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*,

Defendants,

and

Philip E. Berger, *in his official capacity as President* Pro Tempore *of the North Carolina Senate*; Timothy K. Moore, *in his official capacity as Speaker of the North Carolina House of Representatives*; Republican National Committee; North Carolina Republican Party; Virginia A. Wasserberg; Brenda M. Eldridge,

Intervenors.

Case No. 1:23-CV-862-TDS-JEP

REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The oppositions only underscore that a preliminary injunction is warranted. Defendants all but concede the equitable factors: that an injunction would prevent irreparable disenfranchisement by preserving the status quo under the state's well-understood, pre-existing system for same-day registration, and that such disenfranchisement outweighs any harm defendants would suffer from a temporary injunction. And as to plaintiffs' likelihood of success on the merits, although there are disagreements among defendants and intervenors about how S.B. 747's same-day-registration scheme will work, the fact that defendants (who administer North Carolina's elections code) agree that S.B. 747 disenfranchises voters without *any* notice and opportunity to be heard should be dispositive.

ARGUMENT

I. THE OPPOSITIONS CAST NO DOUBT ON PLAINTIFFS' LIKELIHOOD OF SUCCESS

A. Procedural Due Process

Plaintiffs' memorandum demonstrated likely success on each element of a procedural-due-process claim: (i) "a cognizable liberty interest," (ii) "deprivation of that interest by … state action," and (iii) "that the procedures employed" to prevent deprivation are "constitutionally inadequate," *Kendall v. Balcerzak*, 650 F.3d 515, 528 (4th Cir. 2011). Defendants concede that each element is satisfied but argue—incorrectly—that plaintiffs invoke the wrong legal test. Intervenors, meanwhile, dispute that these elements are met, but only by misapprehending state law and misidentifying the right at stake.

1. Defendants Concede That The Elements Of Plaintiffs' Procedural-Due-Process Claim Are Met

Defendants (i) "agree that qualified voters … eligible to register possess a cognizable liberty interest in having their votes properly counted"; (ii) "assume" for now that "eligible voters may have their ballots erroneously retrieved" under S.B. 747, constituting "a deprivation by state action"; and (iii) "concede" that, unlike under pre-existing law, S.B. 747's "same-day registration regime does not provide" "notice and opportunity to be heard before the deprivation of a liberty interest," as required under *Mathews v. Eldridge*, 424 U.S. 319 (1976). NCSBE Br.9-10. As defendants explain, before S.B. 747, if a county board denied a same-day registrant's application before attempting to verify the individual's address, that individual was provided an opportunity to be heard before her ballot was discarded. NCSBE Br.5. And if an address-verification notice was returned as undeliverable after an individual had voted, the board would apply the protection set forth in North Carolina General Statutes §163-82.7(g)(2)-(3), which includes notice and an opportunity to be heard under the absentee-ballot challenge process. Asserting that it is "unclear" whether the first protection applies under S.B. 747, and conceding that the second protection undoubtedly does not, NCSBE Br.8, defendants "acknowledge that if this Court applies" *Mathews*, plaintiffs "likely [will] prevail on … their procedural due process claim." NCSBE Br.10-11.[1]

[1] Defendants' assertion that it is "unclear" whether the first protection applies under S.B. 747, and their position that it does, are dubious. The statutory basis they invoke for such protection, North Carolina General Statutes §163-89, by its terms applies only to "absentee ballot" challenges. *See* N.C. Gen. Stat. §§163-87, 163-88 (amended by S.B. 747 to govern early voting challenges); *id.* §163-89(a) (amended by S.B. 747 to apply

Defendants argue, however (Br.11), that the *Mathews* test does not apply, asserting that *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), supply "the more appropriate test." That argument—which the intervenors do not echo, *see* RNC Br.7; Leaders Br.11—lacks merit.

"Multiple district courts … have considered procedural due process challenges to election regulations under" *Mathews*. *Arizona Democratic Party v. Hobbs*, 485 F.Supp.3d 1073, 1093 (D. Ariz. 2020) (collecting cases). Defendants cite (Br.11) three out-of-circuit decisions describing the *Anderson-Burdick* test as "more appropriate," but their leading case conceded that "[n]either *Anderson* nor *Burdick* … dealt with procedural due process claims," *Richardson v. Texas Secretary of State*, 978 F.3d 220, 233-234 (5th Cir. 2020). Moreover, courts in *this* circuit have consistently applied *Mathews* in election-law cases, *see Democracy North Carolina v. North Carolina State Board of Elections*, 476 F.Supp.3d 158, 228-229 (M.D.N.C. 2020); *League of Women Voters of South Carolina v. Andino*, 497 F.Supp.3d 59, 76-77 (D.S.C. 2020), describing defendants' preferred decisions as "outlier cases" that took "an extremely constricted view of liberty," *League of Women Voters*, 497 F.Supp.3d at 77.

In any event, plaintiffs would likely succeed under the *Anderson-Burdick* test. Eligible voters will unquestionably be disenfranchised entirely under S.B. 747—the most

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only to absentee by mail ballots). And as defendants explain—in concluding that a different provision, which similarly applies only to absentee ballots, "no longer appl[ies]" under S.B. 747—"early voting is no longer a form of absentee voting" under S.B. 747. NCSBE Br.8; *see also* NCSBE Br.6 n.6; N.C. Gen. Stat. §§163-166.35, 163-166.40, 163-166.45 (amended by sections 1.(a), 1.(b), 1(c), and 27.(c) of S.B. 747 to recodify 163-227.2, 163-227.5, 163-227.6 and remove all references to absentee voting).

severe burden on the right to vote—and there is "*no evidence*" of pre-S.B. 747 "fraud or other irregularities" to justify that deprivation, NCSBE, *State Board Unanimously Certifies 2022 General Election in NC* (Nov. 29, 2022) (emphasis added).[2]

2. Intervenors Misconstrue State Law And The Right To Vote

Intervenors misapprehend North Carolina law and misidentify the right at stake here, which is the right to vote and have one's vote counted.

As to the first procedural-due-process element—"a cognizable liberty interest," *Kendall*, 650 F.3d at 528—the RNC protests (Br.9) that the implicated "interest here is not the right to vote," but rather "the right to same-day registration with two (rather than one) verification mailing." The RNC itself explains why that is wrong: The procedure at issue "is both a registration and a *voting* procedure." *Id.*; *see* N.C. Gen. Stat. §163-82.6B(d) (providing that if the first verification notice is returned as undeliverable, "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."). For their part, the legislative intervenors contend (Br.11 n.9) that "the 'right to vote' is not affected by S.B. 747" because same-day registrants "may always cas[t] [a] ballot." But "[t]he right to vote includes the right to have the ballot counted." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964). Indeed, "the right to have one's vote counted has the same dignity as the right to put a ballot in a box." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). That is common

[2] https://www.ncsbe.gov/news/press-releases/2022/11/29/state-board-unanimously-certifies-2022-general-election-nc.

sense: What matters in a democracy is not submitting a completed piece of paper to election officials, but having an actual voice in selecting those who will govern.

Intervenors also argue (RNC Br.3-6; Leaders Br.12-13) that the remaining due-process elements—"deprivation of [the] interest" and "constitutionally inadequate" protections against deprivation, *Kendall*, 650 F.3d at 528—are not satisfied here because North Carolina General Statutes §163-82.7 supposedly provides notice and opportunity to be heard before such deprivation. But defendants—who administer North Carolina's elections code—"concede that the notice mailing process set forth under the new same-day registration regime does not provide for either of these protections." NCSBE Br. 10.

Intervenors' error is that they misinterpret the source of notice and opportunity to be heard under the pre-S.B. 747 regime. They point (RNC Br.4; Leaders Br.12) to the notice-and-appeal provisions in §163-82.7(b), asserting that those provisions continue to apply after S.B. 747. But by its terms, that subsection applies only "[i]f the county board of elections makes a[n] [initial] determination pursuant to subsection (a) … that the applicant is not qualified to vote at the address given." It does *not* apply when an application is instead rejected following failed address-verification by mail (which subsection (a) does not encompass). Rather, as defendants explain (Br.6 n.6), in the pre-S.B. 747 regime, notice and an opportunity to be heard following a failed address-verification comes through the absentee-ballot challenge process under subsection (g)(2). That challenge process no longer applies after S.B. 747 because, as defendants also explain (Br.6 n.6), (g)(2) applies only to absentee ballots, and "early voting will no longer be a type of absentee voting" post-S.B. 747. Intervenors are therefore wrong in asserting

(RNC Br.5) that the mail-verification process under S.B. 747 "includes the full panoply of protections under [§]163-82.7," and that §163-82.7's "notice, hearing, and appeal procedures are all part of the process."

But even if §163-82.7's notice-and-appeal procedures did apply following a failed address verification, they would not protect the right to vote and have one's vote counted. That is because of what intervenors recognize as "the commonsense elephant in the room—timing," Leaders Br.13. As the RNC explains (Br.9), "county boards faced with processing a vote must determine whether to count it within a narrow time frame," such that "delay itself could result in the ballot not being counted." The Supreme Court, however, "consistently has held that some form of hearing is required *before* an individual is finally deprived" of a protected interest. *Mathews*, 424 U.S. at 333 (emphasis added). And "[b]ecause 'there is no possibility of meaningful postdeprivation process when a voter's ballot is rejected …, sufficient predeprivation process is the constitutional imperative.'" *Frederick v. Lawson*, 481 F.Supp.3d 774, 793 (S.D. Ind. 2020). Accordingly, courts find procedural-due-process violations where, due to a lack of notice and opportunity to be heard, the result of the initial rejection of a ballot is that the voter's "vote simply does not count." *Zessar v. Helander*, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006). Were it otherwise, the right to have one's vote counted would be "irremediably denied." *Id*. at *9.

Finally, the RNC's abstention argument (Br.6) fails because §163-82.7 is unambiguous and irrelevant. As defendants confirm, "Plaintiffs are correct in their interpretation" on this point. NCSBE Br.13.

3. Due Process Requires Preserving The Two-Mailing Status Quo

Defendants aver (Br.11) that they "stand ready to incorporate whatever additional procedural protections this Court deems necessary." Plaintiffs submit that due process requires enjoining enforcement of S.B. 747's same-day-registration procedures so as to maintain the status quo described on pages 4-6 of defendants' brief.

Defendants respond (Br.6) that while the "two-notice process tends to work effectively during standard voter registration, the short window … between early voting and county canvass can give rise to complications" with early voters. True or not, defendants (and intervenors) are incorrect that "sending two notices is not a *feasible* approach" with same-day-registration voters. NCSBE Br.13. Defendants could send two notices (however long that takes) and not disenfranchise voters unless both were returned as undeliverable. That is how North Carolina (both pre- and post-S.B. 747) treats *non*-same-day registrants—including when such treatment results in the counting of a vote by an individual later deemed ineligible, which is the scenario defendants and intervenors invoke as justifying the disparate treatment of same-day-registration voters. If a verification notice "is returned … as undeliverable after a person has already voted in an election, then the county board *shall treat the person as a registered voter*" for purposes of that election. N.C. Gen. Stat. §163-82.7(g)(3) (emphasis added).

Intervenors complain that plaintiffs have not "offered any viable solutions that would allow address verification during the short same-day registration period that *also* alleviates the risk of ineligible votes being counted." Leaders Br.13 (emphasis added). Prior law treating one-stop early voting as absentee voting provides the obvious answer:

Ballots could be challenged if either the first or second verification notice was returned as undeliverable. N.C. Gen. Stat. §§163-82.7(g)(2), 163-89. Unlike S.B. 747, which automatically removes a same-day registrant's ballot if the first notice is returned as undeliverable, *id.* §163-82.6B(d), the challenge procedure provided voters with the opportunity to be heard before their ballots were rejected. *Id.* §163-89(e). In any event, it is the state's obligation, "[h]aving induced voters to vote" on the same day they register, to "provide adequate process to ensure that voters' ballots are fairly considered and, if eligible, counted." *Saucedo v. Gardner*, 335 F.Supp.3d 202, 217 (D.N.H. 2018).

Intervenors also complain that plaintiffs "do not explain why due process would be satisfied by two mailings but offended by one," RNC Br.8, and say one mailing suffices because "any claim that existing mail procedures create a risk of harm is specious," Leaders Br.14. But the "presumption of effective delivery" they rely on for this argument, *id.*, applies only when there is "no apparent return of the [mailed] notice," *Nibagwire v. Gonzales*, 450 F.3d 153, 156 (4th Cir. 2006). It does *not* apply, that is, when, as relevant here, a notice *is* returned as undeliverable. Moreover, intervenors acknowledge only one reason a notice could be returned as undeliverable: a same-day registrant having incorrectly "dictate[d]" or "enter[ed] their own address" when registering, Leaders Br.14 n.11. This Court, by contrast, has recognized that undeliverable mail is "not a precise verification system," *North Carolina State Conference of the NAACP v. McCrory*, 182 F.Supp.3d 320, 449 (M.D.N.C. 2016), precisely because "[t]here are *a number of reasons* why … mailings might be returned as undeliverable," *North Carolina State Conference of the NAACP v. North Carolina State*

Board of Elections, 2016 WL 6581284, at *7 (M.D.N.C. Nov. 4, 2016) (emphasis added). Indeed, "[t]he Postal Service itself is responsible for" nearly one-quarter of all undeliverable mail. Office of Inspector General, United States Postal Service, *Strategies for Reducing Undeliverable as Addressed Mail*, Rep. No. MS-MA-15-006 at 5 (May 1, 2015).[3] The risk that such an error—i.e., one *not* tied to a voter's mistake—will occur once is far greater than the risk of it occurring twice. *See, e.g.*, *Wal-Mart Stores, Inc. v. Cuker Interactive, LLC*, 2017 WL 11681850, at *1 (W.D. Ark. Apr. 5, 2017) ("[T]he probability of the joint occurrence of a number of mutually independent events is equal to the product of the individual probabilities that each … event[] will occur."). Preserving the two-mailing requirement thus would be a dramatic improvement.

In short, due process requires enjoining enforcement of S.B. 747's same-day registration and voting procedures so as to maintain the status quo described on pages 4-6 of defendants' brief.

B. Civil Rights Act

Neither defendants nor intervenors dispute that S.B. 747 imposes a higher standard to prove eligibility on a county's same-day registrants than its non-same-day registrants. Instead, they argue that plaintiffs may not sue under the CRA, and that the CRA permits this differential treatment. Both arguments fail.

First, intervenors' assertion (RNC Br.12-13; Leaders Br.9) that 52 U.S.C. §10101 is enforceable only by the attorney general relies on out-of-circuit cases espousing the

[3] https://www.uspsoig.gov/sites/default/files/reports/2023-01/ms-ma-15-006.pdf.

minority view. The Fourth Circuit has assumed there *is* a private right of action, *Washington v. Finlay*, 664 F.2d 913, 926 (4th Cir. 1981), and "the majority of courts" agree, *Taylor v. Howe*, 1999 WL 35793770, at *8 (E.D. Ark. Mar. 31, 1999) (collecting cases). Defendants agree too, quibbling merely (Br.15) that plaintiffs must bring such suits under 42 U.S.C. §1983. Nothing defendants cite, however, states that §10101 is privately enforceable *only* through §1983, or that CRA claims should be rejected absent an express citation to §1983 (which would serve no purpose). In any event, because plaintiffs could simply amend their complaint as of right by adding a citation to §1983, the absence of such a citation in the initial complaint does not affect plaintiffs' likelihood of success.

Second, defendants and intervenors posit that the CRA allows states to apply higher standards to prove eligibility to same-day registrants than to others because same-day and standard registration differ. NCSBE Br.15-17; RNC Br.13-16; Leaders Br.10. That circular argument contravenes §10101(a)(2)(A)'s text, which broadly prohibits states, "in determining whether any individual is qualified under State law or laws to vote in any election," from applying "any standard, practice, or procedure different from [those] applied … to other individuals within the same county," period. Defendants and intervenors protest that applying the plain text would prohibit *any* variation in registration and voting methods, and thus yield absurd results—for example, requiring the state to abolish mail voting or to stop offering multiple locations for registration. NCSBE Br.16-17; Leaders Br.10; RNC Br.14-16. That is wrong. The CRA does not prohibit different methods of *registration* or *voting*. It prohibits differential treatment "in determining

whether any individual is *qualified … to vote*," 52 U.S.C. §10101(a)(2)(A) (emphasis added). While registering "at a DMV versus doing so at a public library," RNC Br.16, is unrelated to determining one's eligibility to vote, S.B. 747 would disqualify same-day registrants based on standards and procedures not applied to other voters within the same county. *See* Memo. 17-19. S.B. 747, that is, does not lay out different registration or voting methods; it creates different standards and procedures for disqualifying voters.

Finally, same-day registrants cannot avoid the extra burdens by simply "choos[ing]" to vote "in a different way." RNC Br.16. When a voter is not registered shortly before an election, same-day registration is the only option.[4]

C. Help America Vote Act

Regarding plaintiffs' claim that S.B. 747 violates HAVA by not providing a ballot-tracking system for same-day registrants, defendants and intervenors first reprise their CRA arguments: The legislative intervenors contend (Br.8-9) that HAVA is not privately enforceable, while defendants say that it is but only under §1983, NCSBE Br.17. These arguments fail for the reasons given earlier.

Intervenors' and defendants' other HAVA arguments (which conflict) lack merit. Intervenors argue that North Carolina's existing tracking system will apply to same-day registrants under S.B. 747. RNC Br.10-11; Leaders Br.9. That is belied by defendants,

[4] Intervenors also suggest that the CRA forbids differential treatment based only on race, Leaders Br.14, or similarly immutable characteristics, RNC Br.10 n.8. But §10101(a)(2)(A) does not mention race or other categories. *See Common Cause v. Thomsen*, 574 F.Supp.3d 634, 639 (W.D. Wis. 2021).

who say (Br.18) they will *not* employ the existing system to track same-day registrants' ballots.

Defendants instead say that HAVA's tracking requirement is inapplicable to same-day registrants. That too is wrong. Defendants note (Br.17) that 52 U.S.C. §21082(a)'s provisional-voting requirements apply only when "an individual declares that such individual is a registered voter" yet "does not appear on the official list of eligible voters for the polling place." But same-day registrants who declare they are registered upon turning in a completed registration form will not immediately appear on the list of eligible voters. While a same-day registrant's ballot may ultimately not be counted, that person has still registered. Defendants also contend (Br.18) that §21082(a)(5)(B) "does not apply because any person who registers and votes on the same day during early voting is provided with a *retrievable* ballot, not a *provisional* ballot." But nothing in HAVA suggests that what North Carolina deems a "retrievable" ballot is not a "provisional" ballot for purposes of §21082(a)(5)(B). To the contrary, §21082(a) states that a person who "does not appear on the official list of eligible voters for the polling place ... shall be permitted to cast a provisional ballot," and under S.B. 747, people in that situation (same-day registrants) may cast retrievable ballots. Defendants cannot evade HAVA merely by assigning a different name to same-day registrants' ballots.[5]

[5] The legislative intervenors suggest (Br.7-8, 11) that plaintiffs lack standing. That too is wrong. As the complaint explains (¶¶26-27), S.B. 747 would both deprive Democratic voters of their right to vote, which suffices for representational standing, and require the diversion of plaintiffs' resources and undermine plaintiffs' ability to get Democrats elected, which suffices for organizational standing. *North Carolina State Conference of NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020). Indeed, the Fourth Circuit has

II. IRREPARABLE INJURY

Absent an injunction, Democratic voters will likely be unlawfully prevented from voting or having their votes counted. Memo. 20. Defendants do not dispute this. NCSBE Br.21. Intervenors do, but only by repeating their failed due-process arguments and theorizing that voters can avoid harm by registering in advance, which defeats the purpose of same-day registration. RNC Br.16-17; Leaders Br.15. No opposition rebuts the critical point (Memo. 20): If same-day registrants are denied the ability to have their votes counted in upcoming elections, they will lose that right *forever*. That loss—of the most "precious" of our rights, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), a right "preservative of all" others, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966)—constitutes irreparable harm. *See, e.g.*, *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("Courts routinely deem restrictions on fundamental voting rights irreparable injury."); *accord Poindexter v. Strach*, 324 F.Supp.3d 625, 634 (E.D.N.C. 2018); *Dean v. Leake*, 550 F.Supp.2d 594, 602 (E.D.N.C. 2008).

III. BALANCE OF EQUITIES AND PUBLIC INTEREST

The merged balance-of-equities and public-interest factor strongly favors preliminary relief, because an injunction would prevent disenfranchisement without substantially burdening the state. Memo. 21-22. Defendants and intervenors respond

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explained that "[w]hen an action perceptibly impair[s] an organization's ability to carry out its mission and consequent[ly] drain[s] … the organization's resources, … the organization has suffered injury in fact." *Id*. (quotation marks omitted).

(NCSBE Br. 21; RNC Br. 19; Leaders Br. 16) that states suffer harm whenever their laws are enjoined. But that generic harm (which if sufficient would preclude injunctive relief in nearly every statutory challenge) cannot outweigh the denial of the fundamental right to vote. Defendants and intervenors also contend (NCSBE Br. 22; Leaders Br. 17-18) that S.B. 747 promotes election integrity. But there was *no* evidence of fraud in the last election, nor any legislative report justifying S.B. 747 on that ground. Memo. 21. Regardless, "electoral integrity is enhanced, not diminished, when all eligible voters are allowed to exercise their right to vote free from interference and burden unnecessarily imposed by others." *North Carolina State Conference of NAACP v. Cooper*, 430 F.Supp.3d 15, 53 (M.D.N.C. 2019). Finally, intervenors complain that an injunction could cause "confusion." RNC Br.18; Leaders Br.19. But as shown by the many disagreements between defendants and intervenors, preserving the pre-S.B. 747 status quo is less confusing than the changes that law wreaks.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be granted.

December 4, 2023

Respectfully submitted,

/s/ Jim W. Phillips, Jr.

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CERTIFICATE OF WORD COUNT

Pursuant to LR 7.3(d)(1) and the Court's Order (DE 57), the undersigned certifies that plaintiffs' consolidated reply brief in support of their motion for preliminary injunction (DE 6) does not exceed 4,000 words in length, including the body of the brief, headings and footnotes, and excluding any caption, signature lines, certificate of service, and any cover page or index. The undersigned certifies this computation was made using the word count feature of word processing software used to create the brief.

This the 4th day of December, 2023.

/s/ Jim W. Phillips, Jr.
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CERTIFICATE OF SERVICE

On this 4th day of December 2023, the foregoing document was served on counsel of record through the Court's Case Management and Electronic Case Filing (CM/ECF) System.

/s/ Jim W. Phillips, Jr.
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