

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
No. 1:23-CV-861**

VOTO LATINO; *et al.*,

Plaintiffs,

v.

ALAN HIRSCH, in his official capacity as  
Chair of the State Board of Elections; *et al.*,

Defendants.

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

**INTRODUCTION AND STATEMENT OF THE CASE**

United States Supreme Court jurisprudence has long recognized that it is within the province of state legislatures to regulate voter qualifications. *Smiley v. Holm*, 285 U.S. 355, 366–69 (1932); *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991); *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013). In areas where Congress has declined to act, states have the authority to establish rules and regulations regarding the times, places, and manner for registered voters to cast their ballots. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). This authority includes “regulations relating to ‘registration.’” *Id.* (quoting *Smiley*, 285 U.S. at 366).

The North Carolina General Assembly has exercised its broad constitutional power to regulate “the conditions under which the right of suffrage may be exercised” by enacting Senate Bill 747/Session Law 2023-140 (“S.B. 747”). *Shelby Cnty.*, 570 U.S. at 543. Plaintiffs Voto Latino, the Watauga County Voting Rights Task Force, Down Home North

Carolina, and Sophie J. Meade (“Plaintiffs”), seek to enjoin certain provisions of S.B. 747 relating to same-day voter registration. The majority of Plaintiffs’ claims in their Motion for Preliminary Injunction (the “Motion”) are based upon an unreasonable reading of existing election laws and the plain text of S.B. 747 itself. To the extent that S.B. 747 actually altered existing law, this Court should defer to the General Assembly’s reasonable interpretations of S.B. 747 because the same-day registration provisions do not deprive any North Carolinians of their due process rights. For these reasons, Plaintiffs’ Motion should be denied.

### **RELEVANT STATEMENT OF FACTS**

S.B. 747 is the culmination of several months of legislating, aimed at addressing feedback from the North Carolina State Board of Elections (“NCSBE”) and constituents regarding election management and deadline. On October 10, 2023, the General Assembly overrode the Governor’s veto, making S.B. 747 law. N.C. Sess. Law 2023-140. Within hours of the veto override, Plaintiffs filed suit against the NCSBE and its Members challenging changes to North Carolina’s same-day registration laws. [D.E. 1]. About a month later, on November 15, 2023, Plaintiffs moved for a preliminary injunction, seeking to enjoin S.B. 747’s same-day voter registration provisions, attaching several declarations in support. [D.E. 44–45].<sup>1</sup> At a status conference held the same day, the Court allowed a limited period for the parties to conduct preliminary discovery.

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<sup>1</sup> Plaintiffs’ Motion is brought under Count I of Plaintiffs’ Complaint, whereby Plaintiffs allege that rejecting a same-day registrant’s application based on the return of one mailed verification card marked undeliverable by U.S.P.S. (the so-called “Undeliverable Mail Provision” or “UMP”)

### Voting Outside of Election Day in North Carolina

North Carolina has some of the most expansive and voter-friendly election laws in the country. Under North Carolina law, citizens can register to vote in person, online, via mail, or even at the DMV up to 25 days prior to election day. N.C.G.S. § 163-82.6(d). For voters who miss this 340-day window, North Carolina provides an accommodation in the form of same-day registration during the early voting period, which runs for seventeen days beginning the third Thursday prior to election day and ends at 3:00 p.m. the Saturday before election day. N.C.G.S. § 163-227.2; S.B. 747 § 10.(a) (*modifying* § 163-82.6B). North Carolina also allows no-excuse absentee voting for all registered voters, § 163-226(a), and voters may request an absentee ballot until 5:00 p.m. the Tuesday before election day. N.C.G.S. § 163-230.1. Finally, as an additional accommodation to all voters, North Carolina also allows all individuals to cast a provisional ballot on election day or during in-person early voting. N.C.G.S. § 163-82.4(f). Under no circumstance is an election worker allowed to deny an individual the right to vote a provisional ballot. *See* N.C.G.S. § 163-166.11.

### Same-Day Voter Registration in North Carolina

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violates their due process rights under the Fourteenth Amendment. [D.E. 1 ¶¶ 83-92; D.E. 45 at 2]. Plaintiffs' Complaint also alleges that the UMP imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments, D.E. 1 ¶¶93-98, which is not covered in Plaintiffs' Motion. [*See* D.E. 44-45].

Unlike North Carolina, most other states do not offer same-day voter registration. [Taylor Rep.<sup>2</sup> 5-6]. In order to register and actually vote on the same day, North Carolina has long required that same-day registrants (1) submit the same voter registration application as timely registrants, and (2) present to an elections official “official written or documentary evidence that the applicant is the person he represents himself to be.” N.C.G.S. § 163-82.6 (effective until January 1, 2024). Plaintiffs recognize that S.B. 747 does not change existing practice that requires proof of residence through a Help America Vote Act (“HAVA”) document and proof of identity through one of the forms of voter identification—just like every other voter. [D.E. 44-6 ¶12].

In relevant part, S.B. 747 altered the same day registration (“SDR”) provisions in the following ways:

- A SDR voter casts a “retrievable ballot” which is counted unless the county board of elections where the voter cast his/her ballot determines that they are not qualified to vote. S.B. 747 § 10(a). A retrievable ballot is a ballot with an identifier to allow for retrievability. N.C.G.S. § 163-227.5 Under N.C.G.S. § 163-227.5, a statute undisturbed by S.B. 747, the State Board “shall adopt” standards for retrievable ballots, which mandates that ballots have a number or equivalent identifier to allow for retrievability such as those for absentee ballots printed in accordance. *See* N.C.G.S. § 163-230.1.
- As part of the address verification process, the county boards of elections will retrieve any ballot if, before the close of canvass, the required address verification card is returned undeliverable. S.B. 747 § 10(a). This change was made at the request of the NCSBE because the time between early voting and the end of canvass did not allow sufficient time for the mailing and return of two verification cards. [Anderson Dep.<sup>3</sup> 51:1–8].

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<sup>2</sup> A true and correct copy of Dr. Andrew Taylor’s Report, which was served on all parties on December 4, 2023, is attached as **Exhibit 1**.

<sup>3</sup> Excerpts from Dr. Stella Anderson’s deposition in this case are attached as **Exhibit 2**.

S.B. 747 does not alter several existing SDR-related election laws. Particularly relevant to here :

- The requirement that individuals be notified if their voter registration application (which an SDR voter must complete) was rejected. Specifically, N.C.G.S. § 163-82.7(b) requires that all persons be notified of any denial of voter registration by certified mail within two days, and provides for appeals from the denial of registration. N.C.G.S. §163-82.18. Nothing alters this provision, and in fact the NCSBE’s new numbered memo provides additional notification in the form of a challenge. [Ex. 3<sup>4</sup> p. 6].

#### Individual Plaintiff

The only individual Plaintiff, and thus the only voter, challenging S.B. 747, Sophie Jae Mead, is a student at Appalachian State University. [D.E. 44-5 ¶3]. Despite the fact that Mead could have remained registered at her parents’ home in Union County, Mead chose to re-register in Watauga County and changed her address each time she moved her college residence. [Mead Dep.<sup>5</sup> 15:1-16:16]. Mead once had an issue with the mail verification process in 2022 whereby her mail verification notice was returned as undeliverable. [See D.E. 45-5 pp. 2-3]. Mead seemingly blames the poll worker who filled out her electronic voter application for the issue, but nevertheless Mead attested under penalty of perjury that the error was true and correct. [*Id.* pp. 11-12]. Ultimately, the issue was resolved and Mead’s ballot was counted. [D.E. 44-5 p. 4]. Despite the one-time issue, Mead’s confidence in the process was clearly not shaken to the point of concern, as she again utilized early

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<sup>4</sup> Attached as **Exhibit 3** is Numbered Memo 2023-5 (“Ex. 3”).

<sup>5</sup> Excerpts from Sophie Mead’s deposition in this matter are attached as **Exhibit 4**.

voting in November 2023 and intends to use it again in 2024 because it is “easiest for [her].” [Mead Dep. 14:19-25, 16:17-23; D.E. 44-5 ¶5].

### Organizational Plaintiffs

Pamela Williamson, a co-founder of the Watauga County Voting Rights Task Force, testified that she was not aware of any one person whose vote had not been counted because of undeliverable mail in previous elections. [Williamson Dep.<sup>6</sup> 11:25-12:6, 30:10-:16]. Instead, Williamson described the “enormous effort” she and the Task Force had to undertake after two ballots were challenged upon return of undeliverable mail for incorrect addresses. [*Id.* 37:8-:13]. To inform the two voters that their ballots had been challenged, Task Force members “sat on doorsteps”; “looked on social media”; “tried to contact friends” and “talked to a neighbor” in an attempt to find these individuals because “no one had a phone number or a valid address.” [*Id.* 39:11-:20 (emphasis added)].

In stark contrast to the two pieces of undeliverable mail that her Task Force sought to correct in the 2022 election, Williamson testified that she saw “stacks” of a significant number of address verification mailings returned after the county canvass deadline in 2016 and 2022. [*Id.* 31:22-32:11]. Williamson even testified that the number of notices provided to a voter “doesn’t matter . . . unless you send them to the correct address.” [*Id.* 53:3-:9].

Dr. Stella Anderson is also a co-founder of the Task Force, and a former member of both the NCSBE and the Watauga County Board of Elections. [Anderson Dep. 11:24-12:20;14:5-:8]. Like Williamson, Anderson confirmed in her deposition that “election after

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<sup>6</sup> Excerpts from Pamela Williamson’s deposition are attached as **Exhibit 5**.

election over many years” she has been “astounded at the total number of [address verification] cards that are returned as undeliverable.” [*Id.* 36:19-:25]. Anderson acknowledged that part of the problem, even under the pre-S.B. 747 system, was that the notice “would have been sent to the same mailing address that produced the undeliverable mail verification cards.” [*Id.* 42:18-:22].

Anderson also testified that based on her experience as a member of the NCSBE, she knew “the importance of [ ]getting the mail verifications out as soon as humanly possible from the day of the same-day registration [a]nd logging the returned cards” because of concerns that “returned mail verification cards still came in past the canvass period [and] so nothing could be done with those voters or those votes.” [*Id.* 43:16-:24]. Anderson admitted that there is a certain amount of error inherent in any system, but it’s in no way because poll workers are “being negligent or ill intended, no. It’s [ ] just going to happen to some extent.” [*Id.* 44:18-45:1]. Anderson conceded that the “State Board advocated for this process that got enacted,” specifically the Undeliverable Mail Provision (“UMP”) because “there’s a short period of time between the same-day registration, the time that the card can go out, [and] the time for the card to be returned if it is going to be returned as undeliverable prior to canvass.” [*Id.* 51:1-:8, 62:23-63:3]. Anderson defines voter fraud, as simply an “ineligible voter casting a ballot.” [*Id.* 88:24-89:3].

Ameer Patel is employed by Voto Latino as its managing director. [Patel Dep.<sup>7</sup> 12:24-13:3]. North Carolina is one of Voto Latino’s “core states” where it seeks to register

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<sup>7</sup> Excerpts of Ameer Patel’s deposition are attached as **Exhibit 6**.

Latino voters, instructs them on how to cast a ballot, and informs them about issues impacting Latino communities. [*Id.* 18:5-19:23]. Patel does not think that S.B. 747 has had any negative impact on fundraising for Voto Latino. [*Id.* 39:9-17].

When asked how many Voto Latino constituents may be harmed by the UMP, Patel responded that he “[could not] say for sure” because the bill has not gone into effect yet. [*Id.* 45:21-46:1]. When asked if he could give an example of a voter who had been disenfranchised because U.S.P.S. had a hard time delivering mail to shared or multi-generational housing, Patel gave the same response. [*Id.* 48:6-11]. Patel alleges that Voto Latino will be harmed because it may have to expend more resources on voter outreach and education on providing mailing addresses that can actually receive mail. [*Id.* 53:10-25].

#### Plaintiffs’ Expert

Plaintiffs offer Dr. Martha Kropf, a professor of political science at UNC-Charlotte, as an expert. [Kropf Dep.<sup>8</sup> 20:21-25]. Kropf’s assignment was to examine the UMP and historical instances of voter fraud, and determine whether the UMP could have an impact on voter fraud. [*Id.* 144:9-12]. She concludes the UMP cannot, but her deposition reveals that her Expert Declaration is nothing more than a self-fulfilling prophesy designed to fail.

At the outset, Kropf claimed to have no concerns with the law prior to S.B. 747. [*Id.* 59:17-20]. However, Kropf repeatedly rejected the notion that anyone’s vote or

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<sup>8</sup> Excerpts from Dr. Martha Kropf’s deposition in this matter are attached as **Exhibit 7**.



registration should be impacted for failing mail verification, *id.* 94:21-95:19, even though current law operates the same way.

First, Kropf makes an assumption that the General Assembly drafted the UMP to combat voter fraud, as she defines it. [Kropf Dep. 242:15-:20]. In making this assumption, Kropf did not speak to any legislators, or review any legislative history or testimony. [*Id.* 58:5-59:24].

Kropf has a prohibitively narrow definition of voter fraud, and therefore the purpose of S.B. 747, which hinges on intent. Her definition does not cover administrative issues, or other technical issues that result in illegal ballots. [*Id.* 77:14-:20].<sup>9</sup> In fact, Kropf admits that in defining voter fraud so narrowly, she's making a normative judgment. [*Id.* 258:11-:20]. In this way, Kropf's definition is at odds with not only Dr. Taylor's, but also Anderson's (who defined voter fraud as simply casting an illegal ballot).

Despite acknowledging that residency requirements are standard to determine voter eligibility, and that both voters and the State have an interest in ensuring voters vote in the district in which they live, Kropf takes issue with the policy choice of residence verification by mail. [*Id.* 47:14-:17, 63:14-64:6]. Particularly, Kropf testified that mail verification is unnecessary because a same-day registrant presents a HAVA document. [*Id.* 47:14-:18]. But Kropf admitted that these documents can be forged or stale. [*Id.* 92:10-94:15]. Kropf repeatedly criticized poll workers and isolated instances of alleged poll worker error

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<sup>9</sup> Ironically, even with her narrow definition, Kropf admits that voter fraud exists, testifying that “[t]he democrats that say there’s not voter fraud. That’s just dumb, right.” [*Id.* 231:3-:5].

throughout her deposition, seemingly unaware that her allegations of error *support* the idea that a mail residency check in addition to presentation of a HAVA document is logical.

In support of her conclusion that the UMP is unnecessary, Kropf conducted a survey of news articles, scholarly literature, one NCSBE audit from 2016, and the Heritage Foundation website. [*Id.* 102:3-107:1]. The methods used and the assumptions that Kropf made from this research ensured that she would find research that appeared to support her conclusion. This is not a proper method for an expert.

Kropf surveyed the Heritage Foundation website, which reports instances of detected fraud, but admits that fraud can go on undetected. [*Id.* 254:25-255:2]. Kropf then claims she examined further news reports for fraud involving SDR. [*Id.* 112:7-:10]. This is an odd choice since the Heritage Foundation largely does not report the method of voting. [*Id.* 120:24-121:3]. Moreover, Kropf declined to further research instances of voter registration fraud documented by the site. [*Id.* 148:2-14].

Instead, Kropf cherry-picked three instances for further investigation via news article searches. [*Id.* 149:10-:19]. Kropf conducted no factual research to verify the contents of the news articles. [*Id.* 149:23-150:2].

- First Kropf notes instances of fraud that led to two Pembroke City Council elections being overturned. [D.E. 44-6 ¶8]. Kropf asserts that the UMP could not have prevented the counting of ballots at issue in this instance because the voters “had a lease and did live in the district” and therefore “there is no reason to believe that the [UMP] would have been remotely effective in preventing the putative fraud.” [*Id.*]. However, when questioned about the basis of her opinion that the voters lived in the district, Kropf testified that she relied on a WRAL article which stated that the voters in question “had a lease.” [Kropf Dep. 158:8-15]. Kropf admitted that she did not independently verify this information, that she does not know whether the lease was valid, or forged, that she does not know how long the lease was for, and that it was

possible it was a short term lease such that UMP could have fixed the issue because the mail card would have been returned as undeliverable. [*Id.* 157:11-165:24]. In sum, Kropf read facts to support her theory into the news article that simply didn't exist.

- Second, Kropf points to a Pembroke mayoral and city council elections that were overturned in 2016 for challenged voters determined to be ineligible for not living at the address provided. [D.E. 44-6 ¶¶8-9]. Kropf asserts that news outlets reported that the election overturn was due to administrative errors, and that “some of the challenged individuals were homeless,” and the Board’s position was that homeless individuals cannot pick any spot for their address for purposes of voting. [*Id.*]. Upon review of the article to which she cited as support for her assertions, Kropf admitted that the article does not support any of her assertions. [*Id.* 272:12-273:13].
- Third, Kropf lists an overturned Lumberton City Council election in 2016. [D.E. 44-6 ¶9]. Kropf asserts that election was overturned due to election irregularities pertaining to a large number of challenged provisional ballots. [*Id.*]. However, upon review of the article she cited, Kropf admitted that the article does not support her assertions. [Kropf Dep. 178:1-179:4].<sup>10</sup>

In response to these issues and others, Kropf issued a “Corrected Report,” D.E. 49-2, which is still highly misleading.

Next, Kropf ran search terms through the Newsbank database to capture articles regarding voter fraud and SDR. Kropf testified that she ran three searches for the years 2008-2022:

- “same day registration” and “voter fraud,”
- “same day registration” and “election fraud,”
- “same day registration” and “voter impersonation.”

[*Id.* 183:22-184:12]. These terms search for articles in the narrowest possible sense. First, the terms locate none of the articles identified above, two of which involved residence

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<sup>10</sup> On re-direct, Plaintiffs’ counsel attempted to salvage Kropf’s provisional ballots claim by showing her the Heritage Foundation database. But the database clearly shows there were a large number of provisional ballots in the second election, not the first. [*Id.* 268:13-270:1].

fraud. [*Id.* 184:20-185:5]. Tellingly, Kropf did not run additional searches that could have provided a more fulsome record, like “one-stop.” [*Id.* 185:25-186:22]. Kropf also failed to provide the articles she references in her table, *Id.* 190:10-:22, and when asked how Defendants could verify her searches, she admitted removing duplicates, articles discussing national issues, and articles referring to the NCSBE 2016 audit in her table. [*Id.* 192:6-195:12]. Not only does this mean Defendants couldn’t replicate her methodology, but it also means Kropf artificially lowered the number of instances of reported fraud. [*Id.* 192:22-193:1].

Kropf’s scholarly and governmental resource review likewise reveals that she cherry-picked her sources. For example, Kropf testified that she did not look at the 2005 Carter-Baker Report while completing her declaration even though the report exhaustively examined election security (and concluded states should do more to prevent voter registration fraud) because “[i]t’s old.” [*Id.* 213:12-219:3, 238:11-:15]. However, Kropf admitted that her declaration references sources from around the same time and one from 1999. [*Id.* 239:5-241:6].

In sum, the Court should give little weight to Kropf’s opinions because they are: (1) not credible; (2) undercut by Plaintiffs’ own lay-witness testimony; (3) based on a flawed self-fulfilling methodology; and (4) contain factual inaccuracies based on assumptions made from news articles without verifying the underlying facts, or even reporting the facts correctly.

### Legislative Defendants' Expert

Legislative Defendants retained Dr. Andrew Taylor to provide a preliminary opinion on the SDR updates in S.B. 747 and address some of Kropf's findings. [Taylor Rep. 1, 3]. Taylor has served as a professor of Political Science at N.C. State University for approximately 28 years. [*Id.* 1]. Taylor concluded among other things:

- That compared to other states, North Carolina's election laws are reasonable, and fall in the "middle of the pack" because most states do not even use SDR. [*Id.* 4-6];
- The UMP will impact few voters because the number of SDR votes even in high-turnout presidential election years constitutes only approximately 3% those cast for the office. Kropf's estimates highlight the maximum effect on turnout if SDR did not exist and SDR voters had no alternative way to vote, which of course is untrue. [*Id.* 7-8];
- Plaintiffs' criticisms of U.S.P.S. are overblown, as only 1% of all mail is undeliverable because of U.S.P.S. error; and in any event, there is no evidence that the attempted delivery of a second card to the same address would significantly decrease the risk of error. [*Id.* 9-11]. Plaintiffs' criticism is also at odds with increased encouragement by both political parties and Voto Latino to vote by mail. [*Id.* 11]. Moreover, because U.S.P.S. can hold a piece of undeliverable mail for 15 days, a single mail card significantly

increases the chances that cards will be returned before the election, allowing for better confidence in election finality. [*Id.*];

- The State has a legitimate interest in ensuring that voters cast a ballot in their correct district, and that the card is returned before the end of canvass. This, in turn, can lead to increased confidence in elections, which is currently low. [*Id.* 12-14]. In furthering the state’s interest in verifying a registrant’s address, the UMP ensures that voters who do cast their ballot correctly are not disenfranchised by illegal votes. [*Id.* 15].
- The UMP “makes it easier to detect voter fraud, ensures individuals have voted in the correct contests, may increase North Carolinians’ confidence in the election process, and, unlike actual fraud, does not disenfranchise voters.” [*Id.* 16]. In contrast to the benefits of S.B. 747, Dr. Taylor concluded that voters who chose to utilize the SDR provisions understand the risk of voting and registering the same day and are aware of the other means of voting available to them. [*Id.* 15-16].

### **QUESTION PRESENTED**

1. Are Plaintiffs entitled to a preliminary injunction of S.B. 747’s same-day voter registration provisions as articulated in their Motion?

### **ARGUMENT**

“A preliminary injunction is an extraordinary remedy intended to protect the status quo and prevent irreparable harm during the pendency of a lawsuit.” *Di Biase v. SPX Corp.*,

872 F.3d 224, 230 (4th Cir. 2017). Plaintiffs cannot meet the burden here for such an extraordinary remedy. As movants, Plaintiffs have not “clearly establish[ed] entitlement to the relief sought.” *Id.* (citation omitted). The burden of proof is on Plaintiffs to demonstrate (1) likelihood of success on the merits; (2) “irreparable harm in the absence of preliminary relief[;]” (3) “that the balance of equities tips in [their] favor[;]” and (4) “that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (internal citations omitted).

Plaintiffs’ Motion must be denied because Plaintiffs have failed to make a clear showing that *any* of the four necessary elements that are required for a preliminary injunction are present, starting with a clear showing of a likelihood of succeeding on the merits.

**I. Plaintiffs Will Not Succeed on the Merits.**

**A. Plaintiffs Lack Standing.**

As will be more fully detailed in Legislative Defendants’ forthcoming Motion to Dismiss, Plaintiffs lack Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, Plaintiffs fail to present a cognizable injury as required under Article III. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (requiring a “personal stake in the outcome of the controversy”). Organizational Plaintiffs have utterly failed to allege that any of the SDR provisions challenged in S.B. 747 create specific harm to their organizations or their members (if they have any). Rather, these claims are generalized grievances that are speculative and not judicially cognizable. *Id.* Mead also failed to show that her vote was

not counted because of S.B. 747. [D.E. 44-5 ¶ 4]. The only harm Mead claims is speculative—some *potential* SDR issue in a *future* election where she *might* utilize SDR.

It is more likely that Plaintiffs’ speculative claims fail, rather than succeed. But even assuming *arguendo* Plaintiffs have standing, which they do not, Plaintiffs will not succeed on the merits and their Motion for Preliminary Injunction must be denied.<sup>11</sup>

**B. Plaintiffs Will Not Succeed on their Procedural Due Process Claim.**

Plaintiffs’ procedural due process claim is unlikely to succeed on the merits. When assessing a procedural due process claim, courts analyze three factors: (1) the private interest that will be affected by the official action; (2) the risk that the individual will be wrongly deprived of that interest under the existing procedure, as well as the value of additional procedures to safeguard against the loss of the interest; and (3) the governmental interest, including the function involved and the fiscal and administrative burdens that additional procedure would entail. *Mathews v. Eldridge*, 424 US 319, 334–35 (1976). Plaintiffs cannot satisfy any of the three.<sup>12</sup>

**i. Organizational Plaintiffs Do Not Possess a Private Interest and Ms. Mead’s Interest is Tenable at Best.**

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<sup>11</sup> Legislative Defendants intend to file a Motion to Dismiss by or on January 16, 2024.

<sup>12</sup> For the same reasons set forth herein, Plaintiffs also fail the burden-shifting framework set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takshi*, 504 U.S. 428, 434 (1992). Legislative Defendants’ citation to *Mathews* should not be construed as an admission that the *Mathews* test applies. Instead, argument under *Mathews* is provided to show that Plaintiffs cannot succeed on the merits even under the more-stringent test. See *Democratic Party of Va. v. Brink*, 599 F. Supp. 3d 346, 361 (E.D. Va. 2022) (noting the Fourth Circuit has not decided whether *Mathews* or *Anderson-Burdick* applies to assess procedural due process challenges to election regulations).



North Carolina citizens have an undeniable interest in the right to vote. But only one individual Plaintiff is a North Carolina resident. It is unclear what relevant private interest the Organizational Plaintiffs have that is affected by SDR. To the extent that Organizational Plaintiffs claim frustration of their missions, the idea that the UMP will disenfranchise these organizations' members or constituents is attenuated, Patel Dep. 45:21-46:1, and demands a level of perfection that is not required under the law. As to Mead, she was never actually prohibited from voting. Despite the known risks and the number of times Mead has moved, she testified in her deposition that she prefers SDR and she continues to utilize it because it is "more convenient" for her. [Mead Dep. 13:15-14:25; 19:6-13]. Choosing to wait until the last minute out of convenience does not reflect concern about a vote not counting. Even assuming Plaintiffs have a private interest that matters here, their procedural due process claims fail the other two *Mathews* prongs.

**ii. Plaintiffs Fail to Show a Risk of Wrongful Deprivation of a Private Interest.**

Plaintiffs' reading that S.B. 747 "deprives voters of their fundamental right to vote without any notice or opportunity to be heard" is at odds with their position that the pre-S.B. 747 provisions were adequate, and is an implausible reading of both versions of the statutes. [D.E. 45 p. 13, 26]. Same-day registrants complete the same registration application as timely registrants. *See* S.B. 747 §10.(a); N.C.G.S. § 163-82.4. While it is true that individuals are allowed to vote immediately after same-day registration, the application is still subject to the same registration verification by the county boards of election as timely registration applications. In fact, recent NCSBE guidance suggests SDR

voters could be entitled to additional notice. [Ex. 3]. If a same-day registrant's registration is denied, they are then entitled to the same due process as all other timely registrants including those set forth in N.C.G.S. § 163-82.7(b), § 163-82.18. This correct reading of the statute allows the statutory provisions to be read as a whole. *Territory of Guam v. United States*, 141 S. Ct. 1608, 1613 (2021). Because same-day registrants are entitled to the same due process rights as timely registrants, the risk of erroneous deprivation is low.

Moreover, Plaintiffs entirely ignore that under North Carolina law all registrants are entitled to vote a provisional ballot. The State's provisional ballot statutes and processes were unaltered by S.B. 747. *See* N.C.G.S. § 163-82.4(f), § 163-166.11.

Furthermore, Plaintiffs make much ado about the fact that voters who fail mail verification do not receive notice, but the pre-S.B. 747 version of the law likewise provided no notice when a voter failed mail verification. *See supra* pp. 6-8, 13-15. Because Plaintiffs misinterpret the applicable statutory scheme, the risk of harm under S.B. 747 to a voter is minimal and no additional procedure is needed. *Mathews*, 424 U.S. at 334–35.

### **iii. S.B. 747 Supports the State's Compelling Interests.**

It is well-established that “[s]tate legislatures are presumed to have acted within their constitutional power” in the first instance. *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961). Therefore, a statute regulating voter qualifications should not be set aside on Fourteenth Amendment grounds “if any state of facts reasonably may be conceived to justify it.” *Id.*

S.B. 747 is a manifestation of the General Assembly’s desire to expand opportunities to register and vote and to work hand-in-hand with the NCSBE to ensure votes are timely counted. This promotes at least two government interests: (1) preserving the integrity of the election process and (2) instilling confidence in the electorate. These clear interests have long been protected by courts. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (recognizing the need to protect confidence “in the integrity and legitimacy of representative government.”).

S.B. 747 furthers these interests in several ways. First, it ensures that registrants live in the precinct where they vote. The importance of residency is fundamental to ensure that voters cast ballots to elect officials that represent their specific community needs. *Democracy N.C. v. NCSBE*, 476 F. Supp. 3d 158, 208 (M.D.N.C. 2020) (proof of residency is a legitimate state interest).

“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,” *Purcell v. Gonzales*, 549 U.S. 1, 4 (2006), and is another compelling state interest here. To promote confidence in the election process, the General Assembly has an interest in setting deadlines that ensure election finality. An integral part of this is knowing which properly registered voters cast proper ballots in a timely fashion. [Taylor Rep. pp. 13-15]. S.B. 747 addresses the issue, raised by the NCSBE, that there was insufficient time for same-day registrants to be mailed two address verification cards in order to ensure the voter was properly registered and voted at the correct address. *See N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 449-455 (2016) (discussing

how SDR time limitations resulted in votes being counted despite voters failing mail verification). [Anderson Dep. 62:23–63:3; Ex. 8<sup>13</sup> p. 3].<sup>14</sup>

Plaintiffs attempt to paint U.S. Mail as unreliable, but U.S.P.S. successfully processes hundreds of millions of pieces of mail per day.<sup>15</sup> A properly addressed<sup>16</sup> piece of mail is presumed delivered and is sufficient for service. *Nibagwire v. Gonzales*, 450 F.3d 153, 156 (4th Cir. 2006) (regular mail service is entitled to the presumption of effective delivery); *Fed. Deposit Ins. Corp. v. Schaffer*, 731 F.2d 1134, 1137 n. 6 (4th Cir.1984). Thus, any claim that existing mail procedures create a risk of harm is specious at best. It is unclear how a second mailing *to the same address* would alleviate a mailing address issue. [Taylor Rep. 11]. A ruling by this Court that the use of U.S. Mail is a constitutionally inadequate procedure would open the door for a similar challenge to absentee-by-mail voting and could have seismic repercussions in other aspects of government where U.S. Mail is relied upon.

In sum, Plaintiffs are unlikely to succeed because (1) only Mead arguably possesses a private interest; (2) the risk that anyone will be wrongly deprived of the right to vote

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<sup>13</sup> Attached as **Exhibit 8** is copy of Numbered Memo 2016-15 (hereinafter “Ex. 8”).

<sup>14</sup> Plaintiffs incorrectly state that county boards did not log returned mail in the first instance, *see* D.E. 45 at 27. This is untrue. *See* Ex. 8 p. 3. S.B. 747 alleviates the administrative burden by requiring one piece of mail to be logged, instead of two.

<sup>15</sup> <https://facts.usps.com/mailpieces-processed-each-hour/>

<sup>16</sup> A same-day registrant either enters their own address into the application or dictates it to a poll worker. Under either procedure the registrant reviews and signs under penalty of perjury that the information is true and correct.

under the UMP is minimal; and (3) S.B. 747 advances the State's compelling interests including promoting voter confidence and ensuring voters vote in the correct district.

## **II. Plaintiffs will Not Suffer Irreparable Harm.**

While the right to vote is undeniably a fundamental constitutional right, Plaintiffs have offered no evidence (or even a non-speculative claim) that the SDR provisions of S.B. 747 will lead to anyone being denied the right to vote. As detailed above, Plaintiffs offer an implausible reading of S.B. 747's registration provisions. All same-day registrants are still provided the same due process rights, including notice via certified mail, a hearing, and appeal rights if a registration is denied. N.C.G.S. § 163-82.7(b), § 163-82.18. [Ex. 3].

Lastly, Plaintiffs have presented no evidence to support their claim that same-day registrants receiving only a single mail verification card would cause harm. Plaintiffs' Complaint is devoid of any allegation, much less one with evidentiary support, that any alleged deficiencies in a mail verification card are cured with the mailing of a second card. Nor do Plaintiffs address the commonsense argument that there is no time for two mail verification cards to be sent to a voter who registers and votes on the last day of early voting (3 days before election day). Rather, Plaintiffs' chief argument seems to be that if North Carolina is going to offer SDR, then it must accept all SDR applications, including unverified applications where the mail verification fails. Nothing in law or equity demands such a fraudulent result.

### III. The Balance of Equities and Public Interest Weighs Against an Injunction.

The third and fourth *Winter* factors, on the balance of the equities and the public interest, “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). In matters involving challenges to election laws, “[a]llowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality” *Purcell*, 549 U.S. at, 8. This is especially true here where there is *no* record for the Court to judge Plaintiffs’ claims, much less one supporting Plaintiffs’ contentions that Democratic voters (or any voter) will be unable to cast a ballot.

If a preliminary injunction is not issued, Plaintiffs will suffer no harm. In contrast, Defendants would be subjected to significant and irreparable harm if preliminary injunctive relief is granted. “[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (quotation omitted); *see also Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 134 S. Ct. 506, 506 (2013) (mem.) (Scalia, J., concurring).

The balance of the equities and public interest do not favor an injunction. Despite Plaintiffs’ rhetoric about the aims of the bill, S.B. 747 is a manifestation of the General Assembly’s desire to expand opportunities to register and vote while also balancing the need to verify a voter’s residence and achieve election finality to instill voter confidence.

Moreover, S.B. 747 resolves the long-standing concern of “stacks” of undeliverable mail received after the canvas deadline. [Williamson Dep. 31:22-32:11; Ex.7].

North Carolina, through the General Assembly, has an “an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, (1997). And as pointed out by Justice Kavanaugh, sometimes when election statutes are challenged close to an election, the “important principle of judicial restraint . . . prevents election administrator confusion—and thereby protects the State’s interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.” *DNC v. Wis. State Legislature*, 141 S.Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

There is nothing radical about ensuring that same-day registrants, who have forgone the timely registration process, can have their address verified in time to ensure election finality. Moreover, Plaintiffs seek to dismantle these protections designed to instill confidence in elections before the March 2024 primary, potentially causing confusion for election administrators and voters. For these reasons, the balance of equities and the risk to public harm weigh against an injunction.

### **CONCLUSION**

It is difficult to fully articulate the scope and complexity of administering elections in North Carolina. Even within this complex election environment, lawmakers sought to balance greater flexibility in registration and voting with the State’s vital interests in

ensuring integrity in the election process and promoting public confidence in elections. S.B. 747 accomplishes that goal. Legislative Defendants respectfully request that the Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted this the 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 6210 words as counted by the word count feature of Microsoft Word.

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**CERTIFICATE OF SERVICE**

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification to counsel of record.

This the 13th day of December, 2023.

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