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.

REPLY BRIEF IN SUPPPORT OF MOTION TO STAY

INTRODUCTION

In an attempt to manufacture harm where there currently is none, Plaintiffs stretch the claims brought in their Complaint beyond recognition, and cite to cases that are factually distinguishable. In their winding response, Plaintiffs effectively concede that judicial economy warrants a stay, and make no attempt to distinguish two of their claims from the present injunction. For the reasons stated herein, and those in D.E. 77, Legislative Defendants' Motion to Stay should be granted.

RESPONSE TO ADDITIONAL FACTS RAISED

Plaintiffs attempt to mitigate, without supporting factual or legal citations, the importance of this Court's injunction in *Voto Latino v. Hirsch*, No. 1:23-CV-861, 2024 WL 230931, at *31 (M.D.N.C. Jan. 21, 2024). Plaintiffs claim that the preliminary injunction "does not redress Plaintiffs' intentional discrimination claim and is more limited in scope than the relief Plaintiffs seek." [D.E. 87 at 3]. The facts show otherwise.

Plaintiffs' Complaint raises three claims, each of which challenges "Section 10(a) of Senate Bill 747, codified at N.C. Gen. Stat. §163-82.6B." [D.E. 1 at Prayer for Relief]. All three claims are supported by factual allegations laser-focused on the Undeliverable Mail Provision contained in §163-82.B(d), which provided for ballot removal upon one failed to deliver notice. *See, e.g.,* Compl. ¶¶ 101-106 (allegations that the Undeliverable Mail Provision violates procedural due process); 107-113 (allegations that the denial of the right to vote "without giving them any notice" is an unconstitutional undue burden). Plaintiffs' claim for intentional discrimination is also rooted solely in the undeliverable mail provision. *See* Compl. ¶118 (alleging that "the system by which ballots cast using same-day registration fail with one failed-to-deliver-notice" violates the 26th Amendment).

This Court enjoined Defendants from "utilizing the procedures of N.C. Gen. Stat. §163-82.6B(d) to remove from the official count the votes of the ballot of any voter who has provided contact information in the registration process and whose first notice required under N.C. Gen. Stat. §163-82.7(c) is returned by the Postal Service as undeliverable before the close of business on the business day before the canvass, without first providing such voter notice and an opportunity to be heard." *Voto Latino*, 2024 WL 230931, at *31. This injunction is not just for the 2024 elections but remains "in force until such time as a procedure for notice and opportunity to be heard is implemented." *Id.* Practically this injunction is no different than if there was "a full repeal" and no replacement of the challenged provision. [D.E. 87 at 3].

Plaintiffs' Response also raises factual issues pertaining to discovery that warrant correction. First, Plaintiffs' representation that Senator Daniel and Representative Mills

have "partially waive[d]" legislative privilege is incorrect. [D.E. 87 at 7]. Senator Daniel and Representative Mills did waive their personal legislative privilege, but are unable to waive the privilege for other members of the Generally Assembly. Moreover, Plaintiffs' factual discussions about the discovery sought from Ms. Mitchell and NCEIT are incomplete. Plaintiffs fail to note that that Legislative Defendants agreed to include the term "Cleta" in supplemental boolean search terms (**Exhibit 1**), and already produced at least 50 emails from members of the public who identify as NCEIT members. Thus, it is unclear why this motion to compel documents Plaintiffs arguably already have, would present any obstacle to a stay at all.

ARGUMENT

At the outset, Plaintiffs' Response fails to address Legislative Defendants' arguments that judicial economy warrants a stay, D.E. 77 at 7-11, or that Plaintiffs' due process claims (Counts One and Two), are indistinguishable from the other two suits challenging SB 747's Undeliverable Mail Provision or this Court's injunction, *id.* at 2-3, 8. At a minimum, Plaintiffs have conceded that economy supports a stay and any alleged harm from Counts One and Two are alleviated by injunction.

I. Plaintiffs attempt to manufacture ripe harm, but concede that they do not seek relief ahead of the 2024 election.

Instead of responding to the key points of Legislative Defendants' Motion, Plaintiffs spend nearly the entire Response attempting to manufacture harm from an enjoined statute. Plaintiffs first argue they would suffer "significant prejudice" because this is a "voting-related challenge" [D.E. 87 at 13]. In support of this argument, Plaintiffs cite to three

inapposite cases. First, Plaintiffs cite to *N.C. State Conference of NAACP v. Cooper*, 397 F. Supp. 3d 786, 797 (M.D.N.C. 2019) for the proposition that the stay should be denied if it "would jeopardize [the] ability to resolve claims in advance of the next election." [D.E. 87 at 9]. But Plaintiffs later concede that they cannot have relief in time for the next election. [*Id.* at 13]. Next, Plaintiffs cite to *Covington v. North Carolina,* No. 1:15-CV-399, 2018 WL 604732 (M.D.N.C. Jan. 26, 2018), for the proposition that a stay should be denied because "limiting the right to vote" causes irreparable harm. [*Id.* at 9]. But the Supreme Court of the United States stayed that case, in part, less than two weeks later. *N. Carolina v. Covington*, 138 S. Ct. 974 (2018)(mem.). Finally, Plaintiffs' decision to cite to *League of Women Voters of Mich v. Johnson,* No. 2:17-CV-14148, 2018 WL 10483912 (E.D. Mich. Mar. 14, 2018) is puzzling. [*Id.*]. In that case, the district court denied a motion to stay a partisan gerrymandering case pending the outcome in *Common Cause v. Rucho* and proceeded to trial, only to have its decision promptly vacated in light of the very opinion from which Defendants sought a stay. *Chatfield v. League of Women Voters of Mich*, 140 S. Ct. 429 (2019). If anything, *Johnson* supports Legislative Defendants' request for a stay, as does this Court's previous finding. [D.E. 63 ("As a practical matter, though, there is a viable probability that [Plaintiffs' third] claim will become moot if the General Assembly codifies permanent changes to comply with this court's preliminary injunction order.")].

Several pages later, Plaintiffs argue that Legislative Defendants "ignore the constitutional harm caused by a stay" because there is "ongoing harm" allegedly caused by SB 747, and claim there is a "substantial risk" that delays could "metastasize" into a yet

another missed election. [D.E. 87 at 13]. But tellingly, despite their repeated claims of "ongoing harm," Plaintiffs fail to cite a single example of harm to any voters, let alone young voters, in the wake of the implemented cure proceeding used in the March 2024 Primary. Nor do Plaintiffs provide any plausible facts in support of their claim that there is a "substantial risk" that delays could "metastasize" into a yet another missed election. The 2026 primary is 22 months away. Any risk of that hardly seems "substantial."[1]

Along the same lines, Plaintiffs conflate mootness with the current situation. If the General Assembly codifies permanent changes to comply with the preliminary injunction order, then the case becomes moot. But, the current posture of this case "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Crowell v. North Carolina*, No. 2018 WL 6031190, *4 (M.D.N.C. Nov. 16, 2018) (citing *Texas v. United States*, 532 U.S. 296, 300 (1998)). Namely, a future legislative act. But only a future legislative act will alter the potential level for harm. As it stands, the injunction prevents any alleged harm (as pleaded in their complaint) to Plaintiffs.

II. Plaintiffs cannot unilaterally amend their Complaint through briefing.

Next, Plaintiffs claim that Legislative Defendants mischaracterize the scope of their claims and the *Voto Latino* preliminary injunction. But, as discussed above, it is Plaintiffs' who are taking an expansive (and frankly unsupported) view of their own claims. Plaintiffs

[1] In support of this argument, Plaintiffs claim that a ruling on their Motion to Compel documents from third parties Cleta Mitchell and NCEIT could result in an interlocutory appeal. [D.E. 87 at 14]. Even assuming *arguendo* the documents sought from these third parties are relevant to this case, that argument is specious at best. Orders on a motion to compel are "neither a final order nor an appealable interlocutory or collateral order." *Murphy v. Inmate Sys.,* 112 F. App'x 882, 883 (4th Cir. 2004). Therefore, there is no real risk of delay due to an interlocutory order from that motion.

chose to limit their 26th Amendment claim to a challenge of N.C. Gen. Stat. §163-82.6B's Undeliverable Mail Provision, which is the very section enjoined by this Court. If Plaintiffs want to seek "broader" relief, they should have made a broader claim in their Complaint. This Court should not construe Plaintiffs' complaint beyond its clear confines simply because they attempt to expand their claims through briefing. *See Marsh v. Virginia Dep't of Transp.*, No. 6:14-CV-00006, 2014 WL 6833927, at *8 (W.D. Va. Dec. 3, 2014); *Nance v. City of Albemarle*, 520 F. Supp. 3d 758, 783 n.8 (M.D.N.C. 2021) (declining to judicially amend the Complaint to include concrete facts regarding a discriminatory pattern or practice).

III. Plaintiffs' newfound objection to the Numbered Memo does not mitigate against the judicial efficiency of staying this case.

Plaintiffs next abruptly attack the Numbered Memo, claiming for the first time that it does not adequately ameliorate their concerns about notice and an opportunity to cure. This is a curious argument because Plaintiffs have levied no challenge to the Numbered Memo, and have conceded that it will remain in effect for the 2024 General Election. But even assuming *arguendo* that the General Assembly codified the cure provisions in the Numbered Memo, Plaintiffs' newfound objection to its cure provisions highlights the need for a stay, as Plaintiffs would have to amend their Complaint to challenge the new law with the codified Numbered Memo. This means any discovery taken into the supposed effect of the original text would be rendered worthless, and Defendants would have wasted these resources only to re-litigate new claims, and engage in new costly discovery.

In fact, it is plausible that Plaintiffs are looking to engage in that costly discovery for a subsequent case *now.* Plaintiffs' new objection to the Numbered Memo, combined with their insistence that discovery continue to allow for an analysis of the general election, which will be conducted under the Numbered Memo's cure provision, raises the question of whether Plaintiffs are looking to gather discovery in *this* case in order to draft a subsequent amended complaint regarding the effect of certain cure provisions. This, of course, would be entirely improper, as litigants are not entitled to a fishing expedition to inform their next lawsuit.

IV. Plaintiffs' caselaw citations are inapposite.

Plaintiffs then shift to citing cases that they claim have denied "similar requests to stay." [D.E. 87 at 17]. A simple review of the cases shows there is nothing "similar" about Legislative Defendants' request for a stay to the facts of these cases:

- Both *Herd v. Cty. of San Bernardino*, No. ED CV 17-02545-AB (SPx), 2018 U.S. Dist. LEXIS 225891 (C.D. Cal. Sep. 17, 2018) and *Del Valle v. Bechtel Corp*., 24 Mass. L. Rep. 412 (2008) involved stays sought for either the potential for criminal litigation or criminal litigation against a single defendant.

- *Schroeder v. Hess Indus*., No. 1:12-CV-668, 2013 U.S. Dist. LEXIS 75726, (W.D. Mich. May 30, 2013) involved the denial of a stay in the face of real risks that staying a case for bankruptcy proceedings would create a risk of lack of collectability of the employer's assets.

- In *Gladish v. Tyco Toys, Inc*., 1993 U.S. Dist. LEXIS 20211 (E.D. Cal. Sep. 15, 1993) the court denied a stay in a sought pending resolution of patent validity reexamination proceeding by USPTO because the underlying proceedings would not resolve the entirety of the civil suit. Here, of course, the injunction has already enjoined the challenged statute, and a cure provision is in place. Arguably nothing can proceed until legislative action, which will require an amended complaint.

- In *United States v. Rudy's Performance Parts, Inc*., 647 F. Supp. 3d 408, 418-19 (M.D.N.C. 2022)[2] the Court actually granted the requested stay, simply requiring a check in after a period of time, as the Court did in both the *DNC* and *Voto Latino* stays. *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 *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007) the court of appeals overturned a stay on appeal because of failure to weigh the relevant factors and make related findings. Notably, in that case the "indefinite delay" at issue was estimated to take five to six years for resolution, raising statute of limitations implications.

In sum, Plaintiffs cite to no case where the facts are even remotely "similar" to the facts here. Nor do Plaintiffs make any real attempt to distinguish the *Crowell* case cited in Legislative Defendants' motion, which is on all fours factually with this matter. Rather, Plaintiffs claim in response that in *Crowell* the entire statute was enjoined whereas here "much of [sic] challenged enactment is still in force and effect." [D.E. 87 at 21-22]. But, of course, it does not matter that in *Crowell* the entire statute was enjoined because here, like in *Crowell*, Plaintiffs seek to enjoin the exact section of S.B. 747 that is *already enjoined*—Section 10(a).

The cases Plaintiffs cite for the proposition that engaging in discovery does not equate to harm, [D.E. 87 at 19-20] are likewise inapposite. None of the cited cases deal with a scenario like the one here—where all relevant discovery relates to a statute that is already enjoined. Moreover, none of the cited cases involved potential legislative action that would only entirely shift the claims of the case and the nature of the discovery sought.

[2] Plaintiffs also cite this case for the proposition that the public has a clear interest in resolutions with minimal delay [D.E. 87 at 18], but of course the public also has an interest in not wasting taxpayer dollars litigating claims that are not ripe or could be more efficiently tried together.

CONCLUSION

For all the reasons herein and in Legislative Defendants' Memorandum in Support of their Motion to Stay, D.E. 77, Legislative Defendants respectfully request that the Court enter an order staying this action.

Respectfully submitted, this the 13th day of May, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 2,357 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 May, 2024.

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