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

VOTO LATINO, et al., Plaintiffs, v. ALAN HIRSCH, in his official capacity as Chair of the State Board of Elections, et al., Defendants.	§ § § § § § § § § § §	Case No. 1:23-CV-861-TDS-JEP

INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This is the second preliminary-injunction motion before this Court concerning Section 10.(a) of S.B. 747. At issue is North Carolina's same-day registration process, which occurs in a narrow time frame of about two weeks before election day and is utilized by a comparatively small subset of North Carolina voters. Voters who register in person, by mail, or online as of the registration deadline 25 days before an election do not need this procedure. North Carolina is among the minority of states that merge registration and voting into one process to maximize access to the franchise. Its efforts are commendable and do not warrant federal judicial interference.

The Plaintiffs in this case, unlike those in the companion case *Democratic National Committee v. North Carolina State Board of Elections*, 1:23-cv-00862 (the "*DNC* Action"), do not contend that Section 10.(a) denies applicants a notice and hearing opportunity where county election boards deny applications after an initial review to "make a determination that the applicant" is or is not "qualified to vote at the address given." N.C.G.S. § 163-

82.7(a)(1) and (2); S.B. 747 § 10.(a)(d) (to be codified as N.C.G.S. § 163-82.6B(d). As all defendants in the *DNC* Action agree, notice and a hearing are provided at that stage. As to the registration-denial component, Section 10.(a) directs county boards to implement a process that includes a requirement of a notice and hearing opportunity. *See* N.C.G.S. § 163-82.7(b). As to the vote itself, the State Board of Elections will apply the challenge procedure (which includes notice and a hearing) of N.C.G.S. § 163-89 if it finds the applicant ineligible. *See* Numbered Memo 2023-05 at 6. Plaintiffs here do not challenge these points.

Their motion focuses on a later stage of the process governed by what Plaintiffs call the "Undeliverable Mail Provision." It applies where a county board tentatively determines that a same-day registrant is qualified to vote at the stated address, but a subsequent mailed notice sent by the board is returned as undeliverable. Under the Undeliverable Mail Provision, because the failure of delivery defeats the applicant's assertion regarding residency, the county board does not register the applicant and retrieves the applicant's ballot. S.B. 747 § 10.(a)(d) (to be codified at N.C.G.S. § 163-82.6B(d)).

Plaintiffs' preliminary-injunction motion raises a single due-process challenge to the Undeliverable Mail Provision, but it is unlikely to succeed. As a threshold matter, Plaintiffs' challenge turns on a potential harm with a very small chance of occurring: a small fraction of mail is returned undeliverable; a fraction of that is returned in error. Plaintiffs cannot show a likelihood of harm from this provision and are unlikely to prove Article III standing. On the merits, Plaintiffs' due-process claim fails on the facts and the law. On the facts, Plaintiffs do not address the website sponsored by the North Carolina

Board of Elections (the "State Board"), which provides the notice Plaintiffs say is required in a way that bypasses the postal-error risk that undergirds Plaintiffs' claim. On the law, Plaintiffs' due-process challenge does not fit the election context, where irregularities—though unfortunate—do occur in a small fraction of instances. Established precedent holds that garden variety errors in election administration do not create constitutional problems, and Plaintiffs' invocation of the Due Process Clause to bypass that principle is unpersuasive. Although it is a best practice for states to maximize notice and hearing opportunities where ballots are not counted—as North Carolina has done—it would not work to administer election recounts, contests, or other processes in the manner Plaintiffs' novel claim would require. This Court should deny the instant motion.

APPLICABLE LAW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In seeking injunctive relief, Plaintiffs bear the heavy burden of showing (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities weighs in their favor; and (4) a preliminary injunction is in the public's interest. *W.Va. Ass'n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009).

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed on the Merits

A. Plaintiffs Are Unlikely To Establish Standing

Plaintiffs are unlikely to show standing to challenge the Undeliverable Mail Provision. "On a motion for a preliminary injunction, a plaintiff's 'burden of showing a likelihood of success on the merits necessarily depends on a likelihood that plaintiff has standing.'" *Action NC v. Strach*, 216 F. Supp. 3d 597, 630 (M.D.N.C. 2016) (quoting *Obama v. Klayman*, 800 F.3d 559, 565 (D.C. Cir. 2015)) (alteration marks omitted); *see Speech First, Inc. v. Sands*, 69 F.4th 184, 191–92 (4th Cir. 2023). Plaintiffs must establish a likelihood of proving "(1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision." *Speech First*, 69 F.4th at 192 (citation omitted). Plaintiffs do not meet this test.

1. Plaintiffs propose that individual Plaintiff Sophie Mead and unidentified members of entity Plaintiffs Watauga County Voting Rights Task Force ("Task Force"), Voto Latino, and Down Home North Carolina ("Down Home") face a "substantial risk of disenfranchisement." Mot. 15. They contend that Plaintiff Mead and others intend to use same-day registration, that the attendant mailing may be returned undeliverable, and that they may not learn of this in time to take corrective action. *See* Mot. 9–13, 15.

As an initial matter, the entity Plaintiffs are unlikely to succeed because they have "failed to identify a single *specific member* injured" by the Undeliverable Mail Provision. *See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*,

713 F.3d 175, 184 (4th Cir. 2013); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (discussing the "requirement of naming the affected members"). The entity Plaintiffs cannot rely on unidentified persons to establish their standing.

Plaintiffs are also unlikely to establish standing for Plaintiff Mead because the injury proposed as to her is "speculative." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). It is difficult to follow Plaintiffs' contention that Plaintiff Mead will need to rely on same-day registration in next year's elections. She expects to graduate from Appalachian State University "in spring 2024," Mot. 13, which will occur after the 2024 primary and well in advance of the November 2024 general election. Plaintiff Mead has attested that that her future plans are uncertain, Ex. A, Mead Depo. 17:6–21, and that she has no plans to move during next year's early voting period, *id.* 17:23–18:13. It is doubtful that Plaintiff Mead will need same-day registration. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563–64 (1992) (finding speculation that wildlife observers might travel to areas affected by challenged regulations did not support standing).

In any event, the odds that Plaintiff Mead will use same-day registration *and* be erroneously deprived the right to vote without due process is vanishingly small. Plaintiffs contend that "as much as 4.3 percent of all mail sent is undeliverable as addressed," that "23 percent of undeliverable mail resulted from" postal-worker error, and that an unknown percentage of undeliverable mail might result from poll-worker error. *See* Mot. 20–24. That indicates that a future effort at same-day registration where Plaintiff Mead is qualified to vote is nearly certain to succeed. A small fraction of mail is returned undeliverable, a small fraction of that occurs in error, about 0.9% of undeliverable mail results from postal error,

and an unknown (but undoubtedly small) percentage of undeliverable mail results from poll-worker error.[1] The Sixth Circuit found no standing in a challenge to potential poll-worker error highly unlikely to occur, *see Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 387 (6th Cir. 2020), and this Court should follow suit.[2]

It does not matter that Plaintiff Mead previously experienced an erroneous failure of delivery in the same-day registration context. Mot. 12–13. "[P]ast wrongs do not in themselves amount to that real and immediate threat of injury," and evidence of a "likelihood" that Plaintiff Mead "will again be wronged in a similar way" is essential. *Simmons v. Poe*, 47 F.3d 1370, 1382 (4th Cir. 1995) (quoting *Lyons*, 461 U.S. at 111). The record does not prove a likelihood of that.

2. Plaintiffs also allege that the entity Plaintiffs have standing in their own right. But there is no basis for standing under their principal contention that the Undeliverable Mail Provision "harms" their "missions." Mot. 15. "[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 40 (1976); *see also Lane v. Holder*, 703 F.3d 668, 675 (4th Cir. 2012).

Plaintiffs fall short in contending the Undeliverable Mail Provision will require them "to divert their resources from other important initiatives to counteract the harms

[1] Many mailing errors (e.g., those resulting in lost mail) would not trigger the Undeliverable Mail Provision.

[2] For the same reason, even if some members of the entity Plaintiffs had been disclosed, their claim to standing would likely fail on the same grounds. *See Memphis A. Philip Randolph Inst.*, 978 F.3d at 386–89 (finding no standing of entity members on this basis).

created by the Undeliverable Mail Provision." Opp. 15. This merely describes the entities' "own budgetary choices," not a cognizable Article III injury. *Lane*, 703 F.3d at 675.

Regardless, the record does not show that the entity Plaintiffs have in fact increased spending because of the Undeliverable Mail Provision. Plaintiff Task Force does not have a bank account, Ex. B, Williamson Depo. 24:19–20, does not hire anyone to do anything, *id.* 49:7–9, and cannot establish a diversion of resources it does not have for expenditures it will not make. The Task Force operates a texting service funded by the Watauga County Democratic Party "to inform voters about their voting options," Ex. C, Anderson Depo. 21:8–11; 23:11–12, 15–24, but texts are sent to registered voters only, *id.* 27:2–5, and have no connection to same-day registration. *Id*. 79:24–80:19, 83:7–12. Voto Latino is also unlikely to establish a diversion of resources, which has yet to occur, and may never occur, and the testimony of their corporate representative lacked any reliable basis to believe it is likely to occur. *See* Ex. D, Patel Depo. 45:21–46:1 (no basis to know of impact on Voto Latino constituents); *id.* 52:24–53:14 (speculation on future injury admittedly yet to occur). Likewise, S.B. 747 has not impacted Voto Latino's fundraising. *Id.* 39:9–13.

Finally, it is highly speculative that any entities' "efforts . . . will be nullified when registrations are rejected and ballots discarded based on one piece of undeliverable mail." Mot. 8. As shown, it is unlikely that this will occur—especially to specific persons the Plaintiff entities contact—and the entity Plaintiffs' actions underscore this: one of them alone spends "upwards of $1 million on direct *mail*," Mot. 8 (emphasis added), demonstrating their own confidence in the mail system, *see also* Ex. D, Patel Depo. 55:19–22; 56:17–22; Ex. E, Patel Depo. Ex. 12.

B. Plaintiffs Are Unlikely To Establish a Constitutional Violation

1. North Carolina Provides the Notice Plaintiffs Say Is Required

Standing aside, Plaintiffs are unlikely to establish a constitutional impingement. Their position rests on the factual premise that North Carolina provides no notice when the Undeliverable Mail Provision is triggered, but the preliminary-injunction shows otherwise.

The State Board hosts a public-facing voter-search website, *see* North Carolina State Board of Elections, Voter Search,[3] Ex. F., Mead Depo. Ex. 1, that the sole voter Plaintiff (Sophie Mead) attested accurately reflects her voting history, Ex. A, Mead Depo. 9:23–17:2. The record displays that, when Plaintiff Mead voted through same-day registration, that act was recorded, and it was also recorded—in a column titled "Return Status"—that her vote was "ACCEPTED":

Election Date	County	Absentee Type	Absentee Status	Return Date	Return Method	Return Status
11/07/2…	WATAUGA	ONE-STOP EARLY VOTING	VALID RETURN	11/01/2023	IN PERSON	ACCEPTED

Ex. G, Mead Depo. Ex. 17 at 2. Plaintiffs presented no evidence that the same column would not record the non-acceptance of a ballot, and the plain inference is that it would. Applicants in receipt of such a notice can contact local election officials, and they can seek to vote again during the early voting period.

[3] https://vt.ncsbe.gov/reglkup/.

Plaintiffs do not even attempt to say why this form of notice does not satisfy their proposed due-process test, and they cannot make "a clear showing" of a likelihood of success, where the State's website appears to afford the notice they say is required. *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 292 (4th Cir. 2011). Notice via website is, by all accounts, superior to a mailing, as Plaintiffs' core contention is that the mail is unreliable. *See* Mot. 19–23. Plaintiffs' corporate representatives admit that a notice mailing is unlikely to cure the problems they claim to have identified, because the same errors they contend plague the Undeliverable Mail Provision would also plague a mailing notice. *See* Ex. D, Patel Depo. 50:2–4 (testifying that if the desired notice "is by mail, then we have the same problem potentially"); Ex. B, Williamson Depo. 53:8–9 (recognizing that it "doesn't matter how many [notices] you send unless you send them to the correct address").

2. There Is No Unreasonable Burden on the Franchise or Due Process Violation

Even assuming Plaintiffs' factual assertion were correct, they would be unlikely to prevail. They invoke a due-process balancing test not applicable to voting rights, do not establish a cognizable voting burden, and fail to appreciate that the demands they make could never be administered in a principled manner in the election context.

a. Plaintiffs Invoke the Wrong Legal Test

Plaintiffs err in invoking the due-process standard articulated in *Matthews v. Eldridge*, 424 U.S. 319 (1976). Every circuit to have considered whether it applies to election-law challenges has answered in the negative and instead applied the test of *Anderson v. Celebrezze*, 460 U.S. 780(1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992).

See 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); *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 233-34 (5th Cir. 2020). Under the *Anderson/Burdick* test, courts must weigh the "character and magnitude of the burden the State's rule imposes" on the right to vote "against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotation marks omitted). This test, not the *Matthews* test, is appropriate in this context.

First, the due-process test applies only to the deprivation of a liberty or property interest, *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989), and the right to vote is neither, *see Richardson*, 978 F.3d at 229–34; *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 479 (6th Cir. 2008); *Johnson v. Hood*, 430 F.2d 610, 612 (5th Cir. 1970); *cf. Jones v. Governor of Fla.*, 975 F.3d 1016, 1048 (11th Cir. 2020).

Second, the Supreme Court has held that courts adjudicating "challenges to specific provisions of a State's election laws" under the Fourteenth Amendment "*must resolve*" them under the *Anderson/Burdick* test. *Anderson*, 460 U.S. at 789 (emphasis added); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (opinion of Stevens, J.); *id.* at 204 (opinion of Scalia, J.). That holding should not "be discarded merely by raising the same challenge under the banner of procedural due process." *Hobbs*, 18 F.4th at 1195. The Supreme Court has applied *Anderson/Burdick* to all electoral challenges, including those procedural in nature. *See Democratic Party of Va. v. Brink*, 599 F.Supp.3d 346, 361 (collecting cases).

Third, the *Anderson/Burdick* framework properly accounts for "the mechanics of the electoral process." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). The due-process cases Plaintiffs cite—regarding Social Security disability benefits and Medicare billing by a chiropractor—do not address factors unique to elections, where "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Because every election law will impact the right to vote and may be applied such that a small subset of votes are not counted, a test requiring the types of procedures applicable in Social Security, employment, immigration, and other contexts will cripple administration. *Richardson*, 978 F.3d at 235. As shown below (§ I.B.2.b.iii), Plaintiffs' contention that notice and a hearing is required any time a ballot is challenged or not counted would be unworkable and at odds with practice, precedent, and common sense.

b. Plaintiffs Establish No Constitutional Violation

Plaintiffs are unlikely to establish a constitutional violation under any plausible standard. Their complaint of error in administration of the Undeliverable Mail Provision does not arise to a cognizable voting burden (or due-process impingement) and requires only minimal justification. The State's interests in validating voter assertions and discouraging and preventing fraud provide any justification required. Plaintiffs' contrary position proves too much and cannot be applied on a principled and practical basis.

i. No Cognizable Burden on the Franchise Is Likely to Be Shown

Plaintiffs are unlikely to cross the threshold step of showing that the Undeliverable Mail Provision "imposes some burdens on voters." *Crawford*, 553 U.S. at 197 (opinion of Stevens, J.). Under the *Anderson-Burdick* test, the courts "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick,* 504 U.S. at 434 (citation omitted). Accordingly, "'severe' restrictions" on the right to vote "must be 'narrowly drawn to advance a state interest of compelling importance," and "reasonable, nondiscriminatory restrictions" are "generally" justified by "important regulatory interests." *Id.* at 428 (citation omitted).

But here, Plaintiffs do not challenge "restrictions" on the franchise; rather, they allege there may be error in implementing an otherwise valid voting procedure. As designed, the Undeliverable Mail Provision will only result in invalidation of registration and ballots where a voter does not in fact reside at the address represented in the voter's application. Plaintiffs do not argue otherwise. Instead, they propose that certain types of errors will result in undeliverable mail (at an unknown rate unlikely to exceed 1%) even where the voter's application is truthful. *See* Mot. 19–23. That contention carries no constitutional significance, as voting burdens are judged by what "a challenged regulation burdens" by design. *See Burdick*, 504 U.S. at 434; *Crawford*, 553 U.S. at 197–98 (opinion

of Stevens, J.); *see also Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (rejecting "arbitrary" standards of vote-counting).

The constitutionality of a voting procedure does not turn on whether it is implemented free from error. Fourth Circuit precedent recognizes that "[e]lections are, regrettably, not always free from error," as "[v]oting machines malfunction, registrars fail to follow instructions, absentee ballots are improperly administered, [and] poll workers become over-zealous." *Hutchinson v. Miller*, 797 F.2d 1279, 1286–87 (4th Cir. 1986). Accordingly, courts have "uniformly declined" to find constitutional violations "with respect to garden variety election irregularities." *Id.* at 1283 (quoting *Griffin v. Burns*, 570 F.2d 1065, 1076 (1st Cir. 1978)); *see Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985); *Gamza v. Aguirre*, 619 F.2d 449 (5th Cir.1980); *Hennings v. Grafton*, 523 F.2d 861 (7th Cir.1975); *Pettengill v. Putnam County R-1 School District*, 472 F.2d 121 (8th Cir. 1973); *Powell v. Power*, 436 F.2d 84 (2d Cir. 1970); *White-Battle v. Democratic Party of Virginia*, 323 F. Supp. 2d 696, 705 (E.D. Va. 2004), *aff'd*, 134 F. App'x 641 (4th Cir. 2005); *Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 915–16 (E.D. Va. 2018). Where a challenge is directed, not to a voting restriction, but to alleged errors in implementing voting procedures, federal courts intervene only in cases of "total abrogation" of standards, "systematic lack of uniform rules, standards and procedures," or "broad-gauged unfairness that renders an election patently and fundamentally unfair." *Lecky*, 285 F. Supp. 3d at 915–16.[4]

[4] Much of this precedent arises in cases challenging error after it has occurred, rather than before, but Plaintiffs' choice to do the latter only makes for a weaker case.

An alleged error rate that is unknown (and unlikely to exceed 1%) does not satisfy this high standard. The challenge is not cognizable, especially where Plaintiffs seek *facial* relief from the Undeliverable Mail Provision, which requires that it be shown unlawful in every possible iteration, *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008). Plaintiffs' challenge is no different from a challenge to voting machines based on the fact that a very small amount of ballots may be misread, damaged, or not recorded; a challenge to precincts because a small number of voters may be given the wrong ballot; a challenge to any form of marking because a small number of markings may be misconstrued; or a challenge to virtually any other procedure because—in administering millions of votes—workers may commit a fraction of (typically inadvertent) errors. Indeed, Plaintiffs' challenge is much weaker than a challenge to mail-in voting would fare on the ground that the errors resulting in undeliverable mail—plus other errors (like those resulting in lost mail)—will eventuate in a very small number of ballots being lost or arriving late, without a notice or hearing opportunity.

Even if the *Mathews* test applied, the result would be the same. If there is a liberty or property interest in the right to vote, a state action must "*deprive[]*" someone of a cognizable interest, not merely "*jeopardize[]*" that interest before a due-process concern arises. *Beley v. City of Chicago*, 901 F.3d 823, 827 (7th Cir. 2018); *see Common Cause Indiana v. Lawson*, 978 F.3d 1036, 1041 (7th Cir. 2020) (no right to due-process protection from long poll lines "that merely jeopardize[] a liberty interest"). Plaintiffs here complain of a risk of error, not of a deprivation of anyone's right to vote, and their challenge fails.

ii. Any Justification Requirement Is Likely to Be Satisfied

Any cognizable burden requiring justification is satisfied by "the State's important regulatory interests." *Burdick*, 504 U.S. at 434. While governing precedent rightly holds that "that 'voting is of the most fundamental significance under our constitutional structure,'" it equally recognizes that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 433 (citations omitted). Accordingly, the Supreme Court has consistently declined to read federal law to "tie the hands of States seeking to assure that elections are operated equitably and efficiently" *Id.*; *see also Crawford*, 553 U.S. at 191 (opinion of Stevens, J.); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338–39 (2021); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Here, it would be particularly noxious to tie North Carolina's hands, when it has woven elements of registration and voting together into a generous voting opportunity that most states do not provide, Ex. H, Expert Report of Andy Taylor 5–6, and which Plaintiffs call "an important means by which North Carolinians participate in elections," Mot. 6. The State has compelling reasons to tailor the processes of same-day registration to account for both the registration and voting components of the merged process.

Deterring and Preventing Fraud. Governing precedent establishes "the legitimacy [and] importance" of states' interests in deterring election fraud. *Crawford*, 553 U.S. at 195–96 (opinion of Stevens, J.). "Fraud can affect the outcome of a close election," it can "dilute the right of citizens to cast ballots that carry appropriate weight, and it "can

also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Brnovich*, 141 S. Ct. at 2340. The Undeliverable Mail Provision serves that interest by testing the assertions of applicants concerning their residencies. If, for example, an applicant erroneously states a prior address as the applicant's current address, or otherwise is inaccurate or untruthful in alleging residency, the postal service will likely catch the error and return the State Board's mailing as undeliverable.

Plaintiffs' attacks on this interest err. They contend that "[v]oter fraud is exceedingly rare in North Carolina" and that "there is no history of same-day registration *ever* serving as a vehicle for fraud." Mot. 25–26. But the Supreme Court in *Crawford* found the interest in preventing fraud compelling even though "[t]he record contains no evidence of any such fraud actually occurring in Indiana [where the case arose] at any time in its history," and even though most national election fraud is "perpetrated using absentee ballots" and would not have been prevented by the photo-identification method under dispute. 553 U.S. at 194–96. The Court reached virtually the same conclusion again in *Brnovich*. 141 S. Ct. at 2343. That rationale is binding here. *See Frank v. Walker*, 768 F.3d 744, 749–50 (7th Cir. 2014) (rejecting effort to recast *Crawford*'s holding as fact-finding inapplicable in future cases). North Carolina need not wait for fraud to actually occur—or occur in ways that can be detected—before acting to *deter* people from attempting it and *prevent* it when it is attempted. And, in an environment where allegations of election fraud are widespread, the State has a vital interest in *promoting* confidence by showing that

appropriate precautions are being utilized to safeguard procedures that may appear to open the door to misconduct. *See Brnovich*, 141 S. Ct. at 2340.

Besides, the record contains substantial evidence of electoral fraud in North Carolina since 2007, which is documented in the corrected expert report that *Plaintiffs* sponsored. *See* Ex. I, Corrected Expert Report of Dr. Kropf ¶¶ 16–30. This includes "441 open cases of voting by suspected active felons," "41 cases of non-citizens with legal status voting," "24 cases of double voting," an entire election invalidated in Pembroke city after ineligible voters voted, another election invalidated there because it was shown that voters did not reside at their stated residencies, and a showing in Lumberton that 20 voters did not reside where they alleged. *Id.* ¶¶ 17, 18. That is by orders of magnitude more fraud than was on the record in *Crawford*. 553 U.S. at 194–96.

Plaintiffs' expert speculates that the Undeliverable Mail Provision would not have prevented these and the many other episodes on record, but that is far from clear. And, besides, the expert understates the effect of that provision. To begin, the many documented episodes of fraud and attempted fraud "demonstrate that . . . the risk of voter fraud [is] real" and justify the State in acting against fraud in *all* its systems. *Crawford*, 553 U.S. at 196. Moreover, Plaintiffs' expert does not account for the State's deterrence interest: persons considering election fraud will understand that assertions concerning their residencies will be tested and are less likely to attempt fraud. Besides, Plaintiffs' expert acknowledges "there are no reliable national or even statewide databases" concerning election fraud, Ex. I, Corrected Expert Report of Dr. Kropf ¶¶ 14, so any analysis is necessarily incomplete.

The analysis here is particularly weak. Instead of relying on data from the State Board, Dr. Kropf shortcut her research by relying on the 2022 Election Administration and Voting Survey report completed by Fors Marsh for the United States Election Assistance Commission. Ex. J, Dr. Kropf Depo. 65:1–66:9. The survey used by Dr. Kropf does not look at primary or municipal elections. *Id.* 69:4–10. Dr. Kropf's "rough estimates" are not reliable data and should not be considered. *Id.* 69:17–72:15.

Administering the Vote Count in a Timely Manner. The State's specific choices under the Undeliverable Mail Provision are reasonably tailored to its compelling interest in timely administration of the canvas and counting of votes. *See, e.g.*, *Am. Party of Texas v. White*, 415 U.S. 767, 786–87 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 761–62 (1973). Same-day registration occurs from the third Thursday before election day through 3:00pm the Saturday before election day. N.C.G.S. § 163-227.2; S.B. 747 § 10.(a) (modifying §163-82.6B). To permit same-day registration through the Saturday before election day—which Plaintiffs do not challenge as a policy—the State needs a procedure of address verification that can be timely completed before the canvass. Plaintiffs do not explain how the State can feasibly provide a mailed notice of undeliverable mail in a timely manner. "[T]he Constitution has never required the States to do the impossible," *White*, 415 U.S. at 786–87, and it does not here require that the State sacrifice its compelling interests through a system that cannot be administered in time for votes to be counted and results certified.

***Mathews* Balancing**. Again, the *Mathews* test (though inapplicable) does not yield a materially different analysis. The *Mathews* test calls for weighing "the private interest

that will be affected by the official action," the "risk of an erroneous deprovision," the "probably value, if any, of additional or substitute procedural safeguards," and "the Government's interest." *Miranda v. Garland*, 34 F.4th 338, 358 (4th Cir. 2022) (quoting *Mathews*, 424 U.S. at 335).

Even assuming a liberty interest in voting rights, the other factors cut against Plaintiffs. There is a very small risk of an erroneous deprivation, and Plaintiffs have not proven what that is. Only a small fraction of a small fraction "of all mail" is erroneously returned undeliverable, Mot. 22, and there is no evidence of what percentage of same-day registration mailings are so returned. Moreover, there is no probable value of different procedural safeguards. Assuming (with Plaintiffs) that the State's website does not count in its favor, there is no reason to believe that curing postal uncertainty with more mailings will resolve their concerns. Ex. D, Patel Depo. 50:2–4; Ex. B, Williamson Depo. 53:8–9; *see* Ex. H, Expert Report of Taylor 9–10.

Importantly, "due process is flexible and calls for such procedural protections as the particular situation demands." *Miranda*, 34 F.4th at 359 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Due Process Claus contains "a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.* The State's obligations in this context—even if *Mathews* balancing applies—must be understood against established prerogative of North Carolina to "preserv[e] preserving the integrity of its election process," *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989), and the recognition that "[e]lections are, regrettably, not always free from error," *Hutchinson*, 797 F.2d at 1286. To demand notice and a hearing based on postal error

in these circumstances would be to expect too much from state officials charged with the difficult task of administering and counting millions of votes.

iii. Plaintiffs' Requested Relies Is Unprecedented and Unwarranted

Although there are good reasons for states to maximize the notice and hearing opportunities—as North Carolina does—to demand that inflexibly would create more problems than it would solve. As explained, courts have long understood that there can be no constitutional right to perfectly executed elections. *Hutchinson*, 797 F.2d at 1286–87. But to apply the Due Process Clause to require notice and a hearing any time a ballot is not counted, or other errors occur, would effectively create such a right through a back door channel never to date recognized. Under Plaintiffs' theory, there would be no principled basis for states not to provide notice and hearing every time a ballot arrives at a polling place late (regardless of the deadline), a machine destroys or misreads a ballot, or a ballot is rejected based on a finding that an election rule was unmet.

This new regime would prove especially unworkable in recounts and election contests where a high volume of ballots are scrutinized, and their validity litigated, such that some votes are not counted. *See, e.g.*, *In re Contest of Gen. Election Held on Nov. 4, 2008, for Purpose of Electing a U.S. Senator from State of Minnesota*, 767 N.W.2d 453, 458–59 (Minn. 2009) (adjudicating challenge concerning "ten categories of rejected absentee ballots that would not be considered legally cast as a matter of law because the ballots failed to comply with one or more of the statutory requirements for voting by absentee ballot"); *Migliori v. Cohen*, 36 F.4th 153, 157 (3d Cir.), *vacated sub nom. Ritter*

v. Migliori, 143 S. Ct. 297 (2022) (adjudicating state board's decision to "set aside 257 out of approximately 22,000 mail-in or absentee ballots that lacked a handwritten date next to the voter declaration signature"); *Ball v. Chapman*, 289 A.3d 1, 28 (Pa. 2023) (similar adjudication). Under Plaintiffs' theory, every voter whose ballot became subject to challenge (and certainly every voter whose ballot is not counted) must receive notice and a trial. But it would not be possible for such a system to be administered consistent with states' pressing need for certified results and for prevailing candidates to take office.

Plaintiffs' contentions against the Undeliverable Mail Provision would equally condemn most methods of mail-in voting and certainly every system permitting no-excuse mail-in voting, like North Carolina's, *see* N.C.G.S. §163-226(a). Plaintiffs insist that mail error carries constitutional significance requiring a notice and opportunity for a hearing in time to cure any error. By that rationale, a voter whose mail-in ballot arrives late, is returned undeliverable, or is simply lost in the mail is required to have timely notice of the error and an opportunity for a hearing. But that could never be satisfied, given that such a notice would practically always come too late to do any good and some errors are never discovered. Nevertheless, a challenge to mail-in voting would present a more compelling case than this, given that (1) many more voters use mail-in voting than same-day registration and (2) the possibility of mail error is significantly greater for mail-in voting than under the Undeliverable Mail Provision, as votes will not be counted if they are lost, arrive late, or are returned undeliverable in the former case.

II. Plaintiffs Have Not Established an Equitable Right to a Provisional Injunction

Plaintiffs miss the mark in their perfunctory analysis of the equities. Plaintiffs make only the conclusory assertion that they will suffer irreparable harm while the State will suffer none. Mot. 27. But, as demonstrated, Plaintiffs complain of an occurrence of very low odds. The Supreme Court has repeatedly held that plaintiffs seeking a preliminary injunction "must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief." *Winter*, 555 U.S. at 21. That is not shown here. *See Memphis A. Philip Randolph Inst.*, 978 F.3d at 391 ("The plaintiffs have not presented any evidence that demonstrates that members of their organizations are likely to have their ballots erroneously rejected under the current procedures."). That standard is unmet.

By comparison, the harm to the State if Plaintiffs are granted an injunction would be real and substantial. For one thing, Plaintiffs do not even clarify what relief they want. They ask the Court to enjoin the Undeliverable Mail Provision, Doc. 44 at 1, but it is unclear what that would accomplish, given the interaction between S.B. 747 and pre-existing law. Plaintiffs do not say whether they expect the State Board to administer same-day registration with no test mailings (i.e., so that all same-day registrants who pass the initial review are deemed eligible without more) or with two test mailings (i.e., so that the standard registration process is applied). This runs afoul of the basic equitable principle that an injunction "state its terms specifically[] and . . . describe in reasonable detail . . . the act or acts restrained or required." *See also Bone v. Univ. of N.C. Health Care Sys.*, 2023 WL 4144277, at *32 (M.D.N.C. June 22, 2023) (discussing Fed. R. Civ. P. 65(d)). An injunction would therefore be an invitation for confusion, error, and more litigation. And

either form of relief would harm the State's interests, either by compelling an application of same-day registration without important protections or an application that cannot feasibly be administered on the time frame the State needs to secure a final certification of election results.

CONCLUSION

The Court should deny the motion.

Respectfully submitted, this 13th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 6135 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 13th day of December, 2023.

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