

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:23-CV-862

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*; and
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.

**PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION
(Fed R. Civ. P. 65)**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs—the Democratic National Committee and the North Carolina Democratic Party—move for a preliminary injunction enjoining defendants, their agents, successors in office, and all persons acting in concert with them from enforcing certain provisions of Senate Bill 747, recently enacted by the North Carolina General Assembly. In support of this motion,

plaintiffs have filed a brief setting out the grounds for the requested injunction, which plaintiffs incorporate here by reference.

Under Local Rules 7.3(c)(1) and 65.1(b), plaintiffs request oral argument on the motion, given the importance of the issues it raises.

WHEREFORE, plaintiffs request that the Court grant the motion and enjoin defendants, their agents, successors in office, and all persons acting in concert with them from doing any of the following:

- (1) requiring same-day registrants (i.e., voters who seek to register and vote on the same day, prior to election day) to produce documentation that other registrants need not produce;
- (2) denying a same-day registrant's application to register without providing that individual with sufficient notice and a meaningful opportunity to be heard;
- (3) rejecting a same-day registrant's application to register based on the return of a single notice as undeliverable by the U.S. Postal Service;
- (4) applying different voting-registration standards, practices, or procedures to different individuals in the same county; and
- (5) failing to provide a free-access system by which same-day registrants can track their retrievable ballots.

Plaintiffs respectfully request that the Court waive the security requirement in Rule 65(c) of the Federal Rules of Civil Procedure.

October 10, 2023

Respectfully submitted,

/s/ William A. Robertson
JIM W. PHILLIPS, JR.
N.C. BAR NO. 12516
SHANA L. FULTON
N.C. BAR NO. 27836
WILLIAM A. ROBERTSON
N.C. BAR NO. 53589
JAMES W. WHALEN
N.C. Bar No. 58477
BROOKS, PIERCE, MCLENDON
HUMPHREY & LEONARD, LLP
150 Fayetteville Street
1700 Wells Fargo Capitol Center
Raleigh, N.C. 27601
Phone: (919) 839-0300
Fax: (919) 839-0304
jphillips@brookspierce.com
sfulton@brookspierce.com
wrobertson@brookspierce.com
jwhalen@brookspierce.com

RETRIEVED FROM DEMOCRACYDOCK.COM

SETH P. WAXMAN*
DANIEL S. VOLCHOK*
CHRISTOPHER E. BABBITT*
GARY M. FOX*
JOSEPH M. MEYER*
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
Phone: (202) 663-6000
Fax: (202) 663-6363
seth.waxman@wilmerhale.com
daniel.volchok@wilmerhale.com
christopher.babbitt@wilmerhale.com
gary.fox@wilmerhale.com
joseph.meyer@wilmerhale.com

* Local Rule 83.1(d) special
appearance forthcoming.

CERTIFICATE OF SERVICE

I certify that the foregoing document will be served together with Defendants' summonses and complaint via Federal Express, delivery confirmation requested, on defendants' counsel, at the following addresses:

Sarah Boyce, Deputy Attorney General and General Counsel
North Carolina Department of Justice
114 West Edenton Street
Raleigh, NC 27603

Paul Cox, General Counsel
North Carolina State Board of Elections
430 North Salisbury Street
Suite 3128
Raleigh, NC 27603

This 10th day of October, 2023.

/s/ William A. Robertson

William A. Robertson

**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.

Case No. 1:23-CV-862

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	- 1 -
STATEMENT	- 3 -
A. Non-Same-Day Registration And Voting In North Carolina	- 3 -
B. Same-Day Registration And Voting Before And After S.B. 747	- 5 -
C. Other Changes Effected By S.B. 747	- 7 -
D. S.B. 747 Was Enacted Over The Governor’s Veto	- 8 -
LEGAL STANDARD	- 9 -
ARGUMENT	- 9 -
I. Plaintiffs Are Likely To Succeed On The Merits Of Their Claims	- 9 -
A. Plaintiffs Will Likely Prevail On Their Claim That S.B. 747’s Same-Day-Registration Provisions Violate Procedural Due Process	- 9 -
B. Plaintiffs Are Likely To Succeed On Their Claim That S.B. 747’s Same-Day-Registration Provisions Violate The Civil Rights Act	- 16 -
C. Plaintiffs Will Likely Succeed In Proving That S.B. 747’s Same- Day-Registration Provisions Violate The Help America Vote Act.....	- 19 -
II. Plaintiffs Will Suffer Irreparable Injury Absent An Injunction.....	- 20 -
III. The Balance Of Equities And Public Interest Favor An Injunction	- 21 -
CONCLUSION	- 22 -
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Arizona Democratic Party v. Hobbs</i> , 485 F.Supp.3d 1073 (D. Ariz. 2020)	10
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	13
<i>Democracy North Carolina v. North Carolina State Board of Elections</i> , 476 F.Supp.3d 158 (M.D.N.C. 2020)	10, 13, 16
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	20
<i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972)	11
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970)	13
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	14
<i>Harper v. Virginia State Board of Elections</i> , 383 U.S. 663 (1966)	1
<i>Illinois State Board of Elections v. Socialist Workers Party</i> , 440 U.S. 173 (1979)	13
<i>Kendall v. Balcerzak</i> , 650 F.3d 515 (4th Cir. 2011)	10
<i>Kirk v. Commissioner of Social Security Administration</i> , 987 F.3d 314 (4th Cir. 2021)	14
<i>League of Women Voters of North Carolina v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014)	20
<i>League of Women Voters of South Carolina v. Andino</i> , 497 F.Supp.3d 59 (D.S.C. 2020)	10
<i>Mackey v. Montrym</i> , 443 U.S. 1 (1979)	14, 16
<i>Martin v. Kemp</i> , 341 F.Supp.3d 1326 (N.D. Ga. 2018)	13
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	10, 15
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	21
<i>North Carolina State Conference of NAACP v. Cooper</i> , 430 F.Supp.3d 15 (2019)	21

<i>North Carolina State Conference of the NAACP v. McCrory</i> , 831 F.3d 204 (4th Cir. 2016)	13, 18, 22
<i>Obama for America v. Husted</i> , 697 F.3d 423 (6th Cir. 2012).....	21
<i>Pashby v. Delia</i> , 709 F.3d 307 (4th Cir. 2013).....	9
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006).....	21
<i>Raetzl v. Parks/Bellefont Absentee Election Board</i> , 762 F.Supp. 1354 (D. Ariz. 1990).....	16
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	10
<i>Rockville Cars, LLC v. City of Rockville</i> , 891 F.3d 141 (4th Cir. 2018).....	11
<i>Taylor v. Louisiana</i> , 419 U.S. 522 (1975).....	22
<i>United States v. City of Cambridge</i> , 799 F.2d 137 (4th Cir. 1986).....	20
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964)	1
<i>Winter v. Natural Resources Defense Council, Inc.</i> , 555 U.S. 7 (2008).....	9
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	13
<i>Zinerman v. Burch</i> , 494 U.S. 113 (1990)	15

STATUTES AND CONSTITUTIONAL PROVISIONS

42 U.S.C. §1971	16
52 U.S.C.	
§10101	16, 17
§21082	19
N.C. Gen. Stat.	
§163-45.1	8
§163-54.....	3
§163-55.....	3
§163-82.1	3
§163-82.18.....	4, 5
§163-82.4.....	3, 4
§163-82.6B	6, 7, 17, 18
§163-82.7.....	4, 12, 15, 18
§163-88.....	15

§163-89.....	8, 15
§163-227.6.....	5
§163-231.....	7
U.S. Const. amend. XIV	9
N.C. Const. art. VI,	
§1	3
§2	3
§3	3

OTHER AUTHORITIES

<i>Governor Roy Cooper Objections and Veto Message</i> (Aug. 24, 2023), https://webservices.ncleg.gov/ViewBillDocument/2023/7138/0/S747-BILL-NBC-11326	2, 8
NCSBE, <i>Register in Person During Early Voting</i> , https://www.ncsbe.gov/registering/how-register/register-person-during-early-voting	5
NCSBE, <i>State Board Unanimously Certifies 2022 General Election in NC</i> (Nov 29, 2023), https://www.ncsbe.gov/news/press-releases/2022/11/29/state-board-unanimously-certifies-2022-general-election-nc	2, 21
North Carolina Senate Bill 747	6, 7, 8, 11, 12, 15, 17
Office of Inspector General, United States Postal Service, <i>Strategies for Reducing Undeliverable as Addressed Mail</i> , Rep. No. MS-MA-15-006 (May 1, 2015), https://www.uspsoig.gov/sites/default/files/reports/2023-01/ms-ma-15-006.pdf	12
Pew Research Center, <i>The demographics of multigenerational households</i> (Mar. 24, 2022), https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/	18

INTRODUCTION

North Carolina Senate Bill 747 (“S.B. 747”) is a multi-pronged assault on the right to vote. “No right is more precious” than the right to cast a ballot and have it counted, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), because voting is “preservative of all rights,” *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 667 (1966). And yet, for no good reason, S.B. 747 chips away at the right to vote from just about every angle: It makes it harder to register to vote. It makes it harder to *stay* registered to vote. It makes it easier to challenge someone else’s vote. It invites voter intimidation at the polls. And it virtually ensures that a substantial number of lawful votes will be “retrieved” and tossed out by election officials, or otherwise not counted, due to vagaries of the mail. The U.S. Constitution and multiple federal statutes prohibit this bald-faced vote suppression.

The Democratic National Committee (“DNC”) and the North Carolina Democratic Party (“NCDP”) seek a preliminary injunction against certain provisions of S.B. 747 that can and should be found unlawful now—before they suppress votes in the upcoming elections. Specifically, plaintiffs seek to enjoin S.B. 747’s provisions upending North Carolina’s scheme for same-day registration and early voting. These provisions violate the U.S. Constitution’s Due Process Clause by (1) providing *no* process for same-day registrants to contest erroneous rejections of their registration applications and ballots, and (2) establishing a system in which registration applications are denied—and voted ballots “retrieved” and discarded—if a county election board or the U.S. Postal Service makes a single mistake resulting in the improper return of an address-verification notice

as undeliverable (again without any mechanism for the affected voter to learn of or dispute the denial). The challenged provisions also violate the Civil Rights Act (“CRA”), by applying different standards and procedures to same-day registrants than to non-same-day registrants in the same county. And the provisions violate the Help America Vote Act (“HAVA”), by failing to provide a system for same-day registrants to track whether their ballots are counted.

S.B. 747 is an omnibus grab-bag of vote-suppression provisions, including some that were first passed by the legislature a year ago, but did not become law because they were vetoed by Governor Cooper. Since then, North Carolina held elections in which there was “*no evidence* of any fraud or other irregularities that could affect the outcome of a contest.” North Carolina State Board of Elections (“NCSBE”), *State Board Unanimously Certifies 2022 General Election in NC* (Nov. 29, 2022)¹ (emphasis added). Despite that, an emboldened supermajority in North Carolina’s General Assembly passed S.B. 747, and this time overrode Governor Cooper’s veto (strictly along party lines) without any legislative reports justifying the bill’s restrictions on the franchise. As the governor’s veto message stated, S.B. 747 “has nothing to do with election security.” *Governor Roy Cooper Objections and Veto Message*.² It seeks instead to “block voters and their ballots unnecessarily.” *Id.*

¹ <https://www.ncsbe.gov/news/press-releases/2022/11/29/state-board-unanimously-certifies-2022-general-election-nc>.

² <https://webservices.ncleg.gov/ViewBillDocument/2023/7138/0/S747-BILL-NBC-11326>.

Because S.B. 747's same-day-registration provisions are unconstitutional and violate the CRA and HAVA, they should be promptly enjoined.

Pursuant to Local Rule 7.3(c)(1), plaintiffs request oral argument on this motion given the importance of the issues involved.

STATEMENT

A. Non-Same-Day Registration And Voting In North Carolina

Under the North Carolina Constitution, “[e]very person born in the United States and every person who has been naturalized,” is at least “18 years of age,” and meets certain qualifications “shall be entitled to vote at any election.” N.C. Const. art. VI, §1. To be eligible to vote in a certain county, voters must generally reside there. N.C. Gen. Stat. §163-55(a). And to vote in person, voters must “present photographic identification.” N.C. Const. art. VI, §§2(4), 3(2).

Individuals must register before they can vote in North Carolina. N.C. Gen. Stat. §§163-54, 163-82.1(a). The state's registration form asks an applicant to provide certain information, including his or her name, residential address, county of residence, and political party affiliation (if any). *Id.* §163-82.4(a). And election officials can ask an applicant for any other “information the [NCSBE] finds is necessary to enable officials of the county where the person resides to satisfactorily process the application.” *Id.*

When an applicant fills out the registration form, he or she is not required to present any specific documentation verifying his or her eligibility. Rather, the applicant must sign an attestation under penalty of perjury that he or she meets all the requirements

to register. *Id.* §163-82.4(c)(1). Registration forms typically must be submitted no later than 25 days before the election in which the applicant seeks to vote. *Id.* §163-82.6(d).

When a county board of elections receives an application to register to vote, the board either tentatively determines that the applicant is qualified to vote at the address given on his or her application or determines that the applicant is not qualified to vote at that address. N.C. Gen. Stat. §163-82.7(a). If the board tentatively determines that an applicant is qualified to vote at the given address, it “shall send a notice to the applicant, by nonforwardable mail, at the address the applicant provide[d] on the application form.” *Id.* §163-82.7(c). If the U.S. Postal Service does not return that verification notice to the county board as undeliverable, then “the county board shall register the applicant to vote.” *Id.* §163-82.7(d). If the Postal Service does return the notice to the board as undeliverable, then “the county board shall send a second notice by nonforwardable mail to the same address to which the first was sent.” *Id.* §163-82.7(e). If the second notice is not returned as undeliverable, then the board “shall register the applicant to vote.” *Id.* If the second notice is returned as undeliverable, then the board “shall deny the application” and “need not try to notify the applicant further.” *Id.* §163-82.7(f).

If a county board determines that an applicant is *not* qualified to vote based on his or her application to register, then the board “shall send, by certified mail, a notice of denial of registration.” N.C. Gen. Stat. §163-82.7(b). An applicant who wishes to dispute the denial of the application may appeal to the county board within five days. *Id.*; *see also id.* §163-82.18(a). The board must conduct a public hearing on any such appeal. *Id.* §163-82.18(b). An applicant whose appeal is denied after such a hearing may appeal

to the North Carolina Superior Court within ten days of the board’s post-hearing denial, and may appeal that court’s decision to North Carolina appellate courts. *Id.* §163-82.18(c).

B. Same-Day Registration And Voting Before And After S.B. 747

Before S.B. 747’s enactment, North Carolinians could, in addition to the options just discussed, register to vote and cast a ballot before election day (or just cast a ballot if they were already registered) at what the state called “one-stop” voting sites. N.C. Gen. Stat. §163-227.6. Whether they were both registering and voting or just voting, individuals at these sites cast “absentee ballots.” *Id.* Those who sought to both register and vote were required to fill out a registration application and provide one of several documents proving residence (with certain special dispensations for students living on campus). NCSBE, *Register in Person During Early Voting*.³ For students living on campus, proof of residence could include (1) any document from the student’s school showing the student’s name and on-campus address, or (2) a photo-identification card issued by the school, if the school provided the county board of elections with a list of students residing on campus. *Id.* Same-day registrants’ applications were treated the same as other registrants’ applications with respect to the address-verification process: The county board of elections would deny a same-day registrant’s application only if two notices were returned as undeliverable. *Id.* §163-82.7(f). Same-day registrants also were afforded the same appeal procedures as other registrants. *Id.* §163-82.18.

³ <https://www.ncsbe.gov/registering/how-register/register-person-during-early-voting> (visited October 10, 2023).

S.B. 747 upends these rules for same-day registrants. With respect to documentation, S.B. 747 requires individuals seeking to register and vote on the same day to (1) “[p]resent photo identification,” (2) “[c]omplete a voter registration application form,” and (3) “[p]rovide proof of residence by presenting a HAVA document listing the individual’s current name and residence address.” S.B. 747 §10.(a) (to be codified at N.C. Gen. Stat. §163-82.6B(b)). A “HAVA document” is a “current utility bill,” “bank statement,” “government check,” “paycheck,” “[a]nother current government document,” or a “current document issued from the institution who issued the photo identification shown by the voter.” *Id.* (to be codified at N.C. Gen. Stat. §163-82.6B(e)). There are no longer any special dispensations for students living on campus. If an election official rejects a same-day registrant’s application based on allegedly deficient documentation, S.B. 747 provides no means for the individual to challenge that rejection.

Next, S.B. 747 enacts a new and unique scheme for the treatment of registration applications submitted by same-day registrants as well as of the “retrievable ballots” such registrants must cast (what were called “absentee ballots” pre-S.B. 747). As noted, before S.B. 747, *two* address-verification notices had to be returned as undeliverable before any registration application could be rejected (the same as with all other registrants). But under S.B. 747, whereas that same rule still applies for *non*-same-day registrants, for same-day registrants, “if the Postal Service returns the *first* notice ... as undeliverable before the close of business on the business day before canvass, 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.” S.B. 747 §10.(a) (to be codified at N.C. Gen. Stat. §163-82.6B(d)) (emphasis added).

Finally, S.B. 747 eliminates any recourse for same-day registrants whose registration applications are denied. As noted, before S.B. 747, same-day registrants were afforded the same appeal procedures as all other registrants. S.B. 747, however, does not provide any mechanism to even *notify* a same-day registrant that his or her application was rejected and that the accompanying ballot will accordingly be discarded (i.e., that the person will lose his or her fundamental right to vote), let alone a means for the person to correct any error that may have led to that result. For example, the law does not require a voter whose application was erroneously denied because of an administrative error—such as a clerical error in the county board's preparing the lone address-verification notice, or a processing error in the Postal Service's handling of the lone notice—and whose ballot is thus erroneously excluded to be notified of the denial itself or the grounds for the denial. Nor does the law provide such an applicant any opportunity to contest the grounds for denial as erroneous.

C. Other Changes Effected By S.B. 747

S.B. 747 enacts various other restrictive changes to North Carolina's elections code. For example, before S.B. 747, an absentee ballot would be counted so long as it was postmarked by election day and received by the county board of elections no later than 5:00 p.m. three days after the election. Going forward, however, absentee ballots must be received by the close of balloting on election day. S.B. 747 §35 (to be codified at N.C. Gen. Stat. §163-231(b)(1)). And at the same time that the law thereby reduces

the time for voters to *cast* their absentee ballots by mail, S.B. 747 increases the time to *challenge* such ballots. S.B. 747 §15 (to be codified at N.C. Gen. Stat. §163-89). The legislation also empowers poll observers to engage in more intrusive conduct than was allowed before, including moving freely around voting places. S.B. 747 §7.(b) (to be codified at N.C. Gen. Stat. §163-45.1(g), (i)).

D. S.B. 747 Was Enacted Over The Governor’s Veto

On August 16, 2023, the North Carolina General Assembly passed S.B. 747 strictly along party lines. On August 24, Governor Cooper vetoed the bill, explaining in his veto message that North Carolina “conducted fair and secure elections” before S.B. 747, and that the new legislation “has nothing to do with election security.” *Governor Roy Cooper Objections and Veto Message, supra* n.2. S.B. 747, he added, “erect[s] new barriers for younger and non-white voters, many of whom use early voting and absentee ballots”; “hurts older adults, rural voters and people with disabilities”; and generally “will block voters and their ballots unnecessarily.” *Id.*

On October 10, the General Assembly overrode Governor Cooper’s veto with barely enough support to surpass the required three-fifths threshold. The provisions discussed herein are slated to become effective on January 1, 2024. S.B. 747 §50.

The DNC and the NCDP filed a complaint in this Court challenging S.B. 747 under the First and Fourteenth Amendments’ protection of the right to vote, the Fourteenth Amendment’s Due Process Clause, article I of the North Carolina Constitution, the CRA, the Voting Rights Act, and HAVA. Plaintiffs filed this motion

the same day, seeking preliminary injunctive relief under the Due Process Clause, the CRA, and HAVA.

LEGAL STANDARD

A preliminary injunction is warranted when (1) the plaintiff is likely to succeed on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in the plaintiff's favor, and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Plaintiffs Will Likely Prevail On Their Claim That S.B. 747's Same-Day-Registration Provisions Violate Procedural Due Process

Plaintiffs are likely to succeed on their claim that S.B. 747's same-day-registration provisions violate procedural due process, both by failing to provide adequate procedures for verifying same-day registrants' addresses and by failing to give same-day registrants notice and an opportunity to be heard when their applications are rejected (due to unsuccessful address verification or otherwise).

The Due Process Clause prohibits states from depriving "any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, §1. Thus, a state may not deny a constitutionally protected liberty interest without adequate procedural protections. A plaintiff succeeds on a procedural-due-process claim by showing "(1) a cognizable liberty interest or property interest; (2) the deprivation of that

interest by some form of state action; and (3) that the procedures employed were constitutionally inadequate.” *Kendall v. Balcerzak*, 650 F.3d 515, 528 (4th Cir. 2011).

The first two prongs are clearly met here: Same-day registrants have a strong interest in exercising their right to vote, and the scheme enacted by S.B. 747 deprives them of the ability to do so. “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

The third due-process prong—constitutionally inadequate procedures—is also met. To determine whether procedures are adequate, courts examine three factors: (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;” and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).⁴

⁴ “Multiple district courts ... have considered procedural due process challenges to election regulations under ordinary procedural due process principles,” i.e., the *Mathews* factors. *Arizona Democratic Party v. Hobbs*, 485 F.Supp.3d 1073, 1093 (D. Ariz. 2020) (collecting cases); see also *Democracy North Carolina v. North Carolina State Board of Elections*, 476 F.Supp.3d 158, 228-229 (M.D.N.C. 2020) (applying the *Mathews* factors for a procedural-due-process claim against a North Carolina law governing absentee ballots); *League of Women Voters of South Carolina v. Andino*, 497 F.Supp.3d 59, 76-77 (D.S.C. 2020) (same for South Carolina law).

Procedures that do not provide “notice and opportunity to be heard” are generally deficient. *Rockville Cars, LLC v. City of Rockville*, 891 F.3d 141, 145-146 (4th Cir. 2018). That is because “[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Under S.B. 747, however, same-day registrants deemed unqualified to vote are *not* given notice of that determination, nor an opportunity to be heard. The statute provides that an individual may register and vote on the same day during early voting by filling out the required form and presenting both a HAVA document and photo identification. S.B. 747 §10.(a). And a same-day registrant’s “vote shall be counted unless the county board determines that the applicant is not qualified to vote.” *Id.* But S.B. 747 does not prescribe any mechanism for notifying a same-day registrant of an adverse determination of eligibility, let alone the grounds for such determination. Nor does the law provide any opportunity for a same-day registrant to contest (i.e., to be heard on) an adverse determination—even though it results in the immediate removal of the applicant’s ballot from the official count. Rather, S.B. 747 is silent as to how any disputes over the acceptability of an applicant’s documentation should be resolved, meaning that it enacts a system under which any election official may unilaterally deny a person his or her right to vote without due process. This creates a substantial risk that such an adverse determination could be erroneous.

In addition, S.B. 747 violates procedural due process by (1) not providing adequate procedures to verify a same-day registrant’s address and (2) providing no notice when a same-day registrant’s address is not verified (resulting in the registrant’s

application being denied and his or her ballot being discarded). Under the statute, if the Postal Service returns as undeliverable a *single* verification notice sent to the address the same-day registrant provided, then 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,” S.B. 747 §10.(a). A single error by the county board in preparing the mailing, therefore, or a single error by the Postal Service in processing the mailing, could result in a valid vote being discarded, and thus in the denial of an eligible voter’s fundamental right to vote.

This is no trivial risk: In the most recent study on the subject, the Postal Service’s Inspector General found that 4.3 percent of all U.S.P.S. mail in 2014—amounting to 6.6 billion mailed items—was undeliverable as addressed. Office of Inspector General, United States Postal Service, *Strategies for Reducing Undeliverable as Addressed Mail*, Rep. No. MS-MA-15-006 at 5 (May 1, 2015).⁵ And “[t]he Postal Service itself is responsible for” nearly a quarter of all undeliverable mail, “due to sorting errors or failed deliveries.” *Id.* at 1.

North Carolina has identified no reason why same-day registrants should be mailed only one verification notice, especially considering that *two* notices must be returned as undeliverable before any *non*-same-day registrant can be deemed ineligible to vote. N.C. Gen. Stat. §163-82.7(e)-(f). Moreover, when a county board determines that a same-day registrant should not be registered because a single verification notice

⁵ <https://www.uspsig.gov/sites/default/files/reports/2023-01/ms-ma-15-006.pdf>.

purportedly cannot be delivered, S.B. 747 establishes no procedure for attempting to notify the same-day registrant of that adverse determination so that he or she can be heard on the matter.

Applying the three *Mathews* factors confirms that these various aspects of S.B. 747 violate procedural due process.

First, the private interest affected by the same-day-registration provisions of S.B. 747 is extremely strong. The right to vote is “a constitutionally protected liberty interest.” *Democracy North Carolina*, 476 F.Supp.3d at 227 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). And voting is a “fundamental political right, preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Indeed, the Fourth Circuit has deemed it “beyond dispute that ‘voting is of the most fundamental significance under our constitutional structure.’” *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 241 (4th Cir. 2016) (quoting *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Courts “thus take seriously, as the Constitution demands, any infringement on this right.” *Id.* at 242.

It is no answer to say that there is no federal constitutional right to *same-day* registration. Having chosen to create a same-day-registration regime through which qualified voters can exercise their fundamental right to vote, North Carolina must provide those voters with constitutionally adequate due-process protections in administering that regime. *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (state-created statutory entitlements can trigger due-process requirements); *Martin v. Kemp*, 341 F.Supp.3d 1326, 1338 (N.D. Ga. 2018) (collecting cases holding that once a state chooses to create an

absentee voting regime, it must administer that regime in accordance with the Constitution).

Second, S.B. 747’s same-day-registration provisions create an intolerably high risk of erroneously depriving same-day registrants of their right to vote—risk that could easily be mitigated by added procedural safeguards. As explained, S.B. 747 creates a system in which an election official may unilaterally determine that a prospective same-day registrant is not qualified to vote. That determination may well be wrong, but the statute provides no mechanism for the applicant to learn that he or she was deemed ineligible to vote, let alone to challenge that decision. As the Fourth Circuit has explained, “the risk of an erroneous deprivation is too high where an individual is not provided ‘notice of the factual basis’ for a material government finding and ‘a fair opportunity to rebut the Government’s factual assertions.’” *Kirk v. Commissioner of Social Security Administration*, 987 F.3d 314, 325 (4th Cir. 2021) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004)). Giving voters notice that their registration applications were rejected and opportunities to be heard within sufficient time to remedy any incorrect rejections would greatly reduce the risk of erroneous deprivations of the right to vote. Moreover, S.B. 747’s provision for only one address-verification notice to be sent to same-day registrants is not “designed to provide a reasonably reliable basis for” denying such registrants the right to vote, *Mackey v. Montrym*, 443 U.S. 1, 13 (1979). A requirement that two address-verification notices be returned as undeliverable before a same-day registrant’s application is rejected and his or her vote discarded—again, the same

verification procedure the state uses for *non*-same-day registrants—would greatly reduce the risk of depriving same-day registrants of their right to vote due to a mailing error.

Third, although the government has an interest in preventing ineligible people from voting, providing notice and an opportunity to be heard before discarding a person’s ballot or rejecting a person’s registration would not undermine that interest. That is because providing notice and an opportunity to be heard would not allow voting by people who are truly ineligible. Nor would it entail excessive “fiscal and administrative burdens.” *Mathews*, 424 U.S. at 335. Indeed, S.B. 747 already provides an opportunity to be heard when anyone in the same county as a registered voter challenges the voter’s ability to vote in that election. S.B. 747 §13.(b) (to be codified at N.C. Gen. Stat. §163-88). It also leaves intact the requirement that two verification notices be returned as undeliverable before any non-same-day registrant’s application can be rejected. N.C. Gen. Stat. §163-82.7(e). And it preserves voters’ opportunity to be heard on challenges to absentee ballots, even while extending the window for challenging absentee ballots to five business days after election day. S.B. 747 §15 (extension to be codified at N.C. Gen. Stat. §163-89(a), without altering the existing right to be heard codified at N.C. Gen. Stat. §163-89(e)). Because North Carolina “already has an established procedure” for notice and an opportunity to be heard, there is no viable argument that providing a “postdeprivation process was impossible” or burdensome. *Zinerman v. Burch*, 494 U.S. 113, 137 (1990).

Application of the *Mathews* factors thus confirms the commonsense conclusions that (1) due process is “not provided when ... election procedures do not give some form

of post-deprivation notice to the affected individual so that any defect in eligibility can be cured and the individual is not ... denied so fundamental a right,” *Democracy North Carolina*, 476 F.Supp.3d at 228 (quoting *Raetzl v. Parks/Bellefont Absentee Election Board*, 762 F.Supp. 1354, 1358 (D. Ariz. 1990)), and (2) due process is denied when procedures are not “designed to provide a reasonably reliable basis for” an official decision resulting in the deprivation of a right, *Mackey*, 443 U.S. at 13. S.B. 747’s new procedures for same-day registrants are accordingly unconstitutional.

B. Plaintiffs Are Likely To Succeed On Their Claim That S.B. 747’s Same-Day-Registration Provisions Violate The Civil Rights Act

Plaintiffs will also likely succeed on their claim that S.B. 747 violates the CRA, which prohibits officials from applying different voting-registration standards, practices, or procedures to different groups of individuals in the same county. 52 U.S.C. §10101(a)(2)(A). S.B. 747 does exactly that by holding same-day registrants to a higher standard than other registrants.

The CRA states in part that:

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

52 U.S.C. §10101(a)(2)(A).⁶

⁶ Section 10101 was previously codified at 42 U.S.C. §1971. For simplicity, this motion refers to §10101, even where cases refer to §1971.

S.B. 747 violates §10101(a)(2)(A) by requiring officials to apply different standards, practices, or procedures to two groups of individuals (namely, same-day registrants and non-same-day registrants) who are qualified under North Carolina law to vote and who reside in the same county, in three respects.

First, under S.B. 747, the requirements that same-day registrants must meet to have their votes counted differ from the requirements for those who register and vote on different days. Non-same-day registrants do not have to provide supporting documentation in addition to photo identification in order to register, whereas same-day registrants must provide both photo identification and proof of residence in the form of a current utility bill, bank statement, government check, paycheck, another current government document, or “a current document issued from the institution who issued the photo identification shown by the voter,” S.B. 747 §10.(a) (to be codified at N.C. Gen. Stat. §163-82.6B(e)). Thus, there is a heightened standard for same-day registrants to register compared with others in the same county. This is a meaningful difference. For many prospective same-day registrants, the burden of producing photo identification and one of the enumerated HAVA documents will be insurmountable. For example, students, young voters, elderly voters, low-income voters, and voters of color may have more difficulty producing documentation verifying their addresses. And some individuals in communities that have a higher prevalence of multigenerational households may not have

utility bills listing their names. Pew Research Center, *The demographics of multigenerational households* (Mar. 24, 2022).⁷

Second, for non-same-day registrants, preexisting law provides that a voter-registration form will be rejected if the Postal Service is unable to deliver *two* verification notices sent to the home address provided on the registration form. N.C. Gen. Stat. §163-82.7. But under S.B. 747, for otherwise-identical same-day registrants, registration will be rejected if the Postal Service is unable to deliver *one* verification notice. S.B. 747 §10.(a) (to be codified at N.C. Gen. Stat. §163-82.6B(d)). Again, then, same-day registrants are subjected to a different standard under S.B. 747 than non-same-day registrants within the same county.

Third, when a county board of elections determines that a non-same-day registrant is not qualified to vote, it must send the individual a notice of denial of registration. N.C. Gen. Stat. §163-82.7(b). The individual is then entitled to an appeal with a hearing before the county board, plus additional appeals to the North Carolina courts. *Id.* §163-82.1(a)-(c). For same-day registrants, however, S.B. 747 does *not* provide allegedly ineligible voters with notices of registration denial, nor does it establish a process for allegedly ineligible voters to appeal a county board's determination. Again, then, the procedures for non-same-day registrants differ from those for same-day registrants in the same county.⁸

⁷ <https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/>.

⁸ Holding same-day registrants to a higher standard is also likely to disproportionately disenfranchise African American voters. *See NAACP*, 831 F.3d at 217

C. Plaintiffs Will Likely Succeed In Proving That S.B. 747's Same-Day-Registration Provisions Violate The Help America Vote Act

Finally, plaintiffs are likely to prevail on their claim that S.B. 747's provisions for same-day registration violate HAVA. As relevant here, that statute provides that:

The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

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).

S.B. 747 does not establish any “free access system” (such as a website or a toll-free phone number) allowing for the tracking of retrievable ballots, including whether retrievable ballots are counted and, if not, the reasons why they were discarded. (A “retrievable ballot” under S.B. 747 is a “provisional ballot” under HAVA. *See* 52 U.S.C. §21082(a).) This failure is particularly problematic because, as noted, S.B. 747 creates new avenues for throwing out retrievable ballots. Because S.B. 747 fails to establish a tracking system, it also does not require election officials in North Carolina to provide written information about such a system to North Carolina voters. This again violates HAVA.

(striking down North Carolina election reform law that eliminated same-day registration, in part because African American voters disproportionately used same-day registration when it was available).

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY ABSENT AN INJUNCTION

Absent a preliminary injunction, both the plaintiff organizations and individual North Carolina voters will be irreparably harmed. It is exceedingly likely that one or more members of the DNC and/or the NCDP, or other individuals who would vote for Democratic candidates in North Carolina, will be unlawfully prevented from voting or having their votes counted because of S.B. 747. Denial of a fundamental constitutional right—certainly denial of what is perhaps the most important and fundamental right of all—“unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, “[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (collecting cases). That is because once an election “comes and goes, there can be no do-over and no redress.” *Id.* The injury to voters is “real and completely irreparable if nothing is done to enjoin” an unlawful statute. *Id.* Moreover, “discriminatory voting procedures in particular are ‘the kind of serious violation ... for which courts have granted immediate relief.’” *Id.* (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)).

Here, if plaintiffs are denied injunctive relief and same-day registrants are accordingly denied the ability to have their votes counted in upcoming elections, they will have lost that right forever. The DNC and NCDP, meanwhile, will suffer the corresponding irreparable harm of having their ability to elect Democrats undermined.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST FAVOR AN INJUNCTION

The third and fourth *Winter* factors, 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). These merged factors strongly favor a preliminary injunction here.

As explained, granting an injunction would prevent disenfranchisement of voters throughout North Carolina. The public has a “strong interest in the fundamental political right to vote.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). That interest is best served by “permitting as many qualified voters to vote as possible.” *Obama for America v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). Indeed, “electoral integrity is enhanced, not diminished, when all eligible voters are allowed to exercise their right to vote free from interference and burden unnecessarily imposed by others.” *North Carolina State Conference of NAACP v. Cooper*, 430 F.Supp.3d 15, 53 (2019). Conversely, S.B. 747 does nothing to advance the public’s interest in election integrity; as noted, there was “no evidence of any fraud or other irregularities that could affect the outcome of a contest” in North Carolina’s last election, NCSBE, *State Board Unanimously Certifies 2022 General Election in NC*, *supra* n.1 (emphasis added), and S.B. 747 was not supported by any legislative reports justifying the bill’s restrictions.

Enabling same-day registrants to vote is particularly important to the public interest. As noted, the Fourth Circuit has struck down an attempt to eliminate same-day registration in North Carolina, emphasizing that same-day registration “provided an easy avenue to re-register for those who moved frequently, and allowed those with low literacy skills or other difficulty completing a registration form to receive personal

assistance from poll workers.” *NAACP*, 831 F.3d at 217. S.B. 747 diminishes this important avenue for exercising the right to vote and thus does the public a serious disservice.

At the same time, remedying these violations would impose no substantial additional burden on the State of North Carolina, either monetarily or administratively. As explained, S.B. 747 already provides notice and an opportunity to be heard in other contexts, and treating same-day registrants like non-same-day registrants by eliminating onerous documentation requirements would, if anything, *reduce* administrative burden. State law, moreover, already provides for two notices to be sent to non-same-day registrants. Even if there were a minimal administrative burden, “administrative convenience” cannot justify practices that impinge upon fundamental rights. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

CONCLUSION

Plaintiffs’ motion for a preliminary injunction should be granted.

October 10, 2023

Respectfully submitted,

/s/ William A. Robertson
JIM W. PHILLIPS, JR.
N.C. BAR NO. 12516
SHANA L. FULTON
N.C. BAR NO. 27836
WILLIAM A. ROBERTSON
N.C. BAR NO. 53589
JAMES W. WHALEN
N.C. Bar No. 58477
BROOKS, PIERCE, MCLENDON
HUMPHREY & LEONARD, LLP
150 Fayetteville Street
1700 Wells Fargo Capitol Center
Raleigh, N.C. 27601
Phone: (919) 839-0300
Fax: (919) 839-0304
jphillips@brookspierce.com
sfulton@brookspierce.com
wrobertson@brookspierce.com
jwhalen@brookspierce.com

RETRIEVED FROM DEMOCRACYDOCS.COM

SETH P. WAXMAN*
DANIEL S. VOLCHOK*
CHRISTOPHER E. BABBITT*
GARY M. FOX*
JOSEPH M. MEYER*
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Avenue N.W.
Washington, D.C. 20037
Phone: (202) 663-6000
Fax: (202) 663-6363
seth.waxman@wilmerhale.com
daniel.volchok@wilmerhale.com
christopher.babbitt@wilmerhale.com
gary.fox@wilmerhale.com
joseph.meyer@wilmerhale.com

* Local Rule 83.1(d) special
appearance forthcoming.

CERTIFICATE OF SERVICE

I certify that the foregoing document will be served together with Defendants' summonses and complaint via Federal Express, delivery confirmation requested, on defendants' counsel, at the following addresses:

Sarah Boyce, Deputy Attorney General and General Counsel
North Carolina Department of Justice
114 West Edenton Street
Raleigh, NC 27603

Paul Cox, General Counsel
North Carolina State Board of Elections
430 North Salisbury Street
Suite 3128
Raleigh, NC 27603

This 10th day of October, 2023.

/s/ William A. Robertson

William A. Robertson

RETRIEVED FROM DEMOCRACYDOCKET.COM