.C.C.A.N. 2394, or, put differently, mandates that states "apply standards, practices, and procedures equally among individuals seeking to register to vote," *id.* at 2491. This statutory text, however, cannot be read to forbid states from creating different ways to register to vote, which individuals may choose from in their sole discretion, so long as those means are equally open to all individuals. Plaintiffs cannot identify any "persuasive limiting principle that would" override countless procedures tailored to specific voting mechanisms equally open to all voters. [D.E. 68] at 40.

5. Plaintiffs' Help America Vote Act (HAVA) claims should also be dismissed. The HAVA provision Plaintiffs invoke reached only "a provisional ballot" and applies in cases where an individual "declares" himself to be a "registered voter" but his name does not appear on the voter list. 52 U.S.C. § 21082(a)(5)(A) and (B). As the Court has already held, [D.E. 68] at 43-45, North Carolina's provisional ballot statute is not at issue in this case. *See* N.C. Gen. Stat. § 163-165(6). Plaintiffs challenge the *retrievable* ballot system under S.B. 747. *See* N.C. Gen. Stat. § 166.45 (as amended by section 27.(c) and recodified by section 1.(b) of 2023 N.C. Sess. Laws 140). Moreover, S.B. 747 addresses same-day registration, which does not describe a scenario where an individual declares registration status but does not appear on the voter list; through same-day registration, the individual *seeks* the status of a registered voter. HAVA therefore does not apply, and the claim should be dismissed.

6. Finally, for the reasons stated by the Legislative Defendants, which are incorporated by reference herein, *see* [D.E. 82] at 11-12, 19-21, Plaintiffs' NVRA claims are both not ripe and fail to state a claim on which relief can be granted.

CONCLUSION

For the foregoing reasons, the Court should grant Intervenors' Motion to Dismiss in its entirety.

Respectfully submitted this the 5th day of March 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 2.763 words as counted by the word count feature of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the forgoing document using the Court's CM/ECF System which will send notification to all counsel of record.

This 5th day of March 2024.

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