

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:23-CV-878**

DEMOCRACY NORTH CAROLINA; *et al.*,

Plaintiffs,

vs.

ALAN HIRSCH, in his official capacity as
CHAIR OF THE STATE BOARD OF
ELECTIONS; *et al.*,

Defendants.

**MEMORANDUM IN SUPPORT
OF MOTION TO STAY**

INTRODUCTION AND STATEMENT OF THE NATURE OF THE MATTER

Legislative Defendant-Intervenors (“Legislative Defendants”) seek a stay in this matter in light of the Court’s order preliminarily enjoining the Undeliverable Mail Provision of S.B. 747 in the parallel *Vote Latino* and *DNC* cases and updated Numbered Memo 2023-05. For the reasons stated herein, the interests of judicial economy, the hardship and inequity to Legislative Defendants and the North Carolina State Board of Elections (“NCSBE”) would suffer absent a stay, and the complete lack of potential prejudice to Plaintiffs in the event of a stay, a stay of this matter is warranted until at least March 9, 2025.

STATEMENT OF FACTS

On October 17, 2023, one week after S.B. 747 became law, *see* N.C. Sess. Law 2023-140, Democracy North Carolina, North Carolina Black Alliance, and League of Women Voters of North Carolina (collectively, the “Plaintiffs” or “Democracy NC Plaintiffs”) filed this lawsuit against the NCSBE and its Members (collectively, the

“NCSBE Defendants”) challenging changes to North Carolina’s same-day registration (“SDR”) requirements. [D.E. 1]. Specifically, Plaintiffs allege that Section 10(a) of S.B. 747, codified at N.C. Gen. Stat. §163-82.6B (hereinafter the “Undeliverable Mail Provision”): (1) denies Plaintiffs’ procedural due process rights under the 14th Amendment; (2) presents an undue burden on the right to vote under the 1st and 14th Amendments; and (3) discriminates against young N.C. voters on basis of age under the 26th Amendment. [*Id.* at Prayer for Relief].

Prior to Plaintiffs filing this action, two other sets of plaintiffs filed similar lawsuits challenging S.B. 747 within hours of the veto override on October 10, 2023. *See Voto Latino, et al. v. Hirsch, et al.*, M.D.N.C. No. 1:23-cv-861 at D.E. 1; *DNC, et al. v. NCSBE, et al.*, M.D.N.C. No. 1:23-cv-862 at D.E. 1. Notably, all three suits challenged the Undeliverable Mail Provision on due process grounds. In fact, the only unique claim brought in this matter is Plaintiffs’ claim under the 26th Amendment.

On November 15, 2023, the Court held a consolidated status conference in all three matters. Ahead of this status conference, *DNC* and *Voto Latino* Plaintiffs filed motions for preliminary injunctions, seeking, among other things, to enjoin S.B. 747’s Undeliverable Mail Provision as alleged due process violations. These motions sought to preliminarily enjoin the Undeliverable Mail Provision on the same grounds and legal theories as Plaintiffs’ first two claims in this case. [*See* D.E. 1]. Democracy NC Plaintiffs did not file a motion for preliminary injunction.

In the status conference, counsel for Plaintiffs informed the Court that no motion for preliminary injunction was forthcoming. Instead, Democracy NC Plaintiffs sought to

open discovery and proceed with an expedited trial on the merits such that relief could be granted ahead of the State's November 2024 General Elections. Counsel for Legislative Defendants and the NCSBE Defendants conducted a Rule 26(f) Conference with counsel for Plaintiffs and a joint report was filed in this matter on December 11, 2023 and entered the next day by Magistrate Judge Peak. [D.E. 43, 44]. The parties agreed to an expedited discovery schedule on the basis of forthcoming data from the NCSBE and sought a June 2024 trial date. [*See id.*].

On December 28, 2023, the Court held a consolidated hearing on the *DNC* and *Voto Latino* Plaintiffs' Motions for Preliminary Injunction. On January 21, 2024, the Court issued an Order enjoining NCSBE Defendants from removing ballots pursuant to SB 747's Undeliverable Mail Provision. *Voto Latino*, No. 1:23-CV-861, 2024 WL 230931 (M.D.N.C. Jan. 21, 2024). That injunction remains in place today and governs, at a minimum, Plaintiffs' first two claims for alleged due process violations. The NCSBE acted quickly, and on January 29, 2024 issued a revised Numbered Memo 2023-05 that "establish[ed] a process that provides a notice and opportunity to cure for same-day registrants whose first notice is returned as undeliverable." [D.E.53]. No set of Plaintiffs, including Democracy NC Plaintiffs, challenged this numbered memo, and the March 5, 2024 primary elections were conducted under the guidance of these cure provisions. Pursuant to N.C. Gen. Stat §163-22.2 the cure provisions of Numbered Memo 2023-05 expire on March 9, 2025—sixty days after the beginning of the next regular legislative

session.¹ This means that absent legislative action, the cure provisions of the updated Numbered Memo 2023-05 will remain in effect through the November 2024 General Elections.

Shortly after the updated Numbered Memo 2023-05 went into effect, counsel for the NCSBE and Legislative Defendants began discussing the impact of the numbered memo on the remaining claims in each of the three cases challenging S.B. 747. On April 9, 2024, all parties in the *DNC* case jointly moved the Court for a stay of the case² citing to the numbered memo, and the possibility of legal developments in the form of new legislation in the near future. The next day on April 10, 2024, the Court granted the Motion to Stay. *DNC*, No. 1:23-cv-862 at D.E. 90. Shortly thereafter the parties in the *Voto Latino* case came to a similar agreement. A Joint Motion to Stay was filed in that case on April 26, 2024. The Court granted that Motion on April 29, 2024. *Voto Latino*, No. 1:23-cv-861 at D.E. 89. Both stay orders reference “the possibility of additional legal developments in the near future” and “the interest of judicial efficiency” as rationales for granting the stay. *DNC*, No. 1:23-cv-862 at D.E. 90 at p. 2; *Voto Latino*, No. 1:23-cv-861 at D.E. 89 at p. 2.

In the interim, all parties in the instant matter engaged in discovery. Due to delays and then questions regarding data received from the NCSBE, on March 14, 2024, the parties moved for an extension of time to complete discovery and amend the trial date to September of 2024. [D.E. 62]. This motion was granted on April 4, 2024. [D.E. 70].

¹ The General Assembly also convened for short session on April 24, 2024, and remains in short session at the time of this filing.

² Notably, Plaintiffs in that case consented to a stay of all of their claims, not just those challenging the Undeliverable Mail Provision.

Counsel for Plaintiffs continued to raise concerns about the data from the NCSBE throughout March and April and the NCSBE continued to provide additional data productions. In light of the data productions, on the evening of April 24, counsel for Plaintiffs inquired about scheduling a call to discuss the data and possible alternatives to the schedule. Exhibit 1³. The next day, Counsel for Legislative Defendants responded that “conferring on the data questions you raised is a good idea” and provided availability for a call. *Id.* Counsel from all parties discussed the possibility of additional date extensions on the afternoon of April 25, 2024. *Id.* Counsel for Legislative Defendants also circulated a proposed joint stay motion modeled after the stay granted in the *DNC* case for consideration. *Id.*

Less than 1.5 hours later, counsel for Plaintiffs rejected Legislative Defendants’ stay proposal without any explanation⁴. Instead, Plaintiffs proposed a schedule modification that only modestly adjusted expert and fact discovery deadlines (by approximately 1 month) while seeking a trial date to occur as soon as possible after March 17, 2025. *Id.* The proposed schedule would result in a complete lull in the case for 3 months until after the 2024 General Elections, then contemplates aggressive deadlines for supplemental expert reports and for this Court to consider summary judgment motions. The proposed trial date (to occur as soon as possible after March 17, 2025) is not even 10 days after the expiration

³ Attached as **Exhibit 1** is a true and correct copy of emails regarding Plaintiffs’ proposal regarding an extended schedule and Legislative Defendants’ objections thereto.

⁴ At the start of the stay negotiations, counsel for Voto Latino had represented that all Plaintiff groups across all three cases had consented in principle to a stay. Counsel for Legislative Defendants sent proposed stay language, virtually identical to the stay orders in *Voto Latino* and *DNC*, to Plaintiffs. The proposals were summarily rejected.

of the updated Numbered Memo 2023-05 on March 9, 2025. Counsel for Legislative Defendants noted their objections to the proposal the next day. *See* Ex. 1. Chief among these objections was the waste of resources for the parties, but also the judicial resources of the Court. Legislative Defendants reiterated that they believed a stay to be the most appropriate course.

In response, Plaintiffs proposed another schedule, this time seeking a trial date in October of 2024,⁵ which could occur during early voting (October 17- November 2, 2024),⁶ and during the busy run-up to the November 2024 general election. The Parties met and conferred about this proposal on Monday, April 29, 2024, and again reiterated their position that a stay was the best course of action. In response, Plaintiffs proposed another schedule, seeking to extend deadlines well into 2025, thus agreeing essentially to a stay in principle, but refusing to actually stay the case.

QUESTION PRESENTED

1. Do the interests of judicial efficiency and equities of the parties merit a stay?

ARGUMENT

District courts have the inherent power to stay proceedings that “is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 375

⁵ Plaintiffs specifically sought an October 7, 2024 trial date but this Court does not usually set trials for dates certain in scheduling orders. *See* L.R. 40.1.

⁶ <https://www.ncsbe.gov/news/events/person-early-voting-period-2024-general-election>

(4th Cir. 2013). Courts in this circuit balance the following factors when deciding whether to exercise their discretion to stay proceedings: (1) “the interests of judicial economy,” (2) “the hardship and inequity to the moving party in the absence of a stay,” and (3) “the potential prejudice to the non-moving party in the event of a stay.” *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 452 (M.D.N.C. 2015). “The party seeking a stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative.” *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983).

I. The interests of judicial economy support a stay.

The interests of judicial economy support a stay for several reasons.

First, absent a stay the Court will need to preside over potential discovery motions, motions for summary judgment, and motions in limine on the same operative facts that could be mooted by legislative action on the eve of trial.⁷ Moreover, trial dates are hard to come by and simply blocking off trial time in this matter, when it could be mooted, deprives others from a speedy trial elsewhere.

Second, when a statute is preliminarily enjoined by one court, the alleged harm in parallel cases challenging the same statutory provisions becomes tenuous at best. For example, in *Crowell v. North Carolina*, No. 1:17CV515, 2018 WL 6031190, *1-*3 (M.D.N.C. Nov. 16, 2018), the court entered a stay following a state court’s enjoining of

⁷ This Court has already recognized that there is a “viable probability” that Plaintiffs claims will become moot if the General Assembly codifies permanent changes to comply with the Court’s preliminary injunction order, and that this more permanent change “appears likely.” *Democracy N. Carolina v. Hirsch*, No. 1:23-CV-878, 2024 WL 1415113, at *9 (M.D.N.C. Apr. 2, 2024)

the same statutory provision challenged in the parallel federal case. In the order staying the matter, the *Crowell* court noted that the plaintiffs’ First and Fourteenth Amendment claims were not presently ripe because of the state court injunction, which meant that there was no present injury. *Id.* at *3. The *Crowell* court concluded then that judicial economy supported a stay pending either the final disposition of the state court case or “the passage of a new statute by the North Carolina state legislature.” *Id.* at *4.

The same principles of judicial economy that were dispositive to the stay in *Crowell* are dispositive here. As in *Crowell*, Plaintiffs’ claims are not currently ripe because the Undeliverable Mail Provision of S.B. 747 is enjoined and a cure provision is in place until March 9, 2025.⁸ Indeed, Plaintiffs’ alleged harm only becomes ripe in the future—dependent on either the expiration of the updates to Numbered Memo 2025-03 or legislative action. While “[t]he absence of a ripe claim would ordinarily require dismissal[,]” a stay can be appropriate when there are future circumstances that could make the case a live controversy. *See id.* (quoting *W. Va. Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 801 (4th Cir. 1998)). Such a stay is appropriate here, because while Plaintiffs’ claims are not currently ripe, they could become so with future legislative action either in the current short session or in the long session scheduled to begin in January of 2025. *See id.*; *Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 660 (W.D. Va. 2019) (granting stay in light of pending legislative action after considering practical considerations, including “principles of constitutional avoidance and judicial restraint.”).

⁸ Even if no new statute were enacted and signed into law by March 9, 2025, the injunction would remain in place, and no statewide elections are scheduled until March of 2026, a year later.

Furthermore, at this juncture, judicial economy supports treating all three cases challenging the Undeliverable Mail Provision of S.B. 747 on parallel tracks. Both the *Voto Latino* and *DNC* matters, before the same Court, have been stayed pending future legislative action. *DNC*, No. 1:23-cv-862 at D.E. 90 at p. 2; *Voto Latino*, No. 1:23-cv-861 at D.E. 89 at p. 2. Both stay orders reference “the possibility of additional legal developments in the near future” and “the interest of judicial efficiency”, the same issues raised in the instant motion, as rationales for granting the stay. *DNC*, No. 1:23-cv-862 at D.E. 90 at p. 2; *Voto Latino*, No. 1:23-cv-861 at D.E. 89 at p. 2.

Previously, Democracy NC Plaintiffs sought relief ahead of the 2024 General Elections. From as far back as the November 2023 status conference Plaintiffs made clear that they intended a different path than *Voto Latino* and *DNC*. Now, Plaintiffs want to use the data from those elections and find themselves arguing out from under the schedule they wanted. While Plaintiffs are entitled to change their minds, they cannot have their cake and eat it too, by insisting that Defendants continue to bear the costs of discovery. If Plaintiffs want to examine the 2024 general election results, their case posture is no different than *Voto Latino* and *DNC*, and the cases should be put on parallel tracks, if not consolidated into one matter. Moreover, scheduling a trial to begin in March 2025, days after the expiration of the cure provisions in the Numbered Memo and two months into the long session is an invitation to waste judicial resources. There is simply no need for the Court to schedule a trial (much less hear all the pre-trial motions, a motion for summary judgment, and discovery motions), over claims involving an enjoined statute, with a cure provision in place for the 2024 elections, and with two legislative sessions between now

and the expiration of the administrative cure provision. This is especially true when no statewide elections will be held after November 2024, until March of 2026, a full year after Plaintiffs' requested rushed trial date.

Plaintiffs' second request for an October 2024 trial date fares no better. This second proposal continues to have the parties rush through discovery during the legislative short session, then seeks a trial either during or on the eve of early voting for the 2024 General Election, coinciding with one of the busiest seasons for NCSBE Defendants. Such voter confusion is not warranted and should be avoided at all costs. *See e.g. Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *Merrill v. Milligan*, 142 S.Ct. 879-880 (Kavanaugh, J. Concurring) (“When an election is close at hand, the rules of the road must be clear and settled.”); *Pierce v. NCSBE et al*, 94 F.5th 194, 226-227 (4th Cir. 2024) (collecting cases and noting that the *Purcell* doctrine prevented judicial action while an election was ongoing).⁹

Moreover, even if Plaintiffs were afforded their requested October 7 trial date, unless they expect this Court to rule from the bench in such an important and fact intensive matter, Plaintiffs' October schedule will not afford them relief ahead of the October 17, 2024 start to early voting. In fact, if this trial lasts a week, as estimated, the Court would only be afforded 6 calendar days with which to issue a ruling ahead of the start of early voting. To the extent Plaintiffs argue they don't need a ruling ahead of early voting, this only reinforces Legislative Defendants' arguments that: (1) Plaintiffs claim are not ripe

⁹ Notably, the oral argument in *Pierce* was held on the first day of early voting for the 2024 primary.

because there is no current harm; and (2) that the requested rushed schedules are unnecessary and wasteful.

II. Legislative Defendants and NCSBE Defendants will suffer hardship and inequity absent a stay.

Absent a stay, Legislative Defendants and the NCSBE Defendants will have to spend considerable resources on claims that are not ripe, and that could quickly become moot in one of the two ongoing or upcoming legislative sessions. These costs include, but are not limited to, preparing for a March 2025 or October 2024 trial, continuing discovery and costly expert discovery, motions for summary judgment, motions in limine, and other pre-trial briefs and hearings. A continuance of the trial date as opposed to a stay would not alleviate that problem. *See Stinnie*, 396 F. Supp. 3d at 661 (granting stay because the alleged harm would not be in danger of occurring until approximately a year later and legislative action could prevent the harm in its entirety). And if the law is altered in the interim, or shortly after the trial, the NCSBE and Legislative Defendants could face the costs of duplicative discovery over the altered legislation. The taxpayers of North Carolina should not have to incur duplicative expenses in the face of potential future legislation. *Crowell*, 2018 WL 6031190, *4-*5.

A continuance until October of 2024 would compound the harm. In addition to the financial waste detailed above, the NCSBE would be forced into trial during one of its busiest seasons, and perhaps during early voting and same-day registration, the very topics of this lawsuit. Moreover, conducting a trial regarding the statutory provisions of SDR while SDR is actively occurring under the cure provisions of the Numbered Memo could

cause untold voter confusion, which federal courts should avoid whenever possible. *See supra* pp. 9-10.

III. Plaintiffs will suffer little to no prejudice if the motion for stay is granted.

Plaintiffs have all but expressly admitted that they would not be prejudiced by a stay. In fact, the statute Plaintiffs challenge is currently enjoined. The current expedited litigation was premised on the fact that Plaintiffs sought relief before the 2024 General Elections. But that is no longer the case. In fact, Plaintiffs themselves sought a March 2025 trial date—a sixth month extension—so that data from the 2024 General Elections can be analyzed. While it is true that Plaintiffs later sought a shorter continuance until October of 2024, that request is ill-conceived for the reasons discussed above, and is unlikely to get them relief before early voting begins in the 2024 General Elections.

CONCLUSION

For these reasons, this case should be stayed pending further court order.

Respectfully submitted, this the 30th day of April, 2024.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/ Phillip J. Strach

Phillip J. Strach

N.C. State Bar No. 29456

Alyssa M. Riggins

N.C. State Bar No. 52366

Cassie A. Holt

N.C. State Bar No. 56505

Alexandra M. Bradley

N.C. State. Bar No. 54872

301 Hillsborough Street, Suite 1400

Raleigh, NC 27603

Telephone: (919) 329-3800

Facsimile: (919) 329-3779

phil.strach@nelsonmullins.com

alyssa.riggins@nelsonmullins.com

cassie.holt@nelsonmullins.com

alex.bradley@nelsonmullins.com

Counsel for Legislative Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 3249 words as counted by the word count feature of Microsoft Word.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

By: s/ Phillip J. Strach
Phillip J. Strach
N.C. State Bar No. 29456

RETRIEVED FROM DEMOCRACYDOCKET.COM

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 30th day of April, 2024.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

By: /s/ Phillip J. Strach

Phillip J. Strach
N.C. State Bar No. 29456

RETRIEVED FROM DEMOCRACYDOCKET.COM