

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:23-cv-00861-TDS-JEP

VOTO LATINO, et al,)	
)	
Plaintiffs,)	
)	
v.)	
)	STATE BOARD DEFENDANTS’ RESPONSE TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION
ALAN HIRSCH, et al.,)	
)	
Defendants,)	
)	
And)	
)	
PHILIP E. BERGER, et al.,)	
)	
Intervenor-Defendants.)	

Now come State Board Defendants to provide this Response to Plaintiffs’ Motion for Preliminary Injunction. [D.E. 44, 45].

Nature of the Matter Before the Court

On October 10, 2023, Plaintiffs Voto Latino, the Watauga County Voting Rights Task Force, Down Home North Carolina, Sophie Jae Mead, and Christina Barrow, filed a Complaint, alleging that N.C. Session Law 2023-140 (“SB 747”), enacted on October 10, 2023, violates the United States Constitution. [D.E. 1].

On November 15, 2023, Plaintiffs also filed a motion for preliminary injunction seeking to enjoin that provision of SB 747 amending the address verification process for same-day registration. [D.E. 44, p. 1; D.E. 45, pp. 2, 28]. Plaintiffs allege two claims in their Complaint, but they only rely on Count I to support their preliminary injunction motion. [D.E. 45, pp. 15-26]. In Count I, Plaintiffs allege that the changes made to the

address verification process for same-day registration violate procedural due process. [D.E. 1, ¶¶ 83-92].

Plaintiffs' motion for preliminary injunction should be denied because they cannot demonstrate a likelihood of success on the merits and the balance of equities favors implementation of the new same-day registration process.

Statement of Facts¹

A. Standard Voter Registration Procedures in North Carolina.

In North Carolina, a person must register to vote by 25 days before election day. N.C.G.S. § 163-82.6(d). North Carolina offers multiple ways to register, including by mail, facsimile, email transmission of a scanned document, or in person. *Id.*, -82.6(a). Additionally, one may register in person through various state agencies. *Id.*, §§ -82.11; -82.12; -82.19; -82.20; -82.21; -82.22; -82.23. North Carolinians may also utilize the NCDMV website to register, update their address, or update their party affiliation.²

To be qualified to register, the voter must: (1) be a U.S. citizen; (2) have resided in the county where they are registering for at least 30 days prior to election day; (3) be at

¹ The Statement of Facts section above is largely the same as the Statement of Facts section in a Response to a Motion for Preliminary Injunction previously submitted by State Board Defendants in another case pending in this Court challenging SB 747, *Democratic National Committee, et al., v. N.C. State Board of Elections, et al.*, No. 1:23-cv-862 (“DNC”). The facts have been modified here but only to the extent needed to address issues unique to the arguments raised in the present case, and to incorporate guidance on SB 747 issued by the State Board on December 8, 2023, in Numbered Memo 2023-05, attached to the Declaration of Counsel as Exhibit E.

² See NCDMV websites, “Official NCDMV: Voter Registration Application,” <https://www.ncdot.gov/dmv/offices-services/online/Pages/voter-registration-application.aspx>, last visited October 24, 2023.

least 18 years old by the date of the general election; and (4) not be serving a felony sentence. *Id.*, § -55(a).³

Each county board of elections reviews the registration forms submitted by the county's residents to ensure the forms contain all required information, and the board makes an initial determination whether the applicant is qualified to vote at the address given. *Id.*, -82.7(a). If county board staff find that the voter failed to complete any required item on the form but provided contact information, staff are required to attempt to contact the voter to correct the form. *Id.*, -82.4(f). If, at this initial stage, staff determine that the applicant is not qualified, they must send a notice of denial by certified mail to the applicant. *Id.*, -82.7(b). The notice states the alternative means by which the applicant may still vote or appeal the denial decision. *Id.*, §§ -82.7(b) and -82.18. Section 163-82.18 sets forth the procedure for an appeal with a public hearing before the county board and allows for judicial review in North Carolina Superior Court. *Id.*, -82.18

If county board staff determine at this initial stage that the applicant is qualified, they then conduct the address verification mailing process under which they mail a notice, by nonforwardable mail, to the address provided on the form by the applicant. *Id.*, -82.7(c). The notice informs the applicant that they will be registered, unless the postal service returns the notice as undeliverable, and provides the precinct and voting place to which they will be assigned.⁴ *Id.* If the first notice is returned as undeliverable, a second

³ These requirements are also found on the State Board's registration form, a copy of which is attached to the Declaration of Counsel as Exhibit A.

⁴ Most voters would recognize this notice as the "voter registration card" they receive in the mail after registering or updating their registration.

nonforwardable notice is sent to the same address. *Id.*, -82.7(e). If the second notice is also returned as undeliverable, the application to register is denied. *Id.*, -82.7(f). No further notice is required or attempted by county board staff. *Id.*

B. Same-Day Registration Prior to SB 747.

Since enactment in 2007, North Carolina has offered same-day registration as an additional opportunity for individuals to register even if they missed the standard registration cutoff of 25 days prior to election day. Session Law. 2007-230. Under the current version of that law, a person eligible to vote can register and vote at an early voting site in the person's county of residence during the early voting period. N.C.G.S. § 163-82.6A(a) (2012); *see also N.C. State Conf. of the NAACP v McCrory*, 831 F.3d 204, 237, 239, 242 (4th Cir. 2016); Numbered Memo 2016-15, attached to the Declaration of Counsel as Exhibit B.^{5,6}

The individual must complete the same voter registration form as required by section 163-82.4, described above, and provide proof of residence by presenting a North Carolina driver's license, a photo identification from a government agency showing the voter's name and address, a current utility bill, bank statement, government check, paycheck, or other government document. N.C.G.S. § 163-82.6A(b) (2012) (citing N.C.G.S. § 163-166.12(a)(2) for acceptable documents); *see also* Ex. B at 2-3; and the

⁵ Appendix A to Numbered Memo 2016-15 contains a copy of N.C.G.S. § 163-82.6A (2012). Ex. B at 4.

⁶ *See* N.C. State Bd. of Elections' Public Website, "Register in Person During Early Voting," <https://www.ncsbe.gov/registering/how-register/register-person-during-early-voting>, last visited November 7, 2023.

State Board's Registration website, n.5 *supra*. Any person who is qualified, completes the registration form, and presents the required documents is registered to vote and can immediately vote a retrievable ballot like all other early voters. N.C.G.S. § 163-82.6A(c) (2012).

Within two business days, county board staff, working with State Board staff, must verify the driver's license number or last four digits of the Social Security Number provided on the registration form and update the registration database. *Id.*

After the voter is initially determined to be eligible, again like the standard voter registration process, the county board will proceed to verify the person's address through the mailings described above. *Id.*, -82.6A(d). The county board will mail a notice to the applicant by nonforwardable mail. N.C.G.S. § 163-82.7(c) (2023). If the notice does not come back, the applicant's vote will be counted, but if the notice comes back as undeliverable, the county board will mail a second notice. *Id.*, -82.7(d) and (3).

Although this two-notice process tends to work effectively during standard voter registration, the short window of time between early voting and county canvass, which occurs ten days after election day when the vote totals are certified, can give rise to complications. *See* N.C.G.S. § 163-82.7(g), -182.5(b).

First, the limited period for early voting can result in the second verification mailing being returned as undeliverable *after* the county board canvass is complete and the vote totals are certified. *Id.*, -82.7(g)(3); *see also* Ex. B at 3, and Numbered Memo 2022-05 at 8, attached to the Declaration of Counsel as Exhibit C. As a result, a person ultimately

deemed ineligible to register for failing the address verification process after canvass would have their vote counted.

Second, even if the second notice is returned as undeliverable before the county canvass, current law makes removing the applicant's vote difficult. Under such circumstances, section 163-82.7(g) applies and directs that the only means to have that person's ballot removed is through a challenge filed with the county board pursuant to section 163-89. *Id.*, -82.7(g)(2).⁷ Under state law, such a challenge may be filed by the county board. *See id.*, -182.5(a).

However, in 2018, this Court entered a permanent injunction, based on an interpretation of the National Voter Registration Act, that prohibits any voter challenges from being brought without individualized knowledge of the voter's circumstances within 90 days of a federal election. *N.C. State Conf. of the NAACP v. Bipartisan State Bd. of Elecs. & Ethics Enf't*, No. 1:16-cv-1274, 2018 U.S. Dist. LEXIS 134228, at *18-22, 24-25, 27-29, 37-38 (M.D.N.C. Aug. 8, 2018); *see also* Numbered Memo 2018-07, attached to the Declaration of Counsel as Exhibit D; Ex. C at 8. Accordingly, the State Board instructs county boards that a same-day registrant's ballot must be counted and cannot be challenged on the basis of undeliverable mail without additional individualized evidence that the voter is not a resident of the voting jurisdiction. *See* Ex. D and Ex. C at 8. As a practical matter, this means that county boards cannot challenge votes based on the fact

⁷ Section 163-82.7(g)(2) applies because, currently, early voting is a type of "absentee" voting, *see* N.C.G.S. § 163-227.2, and section 163-82.7(g)(2) authorizes a challenge for any "absentee ballot" cast by a voter who fails mail verification. Under SB 747, however, as of January 1, 2024, early voting will no longer be a type of absentee voting. *See* SB 747, N.C. Sess. Law 2023-140, sec. 27.

that two mailings have been returned as undeliverable. Thus, individuals who are ultimately deemed ineligible to register for failing the address verification process before canvass would also nevertheless have their vote counted.

C. Same Day Registration Under SB 747.

SB 747 has altered the same-day registration process to address these issues. Under the newly created section 163-82.6B, a prospective same-day registrant is greeted by the same process as before when they arrive at an early voting site: They must complete a voter registration application form, present a photo identification, and provide proof of residence. 2023 Session Law 140, sec. 10.a(b) and (e); *see also* Numbered Memo 2023-05, attached to the Declaration of Counsel as Exhibit E.

Immediately upon providing that information, a registrant is permitted to vote a retrievable ballot, just like all other early voters. 2023 Session Law 140, sec.10.a(c). The county board staff then engages in the same process to verify the identity and eligibility of the applicant within two business days as they did previously. *Id.*, sec. 10.a(d).

Assuming the same-day registrant passes initial verification, the new legislation introduces changes that Plaintiffs challenge as unconstitutional. In the complaint and motion for preliminary injunction, Plaintiffs refer to the challenged changes as the “Undeliverable Mail Provision.” [*See, e.g.*, D.E. 1, ¶ 1; D.E. 45, p. 1]. SB 747 directs that if a single notice mailed to the address provided on the applicant’s registration form 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.” SB 747, N.C. Sess. Law 2023-140, sec. 10.(a)(d). This amendment removes the requirement

for a second notice to verify an applicant’s address, and allows for a process that is more likely to be completed prior to county canvass. *Id.* This amendment also conforms the same-day registration process to standard registration, in that the applicant is simply denied registration following the failure of the address-confirmation process, rather than requiring the county board to conduct a challenge process. *Compare id. with* N.C.G.S. § 163.82.7(f). Finally, SB 747 no longer classifies early voting as absentee voting, and as a result, the challenge procedures in section 163-82.7(g)(2) no longer apply. SB 747, N.C. Sess. Law 2023-140, sec. 27.

Legal Argument

Legal Standard

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).

A. Plaintiffs Are Unlikely to Succeed on the Merits Because They Fail to State a Claim for a Procedural Due Process Violation.

Plaintiffs argue that the same-day registration provisions violate the U.S. Constitution’s Due Process Clause because the only process afforded same-day registrants (a single notice mailing) does not satisfy the standard for procedural due process under the Fourteenth Amendment of the United States Constitution. [D.E. 45, p. 17]. According to Plaintiffs, at a minimum, same-day registrants subject to removal based upon the failure of

a single notice mailing should receive notice and an opportunity to contest the potential removal. [*Id.*].

To show entitlement to due process, a plaintiff must establish “(1) [he possessed] a cognizable liberty or property interest; (2) the deprivation of that interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate.” *Shirvinksi v. U.S. Coast Guard*, 673 F.3d 308, 314 (4th Cir. 2012).

At this preliminary stage, State Board Defendants agree that qualified voters who are eligible to register possess a cognizable liberty interest in having their votes properly counted.

With respect to the second prong, State Board Defendants assume for the sake of argument at this preliminary stage that otherwise eligible voters may have their ballots erroneously retrieved, and that would be a deprivation by state action.

As for the third prong assessing the adequacy of the procedural protections, Plaintiffs seek to have the Court analyze the third prong under the three-factor procedural due process test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). [D.E. 45, p. 17]. *Mathews* holds that procedural due process requires notice and opportunity to be heard before the deprivation of a liberty interest. *Mathews*, 424 U.S. at 348 (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”); see also *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145-46 (4th Cir. 2018) (“The bottom line is that the deprivation of a protected interest warrants some sort of notice and opportunity to be heard.”). The State Board Defendants concede that the notice mailing process set forth under the new

same-day registration regime does not provide for either of these protections. Therefore, State Board Defendants acknowledge that if this Court applies the *Mathews* test, Plaintiffs are likely to prevail on the merits of their procedural due process claim to the extent they are able to demonstrate that some eligible voters who meet the residency qualifications are nonetheless likely to fail mail verification. If the Court determines that the *Mathews* test is appropriate, the State Board Defendants stand ready to incorporate whatever additional procedural protections this Court deems necessary for such voters.

That said, the State Board Defendants disagree that the *Mathews* test is the most suitable test in cases challenging elections laws under the Fourteenth Amendment. *Richardson v. Hughs*, 978 F.3d 220, 233 (5th Cir. 2020). In those cases, the more appropriate test is one taken from *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)), and *Burdick v. Takshi*, 504 U.S. 428, 434 (1992), as every federal court of appeals to consider the issue has found. *Richardson v. Hughs*, 978 F.3d at 234; accord *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); but see *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 226 (M.D.N.C. 2020) (applying *Mathews* where plaintiffs challenged the lack of a cure process for absentee ballots, without specifically analyzing which framework should apply).

That test—commonly referred to as *Anderson-Burdick*—requires courts to weigh “the character and magnitude of the asserted injury” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Pisano v. Strach*,

743 F.3d 927, 933 (4th Cir. 2014) (citing *Anderson*, 460 U.S. at 789, and *Burdick*, 504 U.S. at 434). Put differently, courts will ask “(1) whether the process poses a ‘severe’ or instead a ‘reasonable, nondiscriminatory’ restriction on the right to vote and (2) whether the state’s interest justifies the restriction.” *Richardson*, 978 F.3d at 235 (quoting *Burdick*, 504 U.S. at 434).

The address-verification process for SB 747’s same-day registration provision is a close question under *Anderson-Burdick*, but it passes muster. Under the prior same-day registration process, due to time constraints and a permanent injunction prohibiting certain challenges, even if two mailings were returned as undeliverable and the applicant’s voting address is therefore unverified, the county board was unable to remove that vote. In this regime, the government’s interest in ensuring only eligible ballots are counted in an election was undermined, because the government had to count even ballots submitted by voters who failed address verification.

The new process under SB 747 attempts to fix this problem. Under the new approach, after a same-day registrant’s form is reviewed and passes initial review, the county board will mail a notice to the voter’s registered address. SB 747, sec. 10.(a)(d). If that notice comes back as undeliverable, the voter’s ballot will be retrieved and will not be counted. *Id.* This approach to registration attempts to balance voters’ interest in having their lawful votes counted against the State’s interest in counting only lawful votes.

Post SB 747, for those voters who register through the standard process before the voter registration deadline, as opposed to same-day registration after that deadline, the county boards still mail *two* notices before declining to register the voter. As a policy

matter, sending two notices may be considered a more effective means of address verification than mailing a single notice. But sending two notices is not a feasible approach to address verification for voters who rely on same-day registration, given the narrow window of time between registration and the canvass, at which time the counting (or discounting) of ballots is final.

Plaintiffs emphasize that state law does not (a) require the county boards to provide notice after an address-verification notice comes back as undeliverable or (b) provide a mechanism for challenging the State's decision to retrieve a ballot on that basis. Plaintiffs are correct in their interpretation of SB 747, as noted above in discussing *Mathews*. But the address verification process is the last step in the same-day registration process, and the burdens it imposes upon applicants should not be analyzed in a vacuum. Instead, those burdens should be considered holistically in light of the other means by which voters may register, and then balanced against the government interests at stake. *Pisano*, 743 F.3d at 933 (citing *Anderson*, 460 U.S. at 789, and *Burdick*, 504 U.S. at 434).

North Carolina law allows any eligible resident to register online or in person at numerous state agencies up to 25 days before the election. N.C.G.S. § 163-82.6(d); *see also* Statement of Facts, Part A. If a potential voter does not register by that deadline, North Carolina provides same-day registration as an exception to the registration deadline. *See* 2023 Session Law 140, s. 10.a (N.C.G.S. § 163-82.6B). To accommodate this significant exception, the government's interest in ensuring only eligible votes are counted requires a modification to the standard address-verification process to address the short period of time between early voting (when same-day registration occurs) and the county

canvass. Instead of two mailed notices, same-day registrants are notified in person at same-day registration that the address provided on their registration form will be verified by a single notice mailing sent to their address. SB 747, sec. 10.(a)(d); Ex. E at 5.⁸ Thus, after leaving early voting, same-day registrants know that the address-verification mailing is coming, and they know that if they do not receive it, they will have failed address verification, and they know that if they fail address verification, they will not be registered, and their vote will not be counted. Taken as a whole, the burden this places on an individual registering to vote using same-day registration is a reasonable, nondiscriminatory restriction that is counterbalanced by the government's interest in ensuring only eligible votes are counted. It follows that Plaintiffs are unlikely to succeed on their claim that the address verification process for same-day registration under S.B. 747 violates the Due Process Clause.

⁸ The State Board is specifically instructing election officials that “[b]ecause a voter’s ballot may be discounted if a single piece of mail is returned as undeliverable by the Postal Service, it is vital that elections officials emphasize to voters that they must provide an address where they can receive mail.” Ex. E at 5 (bolding removed). The State Board’s guidance to election officials demands vigilance when assisting same-day registrants in completing their registration applications. *See id.* Officials “shall,” for example, ask voters whether they can receive mail at their residential address, if voters do not list a mailing address on their applications. *Id.* They “must” recommend voters provide phone numbers or email addresses, so that they may be contacted quickly if there are questions about their address. *Id.* And, if there are questions, officials are instructed that they “should” contact the voter to seek clarification before sending the first mail verification notice. *Id.* The State Board has also created a written notice that poll workers are required to give to all same-day registrants informing them, among other things, that “[i]f the Postal Service is unable to deliver your voter registration card to your address, your voter registration will be denied and your vote will not be counted. For this reason it is very important that you provide a mailing address that will receive mail, if you do not receive mail at your residential address.” Notice to Same-Day Registrants, attached to Declaration of Counsel as Exhibit F, p. 1 (bolding removed).

B. The Balance of Equities and the Public Interest Weigh Against Injunction.

To obtain a preliminary injunction, plaintiffs must make a clear showing that they will likely be irreparably harmed absent such relief, that “the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. An averment that plaintiffs’ harm might simply outweigh the defendant’s is insufficient to tip the balance of equities in plaintiffs’ favor. *Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). The Court must give “particular regard” to the “public consequences” of any relief granted. *Id.*

Even assuming Plaintiffs have sufficiently shown irreparable injury, Plaintiffs have failed to carry their burden to establish that the balance of equities and public interest weigh in favor of an injunction. Where, as here, granting a preliminary injunction means enjoining a state “from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). When weighing the irreparable injury to North Carolina in being unable to effectuate SB 747 against the conclusory assertion of irreparable injury to Plaintiffs, the balance of equities and public interest weigh against an injunction. Under the pre-SB 747 address verification process for same-day registration, due to timing constraints and compliance with a permanent injunction against challenges issued by this Court, ballots cast by same-day registrants whose residence is not verified cannot be removed from the official count. The inclusion of potentially invalid ballots in official election results must weigh significantly against the possibility of erroneous

address-verification failure for some same-day registrants. Contrary to what Plaintiffs argue, the public interest is best served by enforcement of SB 747.

Conclusion

For the reasons above, the State Board Defendants respectfully request that Plaintiffs' motion for a preliminary injunction be denied.

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

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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CERTIFICATE OF COMPLIANCE WITH RULE 7.3(d)

Undersigned counsel certifies that the present filing is in compliance with Local Rule 7.3(d) of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina including the body of the brief, heading and footnotes, and contains no more than 6,250 words as indicated by Word, the program used to prepare the brief.

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

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