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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND INTERVENORS' MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

North Carolina Senate Bill 747 ("S.B. 747") threatens, at virtually every stage of the voting process, North Carolinians' "constitutionally protected right to vote and to have their votes counted," Reynolds v. Sims, 377 U.S. 533, 554 (1964) (citation omitted). S.B. 747 makes it harder to register and vote on the same day; allows ballots by same-day registrants to be rejected without any notice or opportunity to challenge the rejection; empowers poll observers to move freely about voting places, enabling intimidation; requires the discarding of absentee ballots received by election officials even one second after the polls close; and permits certain voters to be purged from the voting rolls, even on the eve of an election. All this was supposedly done to prevent voter fraud—despite there being "no evidence of any fraud or other irregularities that could [have] affect[ed] the outcome" of recent elections, North Carolina State Board of Elections, State Board Unanimously Certifies 2022 General Election in NC (Nov. 29, 2022) (emphasis added).[1]

The U.S. Constitution and multiple federal statutes prohibit S.B. 747's multi-prong scheme for suppressing votes. And neither defendants nor intervenors provide a sound basis to dismiss any of plaintiffs' claims. Indeed, defendants and intervenors misapprehend federal voter protections, the effect of this Court's preliminary injunction, and the workings of S.B. 747. The motions to dismiss should be denied.

[1] https://www.ncsbe.gov/news/press-releases/2022/11/29/state-board-unanimously-certifies-2022-general-election-nc (all web pages cited herein visited April 9, 2024).

STATEMENT

A. S.B. 747 Imposes New Restrictions On Same-Day Registration And Voting

S.B. 747 became law on October 10, 2023, when the General Assembly overrode Governor Cooper's veto. Under the statute, an individual seeking to register and vote on the same day must (1) "[c]omplete a voter registration application," (2) "[p]rovide proof of residence by presenting a HAVA document listing the individual's current name and residence address," and (3) "[p]resent photo identification." N.C. Gen. Stat. §163- 82.6B (b). Under the law, moreover, a same-day registrant casts not a regular ballot but rather a "retrievable ballot." Id. §163-82.6B(c).

Whenever a same-day registrant casts a retrievable ballot, the appropriate county board of elections must work with the North Carolina State Board of Elections ("State Board") to verify the individual's eligibility to vote. N.C. Gen. Stat. §163-82.6B(d). Of particular relevance here, in order to "verify the applicant's address," the board must send a verification notice to the same-day registrant's mailing address—and if the Postal Service returns that lone verification notice as undeliverable before the close of business on the business day before canvass, the board "shall retrieve the applicant's ballot and remove that ballot's votes from the official count." Id.

S.B. 747, however, provides no mechanism for notifying same-day registrants when they have been deemed ineligible to register and vote, and hence when the ballots they cast will be retrieved and discarded. Nor does S.B. 747 provide same-day registrants an opportunity to contest ineligibility determinations.

In January, this Court issued a preliminary injunction to temporarily address this alleged procedural-due-process violation. Specifically, the Court enjoined the use of:

> the procedures of N.C. Gen. Stat. § 163-82.6B(d) to remove from the official count the votes of the ballot of any voter who has provided contact information in the registration process and whose first notice required under N.C. Gen. Stat. § 163-82.7(c) is returned by the Postal Service as undeliverable before the close of business on the business day before the canvass, without first providing such voter notice and an opportunity to be heard[.]

D.E. 68 ("PI Order") at 93-94. Shortly thereafter, the State Board instructed county boards to file a challenge, pursuant to the Board's Numbered Memo 2022-05, "[i]f the county board has reliable grounds to believe [an] applicant is not qualified to vote at this initial stage"—thereby giving the applicant notice. State Board, Numbered Memo 2023-05 (Jan. 29, 2024).[2]

Under state law, interim rules responding to court orders (like Numbered Memo 2023-05) "become null and void 60 days after the convening of the next regular session of the General Assembly." N.C. Gen. Stat. §163-22.2. The next regular session will begin "on the second Wednesday in January" 2025, id. §120-11.1, so Numbered Memo 2023-5 will expire (if not first superseded by statute) on March 9, 2025.

B. S.B. 747 Moves Up The Deadline For Returning Absentee Ballots, While Also Expanding The Opportunity To Challenge Them

Before S.B. 747, an absentee ballot could be counted so long as it was postmarked by election day and received by the county board no later than 5:00 p.m. three days after

[2] https://s3.amazonaws.com/dl.ncsbe.gov/sboe/numbermemo/2023/Numbered%20Memo%202023-05%20Same-Day%20Registration.pdf.

the election. N.C. Gen. Stat. §163-231(b)(2)(b) (2023). Now, absentee ballots must be received three days sooner, by poll-closing on election day. Id. §163-231(b)(1)(a). Any absentee ballots received even a second after that will be discarded—even if they were postmarked days or even weeks before. S.B. 747 thus reduces the time for North Carolinians to return their absentee ballots (i.e., reduces the time to vote).

At the same time, S.B. 747 increases the time for challenging absentee ballots and expands the pool of potential challengers. Before S.B. 747, absentee ballots could be challenged only between noon and 5:00 p.m. on election day. N.C. Gen. Stat. §163- 89 (a)-(b) (2023). Now, they "may be challenged [until] 5:00 P.M. on the fifth business day after the … election," id. §163-89(a). And now, anyone who is registered in the same county as the absentee voter—not just the same precinct, as before S.B. 747—may challenge an absentee ballot. Compare id. §163-89(b), with id. §163-89(a)-(b) (2023).

C. S.B. 747 Unleashes Poll Observers Within Voting Places And Introduces A Novel Voter-Removal Program

S.B. 747 expands the range of permissible activity by poll observers at voting places, with observers now explicitly permitted to "[m]ov[e] about the voting place," with few if any clear limits. N.C. Gen. Stat. §163-45.1(g)(3).

S.B. 747 also requires that North Carolina's superior courts "communicate [to the State Board] information regarding requests to be excused from jury duty on the basis that the person is not a citizen of the United States." N.C. Gen. Stat. §9-6.2(b). The Board, in turn "shall use this information" from superior courts "to conduct list maintenance efforts." Id. Specifically, once it receives a list of self-reported non-

citizens, the Board must disseminate the relevant portions of that list to the corresponding county boards, id. §163-82.14(c1)(1), which in turn are required to send written notice to each listed voter's address, id.§163-82.14(c1)(2)(a). Any voter who does not promptly object to such a notice is removed from the voting rolls. Id. If a voter does object promptly, the chair of the county board will enter a challenge, but the board's receipt of the information from the State Board will "establish a rebuttable presumption … that the person is not a [U.S.] citizen." Id. §163-82.14(c1)(2)(b)).

LEGAL STANDARDS

Where, as here, a motion under Federal Rule of Civil Procedure 12(b)(1) "contend [s] that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based …, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12 (b)(6) consideration." Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

In ruling on a Rule 12(b)(6) motion, the court "must accept as true all of the factual allegations contained in the complaint," Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), and must draw all reasonable inferences in the non-moving party's favor, Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997). "Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations." Neitzke v. Williams, 490 U. S. 319, 327 (1989). Hence, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." Bell Atlantic Corp. v.

Twombly, 550 U.S. 544, 556 (2007) (quotation marks omitted). Moreover, Rule 12(b)(6) must be applied in light of Rule 8's requirement that a complaint "contain 'a short and plain statement of the claim,'" a requirement that is "by no means onerous." Slade v. Hampton Roads Regional Jail, 407 F.3d 243, 252 (4th Cir. 2005).

ARGUMENT

Each of defendants' and intervenors' arguments for dismissal misses the mark. This Court has jurisdiction, and each claim in the amended complaint is plausible.

I. NUMBERED MEMO 2023-05 DOES NOT MOOT THIS CASE

Intervenors argue that "there is no longer a live case or controversy" because the State Board revised Numbered Memo 2023-05 to implement new procedures for same-day registration after this Court partly granted plaintiffs' preliminary-injunction motion. D.E. 82 ("Legislators Br.") at 4; see also D.E. 84 ("RNC Br.") at 2-3. That is meritless: As explained, Numbered Memo 2023-05 will expire no later than March 9, 2025. See N.C. Gen. Stat. §§163-22.2, 120-11.1. Hence, even if the memo otherwise mooted any claim, it would obviously constitute voluntary cessation of the challenged conduct—and just as obviously, defendants have not carried their burden to show that the challenged conduct could not reasonably be expected to recur, see Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2019 n.1 (2017). To the contrary, that conduct is certain to resume barring some further action.

In the same vein, intervenors ignore that this Court entered preliminary injunctive relief, not permanent relief. Compliance with a preliminary injunction generally does not moot a case, because if "'the injunction is dissolved without a decision on the merits,

there is nothing to keep defendants from resuming the activity that had been restrained by the preliminary injunction.'" Marie v. Mosier, 122 F.Supp.3d 1085, 1102 (D. Kan. 2015). Compliance with a preliminary injunction moots a case only if it is "'absolutely clear'" that the challenged conduct could not reasonably be expected to recur upon dissolution of the injunction. North Carolina State Conference of NAACP v. North Carolina State Board of Elections, 283 F.Supp.3d 393, 406 (M.D.N.C. 2017) (quoting Porter v. Clarke, 852 F.3d 358, 364 (4th Cir. 2017)). Because Numbered Memo 2023-05 will automatically expire next year, it is more than reasonable to expect the challenged conduct to recur; consequently, the State Board's implementation of the preliminary-injunction order does not moot this case.

Indeed, this Court has rejected intervenors' mootness argument in parallel litigation, noting that Numbered Memo 2023-05 "remains temporary by operation of the statutory authority for its adoption." Voto Latino v. Hirsch, 1:23-cv-861, Dkt. 80 at 4-5 (M.D.N.C. Apr. 2 2024) (citing N.C. Gen. Stat. §163-22.2); accord Fleming v. Gutierrez, 785 F.3d 442, 446 (10th Cir. 2015) (preliminary injunction did not moot lawsuit seeking permanent relief); North Carolina State Conference of NAACP v. North Carolina State Board of Elections, 283 F.Supp.3d 393, 407 (M.D.N.C. 2017) (same). Likewise here, plaintiffs' requests for a declaration and permanent injunction remain pending (and live). See D.E. 75 ("Am. Compl.") at 39. Consistent with its decision in Voto Latino, this Court should reject intervenors' mootness arguments.

II. EACH CLAIM IN THE AMENDED COMPLAINT IS VIABLE

A. Count I: Undue Burden Under Anderson-Burdick

The amended complaint states a plausible claim that S.B. 747 imposes an undue burden on the fundamental right to vote in violation of the First and Fourteenth Amendments.

First, S.B. 747's same-day-registration provisions require same-day registrants to provide both photo identification and a so-called "HAVA document," i.e., (1) a "current utility bill," (2) a "current bank statement," (3) a "current government check," (4) a "current paycheck," (5) "[a]nother current government document," or (6) a "current document issued from the institution who issued the photo identification shown by the voter." N.C. Gen. Stat. §163-82.6B(b). That requirement poses a substantial (and possibly insurmountable) burden for many prospective voters. S.B. 747 also requires that same-day registrants' ballots be discarded if a single verification mailing is returned as undeliverable, without any notice or opportunity to be heard—which this Court has enjoined as likely unconstitutional, PI Order 93-94. And the law does not expressly permit same-day registrants to appeal any adverse determination about registration to their county board. See S.B. 747 §10.(a).

Second, S.B. 747 burdens the right to vote by reducing the window to vote by mail—requiring absentee ballots to be received by 7:30 p.m. (or whenever all polls in a particular county close) on election day, rather than within three days after election day, as under prior law. See S.B. 747 §35. This unduly burdens the right to vote because (for

example) it deprives people of that right even where a delay in the receipt of their absentee ballot results from circumstances entirely beyond their control.

Third, S.B. 747's poll-observer provisions unduly burden the right to vote by (a) permitting poll observers to engage in intrusive activities, including getting uncomfortably close to voters; and (b) establishing vague standards governing poll observers' conduct, such that would-be voters cannot have confidence that their efforts to vote in person will not be disrupted. S.B. 747 §7.(a)-(b).

None of defendants' and intervenors' arguments warrants dismissal of any aspect of this claim.

1. Standing

Defendants and intervenors contend that plaintiffs lack standing to challenge S.B. 747's poll-observer provision because plaintiffs' alleged injuries are speculative and not directly traceable to the law. D.E. 80 ("State Board Br.") at 11-13; Legislators Br.6-12; RNC Br.4-5. That argument fails.

In particular, while defendants and intervenors fault plaintiffs for not citing specific incidents of intimidation by poll observers, demanding such evidence is manifestly unreasonable given that S.B. 747's poll-observer provision has been in effect only since January. Defendants and intervenors also assert that plaintiffs' injuries are speculative because other laws criminalize voter intimidation. The problem, however, is that S.B. 747 sets vague standards for poll observers' conduct, making it likely that observers will intimidate some voters—even if that conduct is later deemed criminal. Lastly, defendants and intervenors contend that plaintiffs' injuries are not traceable to

S.B. 747 but rather stem from independent conduct by rogue observers. But the case defendants cite (Br.13), Simon v. East Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), actually confirms plaintiffs' standing. Simon held not only that "indirectness of injury" is "not necessarily fatal to standing," but also that the Article III requirement is "'[t]o establish that … the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm.'" Id. at 44-45 (emphasis added). The amended complaint plausibly alleges both here, and at a minimum plausibly alleges that prospective relief would preclude the intimidation plaintiffs challenge—unlike in Simon, where the relief sought would have merely disincentivized the allegedly offensive conduct, id. at 43.

Lastly, intervenors argue that plaintiffs lack standing to challenge S.B. 747's absentee-ballot deadline provision, again asserting that the claimed injuries are speculative and indirect. Legislators Br.5-11; RNC Br.7. Wrong again: Plaintiffs have pleaded "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," Disability Rights South Carolina v. McMaster, 24 F.4th 893, 901 (4th Cir. 2022) (emphasis omitted). The "direct injury" is the non-counting of absentee ballots, and there is "a realistic danger" that that injury will "result [from] the statute's operation," in the form of absentee ballots (including from Democrats) being discarded solely because they were received after the earlier deadline S.B. 747 created.

2. Ripeness

Intervenors contend that plaintiffs' challenges to S.B. 747's absentee-ballot-deadline and poll-observer provisions will not ripen until absentee ballots are rejected as

untimely or until voters are intimidated by poll workers, respectively. Legislators Br.11-12; RNC Br.4-5, 7. But in determining ripeness, courts consider "the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) (subsequent history omitted). Here, requiring as-applied challenges would seriously risk voter disenfranchisement, given that the triggers intervenors would require will not occur until the day of an election, and may then take time to uncover. By the time judicial relief could be obtained, therefore, eligible voters would almost certainly have been denied their right to vote and have that vote counted. Moreover, a court might decline to entertain plaintiffs' challenges at the late date intervenors suggest, as the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election," Republican National Committee v. Democratic National Committee, 589 U.S. 423, 424 (2020) (per curiam) (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam). All this defeats any ripeness argument.

3. Merits

"[B]ecause Anderson-Burdick claims are particularly fact-sensitive, dismissal under Rule 12(b)(6) is disfavored." Mi Familia Vota v. Fontes, 2023 WL 8183070, at *14 (D. Ariz. Feb. 16, 2023). Indeed, recognizing that "the magnitude of the asserted injury" under Anderson-Burdick "present[s] factual questions that cannot be resolved on a motion to dismiss," Mecinas v. Hobbs, 30 F.4th 890, 905 (9th Cir. 2022), courts have reversed the type of "premature" dismissal that defendants and intervenors seek here, Soltysik v. Padilla, 910 F.3d 438, 447, 450 (9th Cir. 2018).

In any event, plaintiffs have plausibly alleged that each of S.B. 747's relevant provisions is unduly burdensome.

a. Same-Day-Registration Provisions

Plaintiffs' challenge to S.B. 747's requirement that a same-day registrant's ballot be discarded if a single verification mailing is returned as undeliverable obviously states a plausible claim because this Court already enjoined that provision as likely unconstitutional after applying the Anderson-Burdick framework. PI Order 93-94. Indeed, this Court declined to dismiss the same claim in two related cases, citing its earlier preliminary-injunction order and noting that "[t]he plausibility standard is lower than the preliminary injunction standard." Voto Latino, Dkt. 80 at 5; see also Democracy North Carolina v. Hirsch, 1:23-cv-878, Dkt. 63 at 23 (M.D.N.C. Apr. 2, 2024). That is sufficient to allow plaintiffs' Anderson-Burdick claim to go forward even if the Court rejects other theories underlying this claim. But plaintiffs' challenges to other aspects of S.B. 747's same-day-registration provisions should not be dismissed either.

First, contrary to defendants' argument, it is plausible that requiring same-day registrants to provide both photo identification and a HAVA document is unduly burdensome. Defendants' only response (Br.17-18) is that North Carolina requires all voters to present photo ID when voting. That ignores the key point, which is that only same-day registrants must also present a HAVA document. It is the requirement to provide both that is challenged here.

Second, defendants contend (Br.18) that "a process does exist for challenging the rejection of registration based upon the county board's initial review." But as plaintiffs

have explained, the notion that this process applies under S.B. 747 is dubious. See D.E. 58 at 2 n.1. The basis defendants assert, North Carolina General Statutes §163-89, applies only to "absentee ballot" challenges. And as defendants themselves previously explained—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. D.E. 53 at 8; see also 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).

b. Absentee-Ballot-Deadline Provision

Defendants and intervenors contend that S.B. 747's requirement that absentee ballots be received on election day (instead of three days after election day, as before S.B. 747) is not unduly burdensome because an election-day deadline is common. State Board Br.18-19; Legislators Br.14-15; RNC Br.7-9. That is likewise infirm. As explained, this provision deprives people of their fundamental right to vote even where the delay in receipt of their absentee ballot by the county election board results from circumstances beyond their control. The fact that other states have an election-day deadline for the return of absentee ballots is irrelevant; those states' laws may likewise be unduly burdensome, or they may not be because of other aspects of those states' election laws that differ from North Carolina's. Moreover, neither defendants nor intervenors identify another state that moved up its deadline for returning absentee ballots while simultaneously moving back its deadline for challenging such ballots; the latter undermines any claim that the accelerated receipt deadline is necessary to expedite final

election results. And contrary to intervenors' claim (Legislators Br.14-15; RNC Br.7-9), this problem cannot be written off as voter negligence, both because delays in the mail are often beyond the voter's control and because voters are reasonably accustomed—thanks to pre-S.B. 747 law—to the receipt deadline being days after the election.

c. Poll-Observer Provision

Defendants do not argue that plaintiffs' challenge to the poll-observer provision should be dismissed as implausible. See State Board Br.2. Intervenors do (Legislators Br.15; RNC Br.5-6), but their arguments lack merit.

Apart from repeating their standing arguments, all the Legislators say on this point (Br.15) is that S.B. 747's poll-observer provision is not unduly burdensome because the North Carolina Democratic Party ("NCDP") can appoint its own poll observers "who can either report or attempt to engage in intrusive poll observer behavior." That makes no sense. Plaintiffs' argument is that S.B. 747's poll-observer provisions (1) permit observers to engage in intrusive activities and (2) establish vague standards governing their conduct. It would not cure the undue burden that such intrusive activities impose to have more observers (i.e., those appointed by the NCDP) subject to vague standards. Similarly, having NCDP observers "report" on poll-observer behavior does not avoid the undue burden if it is not clear—because of the statute's vague standards—what behavior is permissible and impermissible. In short, the Legislators' argument is simply unresponsive.

The RNC, for its part, argues (Br.5-6) that poll observers are important. True or not, that likewise does nothing to show that plaintiffs have failed to plausibly allege that S.B. 747's poll-observer provisions impose undue burdens.

* * *

A final point: "[E]ven if" this Court believes "the burden[s] imposed" by S.B. 747 are "'not severe,' that is not the end of [the] inquiry," Mecinas, 30 F.4th at 905, as the Court still must consider "the weightiness of [the state's] interests in imposing [the] burden[s]," Soltysik, 910 F.3d at 450. Plaintiffs allege (Am. Compl. ¶5) that no "actual voter fraud … warranted S.B. 747's restrictive measures" and that those measures are unlikely to actually "deter or prevent such fraud." That alone precludes dismissal, because mere "speculative concern" about voter fraud is insufficient to justify, "as a matter of law," even burdens that are "not severe." Id. at 448.

B. Count II: Violation Of Procedural Due Process

Plaintiffs' procedural-due-process claim is unquestionably viable; as discussed, this Court already issued a preliminary injunction on this claim. And as with count I, this Court has declined to dismiss the same claim in related cases. See Voto Latino, Dkt. 80 at 5; Democracy North Carolina, Dkt. 63 at 23. The only mention of count II in the motions to dismiss is defendants' claim (Br.19) that "the State Board does provide a process for voters to contest rejections during initial review." That argument fails for the reasons given above, see pp.12-13.

C. Count III: Violation Of The Civil Rights Act

The Civil Rights Act ("CRA") states in pertinent part that:

> No person acting under color of law shall[,] … in determining whether any individual is qualified under State law … to vote …, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law … to other individuals within the same county[] … who have been found by State officials to be qualified to vote[.]

52 U.S.C. §10101(a)(2)(A) (previously codified at 42 U.S.C. §1971). Plaintiffs have stated a viable claim that S.B. 747 violates this provision by holding same-day registrants to a higher standard than other registrants.

Specifically, S.B. 747 requires officials to apply different standards, practices, or procedures to two groups of individuals (same-day registrants and non-same-day registrants) who are qualified under North Carolina law to vote and who reside in the same county. For example, non-same-day registrants need not provide photo identification or other supporting documentation to register, whereas same-day registrants must provide both photo identification and a HAVA document. See N.C. Gen. Stat. §163-82.6B(b)(3). Similarly, for non-same-day registrants, a registration form is rejected if the Postal Service is unable to deliver two notices to the home address provided when registering, whereas for otherwise-identical same-day registrants, a registration form is rejected if the Postal Service is unable to deliver only one notice. See id.

Nothing in the motions to dismiss (or this Court's preliminary-injunction order) requires dismissal of plaintiffs' CRA claim.

To start, intervenors are wrong that "the CRA does not create a private right of action," and that the Court's preliminary-injunction order "forecast" that conclusion. Legislators Br.17; accord RNC Br.9. Indeed, in declining to resolve the issue, this Court correctly noted both that the Fourth Circuit has assumed that a private right of action

through 42 U.S.C. §1983 does exist, and that the Third, Fifth, and Eleventh Circuits have all decided the same. PI Order 38-39. And "the majority of courts" agree. Taylor v. Howe, 1999 WL 35793770, at *8 (E.D. Ark. Mar. 31, 1999) (collecting cases). As those courts reasoned, under the test from Gonzaga University v. Doe, 536 U.S. 273 (2002), "the focus of the [CRA's] text is … the protection of each individual's right to vote," and it is not clear that "Congress's provision for enforcement by the Attorney General" was intended to preclude "enforcement … by a private right of action." Schwier v. Cox, 340 F.3d 1284, 1296 (11th Cir. 2003). Neither defendants nor intervenors provide any valid basis for this Court to depart from the judicial consensus on this point.

With respect to the merits, neither defendants nor intervenors dispute that S.B. 747 imposes a higher standard to prove qualification to vote on a county's same-day registrants than on that county's other registrants. Instead, they argue (State Board Br.20; Legislators Br.17; RNC Br.9-10) that the CRA permits this differential treatment because, as this Court summarized the argument at the preliminary-injunction stage, same-day and non-same-day registration are "'inherently different' types of registration and thus require different procedures," PI Order 37. But that distinction is precisely what the CRA prohibits. The plain text of §10101(a)(2)(A) broadly prohibits every state, "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.

But even if it were proper to apply an extra-textual limitation on the CRA's scope, the sole case defendants and intervenors cite would not support doing so here. In that

case, a district court held that a state law requiring photo identification for in-person voters but not absentee voters did not violate the CRA because the inherent differences between in-person and absentee voting "requir[ed]" different rules. Indiana Democratic Party v. Rokita, 458 F.Supp.2d 775, 840 (S.D. Ind. 2006); see also PI Order 40 (noting Rokita's reasoning that the state "must apply different" rules (emphasis added)). That was so because the requirement for "poll workers to compare [an in-person voter]'s face to the identification tendered" was literally impossible to apply to absentee voters, who never come face-to-face with poll workers. Rokita, 458 F.Supp.2d at 841. Here, by contrast, no party contends that the differences between same-day and non-same-day registration make it impossible to apply the same rules for determining a voter's qualifications in each context. This distinction supplies the "limiting principle" that intervenors claim is lacking. RNC Br.10.

Finally, intervenors are wrong that §10101(a)(2)(A) cannot be applied to protect same-day registrants. Same-day registration is not necessarily, as intervenors contend, an option that "individuals may choose … in their sole discretion," RNC Br.10. For individuals who become eligible to vote after the standard registration deadline, for instance, same-day registration is the only option.

D. Count IV: Violation Of The Help America Vote Act

As relevant here, the Help America Vote Act provides:

> The appropriate State or local election official shall establish a free access system … that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if … not …, the reason [why].

52 U.S.C. §21082(a)(5)(B). HAVA also provides that when an individual casts a provisional ballot, the "election official shall give the individual written information" about the tracking system. Id. §21082(a)(5)(A). The amended complaint plausibly claims that S.B. 747 violates these provisions because it does not establish any system for tracking retrievable ballots, nor makes retrievable ballots trackable in a manner that complies with HAVA through a pre-existing ballot-tracking system.

None of the motions to dismiss supports dismissal of this claim. For starters, defendants and intervenors rely heavily on this Court's preliminary-injunction order. State Board Br.20; Legislators Br. 18; RNC Br.10. But that order provides reasons why the Court declined to enter preliminary injunctive relief—the standard for which is difficult to meet—not reasons going to the plausibility of plaintiffs' claims, which (as this Court recently noted, see Voto Latino, Dkt. 80 at 5; Democracy North Carolina, Dkt. 63 at 23) is a significantly lower standard. Indeed, whereas a preliminary injunction requires the moving party to show likely success on the merits, Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 32 (2008), "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable," Twombly, 550 U.S. at 556 (emphasis added).

In any event, defendants and intervenors' arguments are wrong.

First, intervenors assert (Legislators Br.18) that plaintiffs "lack statutory standing under HAVA." But as plaintiffs have previously explained (D.E. 58 at 10-11), the majority view among courts is that HAVA is privately enforceable. Regardless, defendants have conceded that HAVA is at a minimum privately enforceable through

§1983, see PI Order 42, and they acknowledge that plaintiffs have amended their complaint to cite §1983, see State Board Br.20; Am. Compl. ¶10.

Second, defendants and intervenors wrongly argue (Legislators Br.18; RNC Br.10; State Board Br.20) that HAVA's tracking requirement does not apply to same-day registrants who cast retrievable ballots under S.B. 747. The tracking requirement applies to any individual who "declares that such individual is a registered voter" yet "does not appear on the official list of eligible voters for the polling place." 52 U.S.C. §21082(a). That describes same-day registrants, who declare they are registered upon turning in a completed registration form but who will not immediately appear on the list of eligible voters. The fact that HAVA speaks of "provisional" ballots rather than "retrievable" ballots is irrelevant, because 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 and intervenors rely on this Court's conclusion, at the preliminary-injunction stage, that provisions of North Carolina law define "provisional official ballot" and "retrievable ballot" differently. See PI Order 44-45. But they do not explain why a ballot must be a "provisional official ballot" under North Carolina law to be a "provisional ballot" under HAVA, a federal law. Likewise, the fact that Numbered Memo 2023-04 requires a prospective same-day registrant who does not provide proof of residence to submit a "Provisional Voting Application" in no way means that retrievable

ballots cast by same-day registrants who provide proof of residence are not provisional ballots under §21082(a)(5)(B). As just explained, HAVA considers a "provisional ballot" to be one cast by a person who does not yet appear on the list of eligible voters for a polling place, which perfectly describes same-day registrants.

E. Count V: Violation Of The Voting Rights Act

In seeking dismissal of plaintiffs' claim under the Voting Rights Act ("VRA"), defendants and intervenors advance the same standing arguments they advance regarding plaintiffs' poll-observer claim in count I. State Br.11-13; Legislators Br.18-19; RNC Br.4-5. For the reasons discussed earlier regarding the latter claim (supra pp.14-15), plaintiffs have standing to pursue their VRA claim. Likewise, while intervenors assert (Legislators Br.11-12) that count V is not ripe, that assertion fails for the reasons discussed above, see supra pp.10-11.

Intervenors also contend (Legislators Br.19; RNC Br.3-5) that plaintiffs have not stated a plausible claim because they have not identified a particular instance of voter intimidation under S.B. 747. But that would impose a nearly impossible standard, as S.B. 747's poll-observer provisions did not take effect until January. In any event, intervenors' contention merely repackages their jurisdictional arguments, so it fails for the same reasons. Nor does it help them to cite Acosta v. Democratic City Committee, 288 F.Supp.3d 597 (E.D. Pa. 2018); as this Court later recognized, Acosta involved a claim under section 2 of the VRA, not section 11(b), as here. See Allen v. City of Graham, 2021 WL 2223772, at *7 (M.D.N.C. June 2, 2021). Indeed, this Court declined to dismiss a section 11(b) claim precisely because arguments regarding lack of

intimidation were "better addressed on a more developed factual record." Id. The Court should follow the same approach here.[3]

F. Count VI: National Voter Registration Act

1. Removal of same-day registrants

Defendants and intervenors maintain that plaintiffs' first alleged violation of the National Voter Registration Act—that S.B. 747 impermissibly allows removal of same-day registrants from the rolls within 90 days of federal elections—is not viable because same-day registrants are not really registrants, but only applicants. State Board Br.20-24; Legislators Br.19-21; RNC Br.11. According to them, there is no problem with removing same-day registrants from the voting rolls within 90 days of a federal election because the NVRA applies only to "eligible voters," 52 U.S.C. §20507(c)(2)(A), and same-day registrants are not eligible voters. That argument ignores that same-day registrants do not merely seek to vote; they have cast their ballots, and thus are in fact voters. In addition, North Carolina's statewide registration database "serve[s] as the official voter registration list for the conduct of all elections in the State." N.C. Gen. Stat. §163-82.11(a). Thus, when the State Board "update[s] the statewide registration database" to include a same-day registrant during its initial verification process, see id. §163-82.6B(d), that same-day registrant is considered an eligible voter.

[3] Intervenors suggest (Legislators Br.18) that it is "questionable" whether a private right of action exists to enforce section 11(b). But as this Court has noted, "[m]ultiple courts have found that the statute extends to private conduct and establishes a private cause of action." Allen, 2021 WL 2223772, at *7.

Plaintiffs' NVRA claim is, at a minimum, plausible. Indeed, another judge in this district concluded that a similar claim was not just plausible, but strong enough to warrant injunctive relief. North Carolina State Conference of NAACP v. Bipartisan Board of Elections and Ethics Enforcement, 2018 WL 3748172, at *5-10 (M.D.N.C. Aug. 7, 2018).

2. Removal of non-citizen jurors

According to defendants (Br.13-15), plaintiffs have neither Article III nor statutory standing to pursue their NVRA claim against S.B. 747's provision for the removal of people who declare themselves ineligible for jury duty because they are not U.S. citizens. Defendants also say (Br.15-16) that this claim is not ripe, an assertion intervenors endorse, Legislators Br.12; RNC Br.11. But whether framed as standing or ripeness, there is no jurisdictional problem with this claim.

According to defendants and intervenors, the Court lacks jurisdiction because the State Board's general counsel stated that the Board—as currently constituted—"has no intention of establishing a schedule for the submission of jury-excusal lists … that would consequently lead to removals of registered voters in the 90 days prior to a federal election." D.E. 75-3 at 2 (emphasis added). But given how the General Assembly has been trying to reconstitute the Board, see Am. Compl. 11 n.5 (discussing North Carolina Session Law 2023-139), the current Board's intentions warrant little weight. In any event, the general counsel offered only the equivocal statement that "the NVRA's 90-day provision will not necessarily be implicated by these new list maintenance procedures." D.E. 75-3 at 1 (emphasis added). That hedging follows from the statute itself, which says

that "[t]he clerk of superior court shall, at least on a schedule as determined by the State Board of Elections, communicate information regarding requests to be excused from jury duty on the basis that the person is not a citizen of the United States to the State Board of Elections." N.C. Gen. Stat. §9-6.2(b) (emphasis added). Even if the Board devises a schedule that complies with the NVRA, nothing would stop county boards from contravening the NVRA by providing information to the State Board more frequently. The general counsel's assurances are therefore no substitute for relief from this Court.

Defendants' and intervenors' proposed approach for litigating this claim, moreover (requiring plaintiffs to wait to bring an as-applied challenge) is impractical. As with plaintiffs' absentee-ballot-deadline and poll-observer claims, that approach would create too great a risk of voter disenfranchisement. For example, it might take time to uncover that a voter-removal program is operating during the 90-day pre-federal-election window. And even once a program was uncovered, it would take time to obtain judicial relief, at which point the election might have occurred—with some eligible voters having been unacceptably denied their right to vote. Plaintiffs present a facial challenge raising a pure question of law about how S.B. 747 interacts with the NVRA. The Court can and should decide that legal question now.[4]

[4] In addition to Article III standing, statutory standing, and ripeness, the State Board rehashes the same argument in a fourth way, arguing (Br.24) that plaintiffs' allegations regarding the removal of people from the rolls based on responses to jury summons fail to state a claim. That argument fails again for the same reasons.

CONCLUSION

The motions to dismiss should be denied. If the Court dismisses any claim, dismissal should be without prejudice and the Court should provide plaintiffs an opportunity to amend (which they hereby request) to cure any deficiencies the Court identifies.

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Respectfully submitted,

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* Local Rule 83.1(d) special appearance.

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d)(1), the undersigned certifies that this brief contains 6,210 words (not including material that may be excluded), as counted by the word-count feature in the word-processing software.

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

The undersigned certifies that on this 9th day of April, 2024, the foregoing document was served on counsel of record through the Court's Case Management and Electronic Case Filing (CM/ECF) System.

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