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, and PHILIP E. BERGER, in his official capacity as President *Pro Tempore* of the North Carolina Senate, et al., Intervenor-Defendants.	Case No. 1:23-cv-861-TDS-JEP

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Absent an injunction, the Undeliverable Mail Provision will erroneously disenfranchise qualified North Carolina voters in the 2024 elections. Plaintiffs' uncontroverted evidence shows that in just one small county in 2022, dozens of ballots cast by *specifically identified, qualified voters* were challenged because those voters failed address verification due to poll worker or Postal Service errors. Under S747, any same-day registrant who has a single address verification notice returned will be automatically disenfranchised without any notice or opportunity to prove their qualifications to vote. Because the Undeliverable Mail Provision violates Plaintiffs' due-process rights, it should be enjoined.

The State Board admits that under the plainly applicable *Mathews v. Eldridge* test for procedural due-process claims, the lack of notice and cure provisions renders the Undeliverable Mail Provision a clear violation of the Due Process Clause. State Bd. Defs.' Resp. to Pls.' Mot. for Prelim. Inj. 10, ECF No. 54 ("State Bd. Resp."). Numbered Memo 2023-05—which the State Board issued on December 8, three weeks after Plaintiffs moved for a preliminary injunction, and which clearly aims to patch the Undeliverable Mail Provision's constitutional defects—does not save it. Of particular concern, the memo does not require that county boards attempt to contact same-day registrants who fail address verification, nor does it create a

mechanism by which those voters may prove residency so that their ballots are counted.

Because Plaintiffs are likely to succeed on the merits of their due process claim and the equities counsel in favor of relief, the Undeliverable Mail Provision should be enjoined prior to the 2024 elections. As Plaintiffs explain below, neither Defendants nor Intervenors have made any credible showing that would undermine maintaining the status quo. Alternatively, and at minimum, the Court should enter an injunction mandating that voters who fail mail verification must be given notice and an opportunity to prove their residency. In particular, the injunction should (i) require county boards to collect the phone numbers and email addresses of same-day registrants; (ii) mandate that county boards attempt to contact any voter whose ballot will be retrieved because of failed address verification by phone and email; and (iii) require that any affected voter be afforded the opportunity to prove residency prior to or during the county canvass.

ARGUMENT

I. Plaintiffs have standing to bring their due-process claim.

Only Intervenors challenge standing, arguing that Plaintiffs have failed to establish an injury-in-fact sufficient to satisfy Article III.[1] Intervenors are wrong. As

[1] No Defendant or Intervenor challenges the traceability and redressability of Plaintiffs' injuries.

a threshold matter, only one Plaintiff need establish standing for the case to proceed; here, each of the Plaintiffs satisfy Article III. Nor must Plaintiffs wait until their ballots have been discarded under S747 to have standing; a concrete *risk* of harm is sufficient. Intervenors' arguments to the contrary either mischaracterize the record or create imagined deficiencies in Plaintiffs' standing that have no legal relevance.

A. Sophie Mead

Sophie Mead is a senior at Appalachian State University, a member of the Watauga County Voting Rights Task Force (the "Task Force"), and a qualified North Carolina voter. Mead Decl. ¶¶ 2–4, ECF No. 44-5. Mead's injury is far from "hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Mead plans to move next fall and will use same-day registration ("SDR") to update her address and vote in the 2024 general election. Ex. A, Mead Dep. Tr. 18:14–24. When she used SDR to vote in 2022, her ballot was challenged because her address verification was returned as undeliverable due to poll worker error. Mead Decl. ¶¶ 6–13 & Ex. A., ECF No. 44-5. Intervenors are right that her ballot was ultimately counted, but they ignore that prior to the enactment of S747, she had notice and an opportunity to respond to the challenge. Under S747, she would receive no such due process.

Mead's injury is based on both the harm of having her ballot challenged in 2022 and the substantial likelihood that the Undeliverable Mail Provision will subject her to a real and "imminent" risk of being disenfranchised in 2024. *See*

Lujan, 504 U.S. at 560. This district has previously found a sufficient injury on precisely the same grounds, because a concrete *risk* of harm is enough to show injury-in-fact. *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 v. Strach*, 216 F. Supp. 3d 597, 631 (M.D.N.C. 2016) (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").

Mead's injury stands in stark contrast to those asserted by the plaintiffs in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Memphis A. Philip Randolph Institute v. Hargett*, 978 F.3d 378 (6th Cir. 2020). In *Hargett*, "[t]he plaintiffs d[id] not cite any official data to support their theory that some of the absentee ballots will be incorrectly rejected" or "allege that one of their members has had an absentee ballot erroneously rejected in the past." 978 F.3d at 387. And in *Lyons*, the plaintiff

"made no showing that he is realistically threatened by a repetition of his [previous] experience." 461 U.S. at 109.

Here, Mead testified that she plans to use SDR again in 2024, Ex. A, Mead Dep. Tr. 18:14–24, and showed uncontested evidence that undeliverable mail errors are inevitable, *see* Br. in Supp. of Pls.' Mot. for Prelim. Inj. 22–23, ECF No. 45 ("Pls.' Br."); *see also* Ex. B, Taylor Dep. Tr. 125:16–20. Moreover, under S747, "*all*" county officials will "*always*" remove the ballots of individuals whose mail is returned as undeliverable, regardless of the reason, per the Undeliverable Mail Provision's "order[]" to do so. *Contra Lyons*, 461 U.S. at 105–06 (holding that plaintiff did not have an actual controversy where he had not made analogous assertions).

B. Watauga County Voting Rights Task Force

The Task Force is a volunteer member organization committed to nonpartisan voting-rights advocacy and defending the right to vote. Anderson Decl. ¶ 4, ECF No. 44-2; Ex. C, Williamson Dep. Tr. 12:7–11. It has associational standing because, first, its members and constituents "would have standing if they sued individually." *N.C. State Conf. of NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020). The Task Force's members and constituents tend to be first-time voters and frequent movers who rely on SDR at high rates, and because many of them have different physical and mailing addresses, they are more likely to face errors that result in

undeliverable mail. Anderson Decl. ¶ 12, ECF No. 44-2; *see also* Williamson Decl. ¶¶ 7–20, ECF No. 44-4 (describing 13 voters' experience with undeliverable mail–related challenges to their ballots in 2022). Second, "the interests the lawsuit seeks to raise 'are germane to the organization's purpose.'" *Raymond*, 981 F.3d at 301 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). "The Task Force's mission is to ensure that voting is accessible to every eligible voter who wishes to participate in our democracy." Anderson Decl. ¶ 4, ECF No. 44-2. Finally, "the claims and type of relief asserted in the complaint do not require the individual members' participation in the lawsuit." *Raymond*, 981 F.3d at 301.

Republican Intervenors' assertion that the Task Force has "failed to identify a single *specific member* injured" by the Undeliverable Mail Provision is baseless. The Task Force is not required to wait until one of its members is disenfranchised to move for a preliminary injunction. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) ("A plaintiff need not have the franchise wholly denied to suffer injury."); *Ranchers-Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 573 F. Supp. 3d 324, 335 (D.D.C. 2021) (finding "the requirement for 'specific allegations' to 'identify' a member who is harmed, and any corollary requirement to name specific members, applies only to factual challenges to standing and to later stages of the litigation, such as summary judgment"). And to

the extent the Task Force needs to name an affected voter at this preliminary stage, it has done so: Sophie Mead is a member of the Task Force.

The Task Force also has direct organizational standing. First, the Undeliverable Mail Provision "perceptibly impair[s]" the Task Force's ability to carry out its voter-enfranchisement mission, *Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012), "because efforts spent to encourage voters to register and vote could result in disenfranchisement if their address verification notice fails to reach them," Anderson Decl. ¶ 11, ECF No. 44-2. Second, the Provision will drain the Task Force's resources by requiring the organization "to counteract the risks and detrimental effects of the Undeliverable Mail Provision on its constituency." *Id.* ¶ 13; *Lane*, 703 F.3d at 675. Specifically, the Task Force must use its primary resource, volunteer time, "to retrain[] our volunteers so that they appropriately advise and explain the [SDR] process" to voters, "develop some mechanism . . . for [SDR] voters to . . . reach out to us if they don't get the [verification] card," and update its messaging in response to the Provision. Ex. D, Anderson Dep. Tr. 79:21–80:19; Anderson Decl. ¶ 14, ECF No. 44-2.

For the Task Force, the risk of disenfranchisement caused by S747 is much more than an "abstract concern," as Republican Intervenors contend. Intervenors' Resp. in Opp. to Pls' Mot. for Prelim. Inj. 6, ECF No. 51 ("Republican Intervenors' Resp."). In 2022, the Task Force spent "200 hours . . . minimum" assisting voters

who had been challenged as a result of undeliverable address verifications. Ex. C, Williamson Dep. Tr. 38:25–39:1. And it anticipates that, absent an injunction, S747's consequences for its members and constituents' "voting rights" will be "dire," Ex. D, Anderson Dep. Tr. 73:13–14, and will compel the organization to divert volunteer time from other mission-critical functions—most notably, get-out-the-vote efforts and "be[ing] responsive to the texting service messages, questions, concerns that come in," *id.* 80:24–81:3, 84:1–10. Therefore, the Task Force will not "succeed to the extent to which [it] typically [has] in terms of the number of voters" it registers and turns out. *Id.* 81:3–10. Republican Intervenors wrongly suggest that the only resource that matters for diversion-of-resources standing is money, Republican Intervenors' Resp. 7, ECF No. 51, but multiple federal circuits have held otherwise, *see, e.g.*, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 11 F.4th 1266, 1287 (11th Cir. 2021) (finding organizational injury where volunteers diverted time and energy from one set of activities to another); *Common Cause Indiana v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (finding injury where organizations would "be required to increase the time or funds (or both) spent on certain activities to alleviate potentially harmful effects" of the challenged law, which would "displace other projects they normally undertake"); *Scott v. Schedler*, 771 F.3d 831, 836–39 (5th Cir. 2014) (finding standing where organizational officer dedicated time even though organization spent no additional money).

C. Down Home North Carolina

Down Home is a nonprofit social welfare organization whose mission is to build the power of working people in rural North Carolina. Caldwell Decl. ¶ 3, ECF No. 44-3. Down Home has associational standing because its members and constituents are likely both to use SDR and to be disenfranchised as a result of S747. Many of Down Home's members and constituents experience housing instability, which results in frequent relocations and difficulty receiving mail. *Id.* ¶¶ 12–13; Ex. E, Caldwell Dep. Tr. 50:8–51:9; *see also Raymond*, 981 F.3d at 301. Furthermore, "[a]n integral part of Down Home's mission is to ensure that working-class North Carolinians—including but not limited to, Down Home's members—have access to the franchise." Caldwell Decl. ¶ 5, ECF No. 44-3; *see Raymond*, 981 F.3d at 301. And although "individual members' participation in the lawsuit" is not required, *Raymond*, 981 F.3d at 301, Down Home has identified *more than one member* who is likely to be affected by the Undeliverable Mail Provision, Caldwell Decl. ¶ 14, ECF No. 44-3 (describing two members' experiences with undeliverable mail); Ex. E, Caldwell Dep. Tr. 57:3–24 (same); *id.* 60:11–24 (describing two members who did not receive their voter registration cards as expected); *id.* 65:6–67:8 (describing three members who intend to use SDR and are experiencing housing instability). For example, a Down Home member has been living at a motel in Alamance County due to a house fire. *Id.* 66:6–10; *see also id.* 69:23–70:11 (opposing counsel confirming

that member's registered address is at the Knights Inn). The member cannot establish residency at the motel and therefore moves often, *id.* 66:6–15; she has been unable to receive mail in the past, including her Section 8 housing forms, *id.*; and she has expressed to Down Home staff that she intends to use SDR in 2024, *id.* 66:16–20, 74:25–75:7. Accordingly, the member faces a substantial risk of disenfranchisement under the Undeliverable Mail Provision.

Down Home also has direct organizational standing, as the Undeliverable Mail Provision not only frustrates the organization's mission, but will force it to deviate from its "own budgetary choices" and instead expend limited monetary and staff resources educating voters about their registration options and standing up a new voter registration program, which will require "staffing capacity," "training materials," "digital ads," "organizing capacity," and "budget." Ex. E, Caldwell Dep. Tr. 62:4–23. Efforts to counteract the effects of the Undeliverable Mail Provision will come at the expense of Down Home's "local organizing work, programming around health justice and public schools, and [] electoral work," Caldwell Decl. ¶¶ 21–22, ECF No. 44-3, because "we would have to divert from the things that we already planned to work [on] to be able to . . . inform our members about [the Provision]," Ex. E, Caldwell Dep. Tr. 64:19–65:5.

D. Voto Latino

Voto Latino is a nonpartisan organization that engages, empowers, and educates Latinx communities in North Carolina and other states to participate in the democratic process. Patel Decl. ¶ 3, ECF No. 44-8. Voto Latino has direct organizational standing to bring this case because the Undeliverable Mail Provision frustrates its mission of enfranchising Latinx voters, who are disproportionately likely both to use SDR and to be affected by the Provision. Patel Decl. ¶ 11, ECF No. 44-8; Ex. F, Patel Dep. Tr. 40:3–22, 54:13–55:12; *see also Lane*, 703 F.3d at 675. Voto Latino will have to expend resources to counteract the harm of the Provision in ways that are contrary to the budgetary choices it would make if the law did not exist. Ex. F, Patel Dep. Tr. 52:24–54:5. For example, Voto Latino will have to spend more resources "to register the same amount of voters," knowing that some number will be disenfranchised; "expend more resources reaching back out to [disenfranchised] individuals after the election to ensure they're eligible and to help them get back onto the voter file"; and educate voters about the change in the law so that they can still use SDR effectively. *Id.*

As a result, Voto Latino will have to divert resources it "would otherwise spend on its mission-critical issue advocacy, digital advertisement, and GOTV programs." Patel Decl. ¶ 14, ECF No. 44-8; *see also La Union del Pueblo Entero v. Abbott*, 614 F. Supp. 3d 509, 527 (W.D. Tex. 2022) (finding Voto Latino had

organizational standing in similar election case). That the Undeliverable Mail Provision has not yet impacted Voto Latino's fundraising is irrelevant to its standing, as is the fact that Voto Latino itself uses mail to conduct voter outreach. *See* Republican Intervenors' Resp. 7, ECF No. 51. Rather, that thousands of Voto Latino's own mailers have been returned as undeliverable simply underscores the importance of affording due process when, as under S747, mail delivery determines whether a voter's ballot is counted. *See* Ex. F, Patel Dep. Tr. 56:1–19.[2]

II. Plaintiffs are likely to succeed on the merits of their due-process claim.

Plaintiffs have demonstrated likely success on their procedural due-process claim. The Undeliverable Mail Provision deprives voters of their fundamental right to vote without notice or an opportunity to cure. Fourth Circuit precedent establishes that the right to vote is a liberty interest protected by the Due Process Clause. As such, its deprivation is analyzed under the *Mathews* test, not *Anderson–Burdick* balancing. The State Board concedes outright that under *Mathews*, Plaintiffs will prevail, State Bd. Resp. 10, ECF No. 54, and neither set of Intervenors shows otherwise.[3]

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[2] Although Republican Intervenors refer to Plaintiffs' witnesses as "corporate representatives," *see* Republican Intervenors' Resp. 7, 9, ECF No. 51, all witnesses were deposed in their individual capacities only.

[3] Republican Intervenors correctly observe that Plaintiffs seek facial relief and then erroneously argue that they do not meet the relevant standard. Republican Intervenors' Resp. 14, ECF No. 51. But in every instance where the Undeliverable

A. The Undeliverable Mail Provision does not provide voters with notice or an opportunity to cure.

The Undeliverable Mail Provision does not provide voters with the hallmarks of due process—notice and an opportunity to dispute the deprivation—prior to disenfranchising them. *Goss v. Lopez*, 419 U.S. 565, 579 (1975); State Bd. Resp. 9–10, ECF No. 54; Numbered Memo 2023-05, ECF No. 55-5. The State Board admits as much. State Bd. Resp. 9–10, ECF No. 54. Both sets of Intervenors, by contrast, defend an imaginary law. They insist that the law provides notice but cannot identify any reasonable textual basis for that assertion.

First, Legislative Intervenors assert that the notice and hearing provisions of N.C. Gen. Stat. § 163–82.7(b) ("Subsection 82.7(b)") apply to same-day registrants who fail address verification. That reading is contrary to the plain text of the relevant statutes as well as the State Board's interpretation and planned implementation of S747. By its own terms, Subsection 82.7(b) applies only to "a determination pursuant to subsection (a)." Subsection (a), in turn, requires a county board to make a "tentative determination" about an applicant's qualifications—a preliminary

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Mail Provision is triggered, voters are disenfranchised without due process—satisfying even the highest standard for a facial challenge. *United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court need not "speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation omitted). Rather, it "can readily ascertain" from state law "as written" that the Undeliverable Mail Provision is unconstitutional. *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1337 (N.D. Ga. 2018).

process that is entirely distinct from address verification. N.C. Gen. Stat. § 163–82.7(a). When registration is denied because of address verification, the statutes are explicit that "county board[s] need *not* try to notify the applicant." N.C. Gen. Stat. § 163–82.7(f) (emphasis added).[4]

Next, Legislative Intervenors assert that voters receive due process because "all registrants are entitled to vote a provisional ballot." Intervenor-Defs.' Resp. in Opp. to Pls.' Mot. for Prelim. Inj. 18, ECF No. 52 ("Legislative Intervenors' Resp."). This is a non sequitur. A voter subject to the Undeliverable Mail Provision has *already cast a non-provisional ballot*. The problem is that the ballot will not be counted, and the voter will get no notice or opportunity to prove eligibility so the ballot can be counted. That a voter could cast a provisional ballot in the first instance or attempt to cast a second ballot provisionally does nothing to change that.

Finally, Republican Intervenors claim a same-day registrant receives notice of a disqualified ballot via a "public-facing voter-search website," and that a voter who thereby learns of an address-verification failure can cast a second ballot. Republican Intervenors' Resp. 8–9, ECF No. 51. But neither Numbered Memo 2023-05 nor any other State Board guidance instructs county boards to warn same-

[4] Legislative Intervenors also cite N.C. Gen. Stat. § 163–82.18, but that provision simply creates a process for appeal from "notice of denial of registration pursuant to G.S.163–82.7"—which, as discussed, does not apply here.

day registrants that they should monitor their ballots' status on the State Board's website. And there is nothing in the record establishing that the website tracks address verifications or any resulting ballot disqualification at all—or, if it does, how quickly the website updates after a voter's ballot is disqualified. *See* Ex. B, Taylor Dep. Tr. 26:4–15. Moreover, when "notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). The "means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* The website does not meet that standard. And even if it did, the voter would have no recourse: the Undeliverable Mail Provision does not provide for a cure to the voter's disenfranchisement, by casting a second ballot or otherwise.

B. The Undeliverable Mail Provision's lack of notice and a cure process should be analyzed under *Mathews*, not *Anderson–Burdick*.

Relying on out-of-circuit authority, the State Board and Republican Intervenors argue that this Court should analyze the Undeliverable Mail Provision's constitutionality under *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), rather than *Mathews v. Eldridge*, 424 U.S. 319 (1976). State Bd. Resp. 10–11, ECF No. 54; Republican Intervenors' Resp. 9–11, ECF No.

51.[5] Republican Intervenors go even further, claiming that the right to vote is not a liberty interest protected by the Fourteenth Amendment at all. Republican Intervenors' Resp. 10, ECF No. 51. These arguments fail.

For starters, the Fourth Circuit has indicated that "[t]he right to vote—to the extent it exists and an individual has been deprived of it—is certainly a protected liberty interest, and the Due Process Clause requires fair and adequate procedures if an individual is deprived of his/her liberty." *Barefoot v. City of Wilmington*, 306 F.3d 113, 124 n.5 (4th Cir. 2002). The Fourth Circuit has also made clear that *Mathews* is the proper framework for assessing "the minimal procedural protections required in a given situation." *Halcomb v. Ravenell*, 992 F.3d 316, 321 (4th Cir. 2021). That is because "decades of Supreme Court precedent establish[es] that the *Mathews* test does not supplant a floor, but rather sets the constitutional floor." *Kirk v. Comm'r of Soc. Sec. Admin.*, 987 F.3d 314, 331 n.3 (4th Cir. 2014) (Quattlebaum, J., dissenting on other grounds). While the Fourth Circuit has not had occasion to apply *Mathews* to a voting-rights claim, it has indicated that it would do so in the appropriate case. *See Barefoot*, 306 F.3d at 124 n.5. And this district applied *Mathews* in a voting-rights case just three years ago. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 226–29 (M.D.N.C. 2020).

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[5] Legislative Intervenors apply *Mathews*. Legislative Intervenors' Resp. 16, ECF No. 52.

This makes sense. *Mathews* specifically protects procedural due process—an explicit constitutional guarantee—by mandating an inquiry laser-focused on fair and accurate procedures. *Halcomb*, 992 F.3d at 321. *Anderson* and *Burdick*, by contrast, prescribe a broad inquiry into "the character and magnitude of the asserted injury" and "the legitimacy and strength of each of [the state's] interests." *Anderson*, 460 U.S. at 789; *see also Burdick*, 504 U.S. at 434. That inquiry is derived primarily from the First Amendment and the Fourteenth Amendment's Equal Protection Clause, not the Due Process Clause. *Anderson*, 460 U.S. at 787 n.7, 793. Applying *Anderson–Burdick* to Plaintiffs' procedural due-process claim would conflate two separate constitutional protections and deprive Plaintiffs of the specific protections afforded by the Due Process Clause. Accordingly, this Court should heed the Fourth Circuit's indication that it would follow *Mathews* and assess whether the state has afforded "fair and adequate procedures" in a voting-rights case like this one. *Barefoot*, 306 F.3d at 124 n.5.

Republican Intervenors are also wrong that the Supreme Court mandates application of the *Anderson–Burdick* test to due process claims. *See* Republican Intervenors' Resp. 10, ECF No. 51. The Court has never had the occasion to decide whether a procedural due-process claim that arises in the voting rights context is evaluated under *Mathews* or *Anderson–Burdick*. Nor has the Court ever answered that question in another case. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553

U.S. 181, 190 (2008) (plurality opinion). *Anderson* and the election cases considered by the Supreme Court since *Anderson* have presented right-to-vote claims—which are grounded in equal protection and the First Amendment—not due-process claims. *Id.* at 783–84; *see also id.* at 787 n.7, 793–94. And *Anderson* instructed that in those cases, courts "must resolve" constitutional challenges to a state's election laws under the test it applied, not the "litmus-paper test[s]" *Anderson* disclaimed. 460 U.S. at 789.

All three Circuits to reject *Mathews*' application to voting-rights claims failed to analyze the specific constitutional guarantees at issue because they wrongly assumed that *Anderson* foreclosed applying *Mathews*. *See Richardson v. Texas Sec'y of State*, 978 F.3d 220, 233 (5th Cir. 2020); *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1195 (9th Cir. 2021); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1282 (11th Cir. 2020); *see also Democratic Party of Va. v. Brink*, 599 F. Supp. 3d 346, 361 (E.D. Va. 2022) (same). This Court should not follow suit.

C. Under *Mathews*, the Undeliverable Mail Provision denies Plaintiffs' rights without adequate process.

The State Board admits that Plaintiffs are likely to prevail under the *Mathews* balancing test. State Bd. Resp. 9–10, ECF No. 54. For good reason. This district has already recognized that mail deliverability is an error-prone method of verifying a voter's address. *See N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections*, No. 1:16CV1274, 2016 WL 6581284, at *7 (M.D.N.C. Nov. 4, 2016) ("[T]he NVRA

recognizes that second-hand evidence such as mail returned as undeliverable may not actually reflect a change of residence impacting a citizen's eligibility to vote in the jurisdiction."); *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 449 (M.D.N.C. 2016) ("Mail verification is admittedly not a precise verification system for determining an applicant's residency."). And Defendants and Intervenors have no answer to Plaintiffs' evidence in this case, which shows that voters' address verifications have frequently been returned as undeliverable for reasons unrelated to the voter's residency, including poll worker and Postal Service errors. *See* Pls.' Br. 19–24, ECF No. 45. Indeed, they completely ignore Timothy Greene's declaration, which details myriad reasons why a verification card may be erroneously returned as undeliverable. *See* Greene Decl. ¶¶ 8–13, ECF No. 44-7.

Under the Undeliverable Mail Provision, an unreliable verification method will be applied to all same-day registrants—whose number, in previous presidential elections, has consistently exceeded 100,000 voters. Even taking Legislative Intervenors' self-serving calculations at face value, when "1%" of mailed notices are undeliverable because of Postal Service errors, that means that *at a minimum*, more than a thousand eligible voters will be wrongly disenfranchised in every election. *See* Taylor Rep. 7–11, ECF No. 52-1. Importantly, these conservative figures do not account for several other sources of error, including poll worker error.

Given the substantial risk of erroneous deprivation, there are several potential avenues for providing same-day registrants with notice and an opportunity to be heard before their ballots are rejected—including the challenge process that previously applied to same-day registrants.[6] And no party has suggested that additional procedures would compromise any of the State's purported interests, including ensuring election integrity, fraud prevention, or residency verification. At most, Republican Intervenors—who play no role in the administration of elections—raise the prospect that there could be a high number of affected voters, thereby increasing the burden of providing notice and a cure mechanism. Republican Intervenors' Resp. 20–21, ECF No. 51. This is ironic, since Republican Intervenors *also* claim that the risk of erroneous deprivation is minimal. *Id.* at 19. They cannot have it both ways. And regardless, any administrative burdens associated with providing voters with notice and a cure mechanism pale in comparison to the harm of erroneous disenfranchisement. *See, e.g.*, *Fish v. Kobach*, 840 F.3d 710, 754 (10th Cir. 2016) (rejecting defendant's assertion that "administrative burden [imposed by the injunction, which required] altering the registration status of roughly 18,000"

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[6] Under the status quo, although a county board may not challenge a voter's residency based *solely* on an address verification card's return as undeliverable, it may still challenge a voter's residency based on individualized information. *N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *7 (M.D.N.C. Aug. 7, 2018).

individuals who had applied to vote, was too great); *Obama for Am. v. Husted*, 697 F.3d 423, 434 (6th Cir. 2012) (finding state interest in "smooth election administration" insufficient to justify burden on voters); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005) (holding that, despite "the inconvenience and expense that entering a preliminary injunction may work upon the State," "[d]enying an individual the right to vote works a serious, irreparable injury upon that individual," and thus, the potential harm to plaintiffs outweighed the state's burden).

Republican Intervenors also question the effectiveness of additional procedures—claiming subsequent notice will fail for the same reason the original mailing was returned as undeliverable. Republican Intervenors' Resp. 19, ECF No. 51. But county boards of elections have a range of options for providing effective notice. In particular, county boards can use voters' phone numbers and emails—which they are instructed to collect under Numbered Memo 2023-05—to notify voters before rejecting their ballots.

Finally, both sets of Intervenors claim Plaintiffs' procedural due-process claim would also imperil other uses of mail or require judicial intervention in "garden variety election irregularities," but these concerns are unsubstantiated. Republican Intervenors' Resp. 13, ECF No. 51; Legislative Intervenor' Resp. 20, ECF No. 52. The Fourth Circuit has already established reasonable limits on

challenges to election-administration errors that take into consideration the error's "severity, whether it was intentional or more of a negligent failure to carry out properly the state election procedures and whether it erodes democratic process." *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 915 (E.D. Va. 2018) (quoting *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)). The Undeliverable Mail Provision is uniquely severe: a mere typographical error in entering a same-day registrant's address now results in complete disenfranchisement. Further, unlike the examples cited by Republican Intervenors, the Undeliverable Mail Provision *directs* government officials to implement an unreliable verification-by-mail process—it is not an "error[] in implementing [a] voting procedure[]," Republican Intervenors' Resp. 13, ECF No. 51.

III. Plaintiffs are also likely to succeed on the merits under *Anderson–Burdick*.

Even if the Court accepts the State Board's and Republican Intervenors' arguments that Plaintiffs' procedural due-process claim should be analyzed under *Anderson–Burdick*, Plaintiffs are still likely to prevail. The State's regulatory interests do not and cannot justify the severe burden the Undeliverable Mail Provision imposes on the right to vote.[7]

[7] The Supreme Court has already rejected the State Board's argument that the "burdens should be considered holistically in light of the other means by which voters may register," State Bd. Resp. 12–13, ECF No. 54. *See, e.g.*, *Crawford*, 553

A. The Undeliverable Mail Provision is subject to strict scrutiny.

Although "election laws are usually . . . subject to ad hoc balancing," under *Anderson–Burdick*, "laws which place severe burdens upon constitutional rights are subject to strict scrutiny: the regulation must be narrowly drawn to advance a state interest of compelling importance." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1220–21 (4th Cir. 1995) (cleaned up). For voters who erroneously fail address verification, the Undeliverable Mail Provision imposes the most severe burden to which a voter can be subjected: complete disenfranchisement. "The right to vote includes the right to have the ballot counted," *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964), and when the ballot is not counted, the right is completely denied. The Provision is accordingly subject to strict scrutiny, and there is no plausible argument that it is "narrowly drawn."

B. The proffered state interests do not outweigh the Undeliverable Mail Provision's burdens on voters.

Alternatively, the Undeliverable Mail Provision is unconstitutional under *Anderson–Burdick*'s balancing framework. That framework weighs "'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to

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U.S. at 198, 201 (plurality opinion) (emphasizing that courts must consider the effects of a restriction on those voters who are *affected* by it, not the effects on *all* voters). *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014), does not suggest otherwise; it underscores that a plaintiff's claim must be evaluated within its specific context. *Id.* at 934.

vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule[.]'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). In applying *Anderson–Burdick*, a court "must not only determine the legitimacy and strength of each of [the State's] interests; it also must consider the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789 (emphasis added). *Anderson–Burdick* demands "in many if not most cases . . . a fact-intensive inquiry." *Daunt v. Benson*, 999 F.3d 299, 313 (6th Cir. 2021). Here, the proffered state interests are ensuring that only eligible votes are counted, combatting fraud, and counting ballots in a timely manner. State Bd. Resp. 11–13, ECF No. 54; Republican Intervenors' Resp. 15–18, ECF No. 51. As articulated by the State Board and Republican Intervenors, those interests do not outweigh the Provision's burdens.[8]

Ensuring only eligible votes are counted. For two reasons, the Undeliverable Mail Provision does not substantially further the State Board's only proffered interest, confirming voter qualifications. *See* State Bd. Resp. 12, ECF No. 54. First, the Provision does not assess the relevant qualification—residency—at all. As the State Board emphasizes repeatedly, a voter may provide a mailing address in lieu of

[8] To the extent Legislative Intervenors assert a relevant state interest even though they do not directly address *Anderson–Burdick*, it is "ensur[ing] that registrants live in the precinct where they vote," Legislative Intervenors' Resp. 19, ECF No. 52, which corresponds to the State Board's asserted state interest.

a residential address, and in fact *the State Board's policy is to urge voters to do so when mail cannot be received at the relevant residential address*. State Bd. Resp. 13 & n.8, ECF No. 54. But residency for voting qualifications depends on where a person *resides*, not where they receive mail. N.C. Gen. Stat. § 163–57. The Undeliverable Mail Provision thus fails to provide reliable information that allows the State to verify voters' residency and prevent unlawful votes from being counted. Second, even if the Provision did somehow serve that purpose, it would be redundant. North Carolina law requires that a same-day registrant prove residency at the time of registration and voting by providing a HAVA document. N.C. Gen. Stat. § 163–82.6B(b)(2). That safeguard ensures that only voters who meet North Carolina's residency qualifications are able to register and vote using SDR.

Republican Intervenors assert two further interests. As a threshold matter, these should be given little or no weight, because Republican Intervenors cannot assert interests on the State's behalf that the State's own representatives do not assert.

Combatting fraud. Republican Intervenors' first proffered interest, combatting fraud, *see* Republican Intervenors' Resp. 15–17, ECF No. 51, has not been substantiated with the "fact-intensive" support *Anderson–Burdick* analysis demands, *Daunt*, 999 F.3d at 313. To justify North Carolina's onerous ballot-disqualification regime, Republican Intervenors needed to produce substantial

evidence specifically of *residency* fraud. And they needed to show that such fraud was occurring during SDR and would be redressed by the Undeliverable Mail Provision. But they failed to do so. *See* Republican Intervenors' Resp. 17, ECF No. 51 (suggesting it is "far from clear" whether the Provision affects fraud at all). And the lone expert on Defendants' and Intervenors' side, Legislative Intervenors' expert Dr. Taylor, conceded that he has no basis to believe that there are fraudulent votes cast using SDR that the Undeliverable Mail Provision would prevent. Ex. B, Taylor Dep. Tr. 154:9–13. Instead, he acknowledged that the Provision has "no effect on voter fraud" and does not "necessarily prevent fraud from happening, as far as [he] know[s]." *Id.* 160:1–22. Despite asserting that North Carolina's officials are motivated to investigate fraud and that in-person fraud perpetrated by registered voters (including those changing their addresses) is easy to detect, Dr. Taylor could not point to any instances of voter fraud in North Carolina that were related to SDR. *Id.* 143:13–145:14, 146:16–147:9. He also confirmed, after reviewing Dr. Kropf's corrected declaration, that he had no reason to question the methods or results of Dr. Kropf's analysis showing that there is no such evidence. *Id.* 184:7–11.

Timely counting ballots. Republican Intervenors' other proffered interest fares no better. Even assuming that "the State needs a procedure of address verification that can be timely completed before the canvass," Republican Intervenors' Resp. 18, ECF No. 51, requiring same-day registrants to provide HAVA

documents achieves that purpose. The Undeliverable Mail Provision, by contrast, does not, because it does not verify residency at all.

IV. The remaining preliminary injunctive factors weigh in Plaintiffs' favor.

The other preliminary injunctive factors tip decisively in Plaintiffs' favor. *See* Pls.' Br. 26–28, ECF No. 45. The State Board assumes that Plaintiffs have shown irreparable harm, State Bd. Resp. 14, ECF No. 54, and Intervenors' arguments to the contrary are unavailing. Plaintiffs have shown that their members and constituents are likely to suffer irreparable harm—disenfranchisement—if the Undeliverable Mail Provision is not enjoined. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (finding irreparable harm in voting rights case because "once the election occurs, there can be no do-over and no redress").

The equities also support preliminary injunctive relief in this case. Plaintiffs seek an order that either maintains the pre-S747 status quo or, at minimum, "provide[s] same-day registrants with notice and an opportunity to defend their eligibility," Pls.' Br. 17, ECF No. 45. That is what due process demands. Plaintiffs' request for relief is nothing like the "obey-the-law" injunctions that this Court admonished against in *Bone v. University of North Carolina Health Care System*, No. 1:18-cv-994, 2023 WL 4144277, at *30–32 (M.D.N.C. June 22, 2023) (finding improperly vague a proposed injunction seeking a blanket or "generalized mandate"

to compel compliance with federal disability laws via "sweeping," "significant," and "systemic" reforms).

In addition, the argument that the State has an interest in enforcing S747 irrespective of whether it is constitutional, Republican Intervenors' Resp 14, ECF No. 54; Legislative Intervenors' Resp. 22, ECF No. 52, is contrary to Fourth Circuit precedent. *See* Pls.' Br. 27–28, ECF No. 45 (collecting cases). And the only binding case cited in the opposition briefs proves this point. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (finding state injury where there was "delay[ed] enforcement of a state law *that the court has determined is likely constitutional*" (emphasis added)). Furthermore, the State Board and Intervenors argue that the equities weigh in their favor by invoking the same state interests that they raised on the merits, but those arguments fail. *See supra* Part III.B.

Finally, it is not too late to afford Plaintiffs relief. The Undeliverable Mail Provision has not yet gone into effect, and Plaintiffs seek relief well in advance of the 2024 primary election. *Cf. Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) (suggesting judicial intervention was inappropriate "six weeks before the November election and after absentee voting had already begun"). Legislative Intervenors' preference that, ample time notwithstanding, this Court take a wait-and-see approach and allow

disenfranchisement to occur *before* it passes on the Undeliverable Mail Provision's constitutionality, Legislative Intervenors' Resp. 22, ECF No. 52, flouts the requirements of due process.

CONCLUSION

Plaintiffs respectfully request that the Court preliminarily enjoin the Undeliverable Mail Provision in full, which would effectively maintain the status quo. In the alternative, the Court should at a minimum enter an injunction to: (i) make Number Memo 2023-05's instruction to county boards to collect phone numbers and emails mandatory and permanent; (ii) further mandate that county boards attempt to contact any voter whose ballot will be retrieved because of failed address verification by phone and email; and (iii) require that any affected voter who so desires be allowed to prove residency prior to or during the county canvass.

Dated: December 20, 2023.

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CERTIFICATE OF WORD COUNT

I certify that this brief complies with the requirements of Local Rule 7.3 and the Court's December 19, 2023, Order, ECF No. 58. This brief contains 6,916 words exclusive of the cover page, caption, table of contents, signature lines, and this certificate.

Dated: December 20, 2023.

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