UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS,

Plaintiff,

v.

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; KAREN BRINSON BELL in her official capacity as Executive Director of the State Board of Elections,

Defendants,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenors.

CASE NO. 1:23-cv-837

INTERVENORS' RESPONSE IN OPPOSITION TO PLAINTIFF'S RULE 65 MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

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INTRODUCTION

This Court should deny Plaintiff's belated request to hold a consolidated trial and preliminary injunction hearing before the 2024 general election. The Alliance delayed over two decades before finally challenging North Carolina's longstanding 30-day voter qualification law in October 2023. Compl., Doc. 1. Even then, Plaintiff did not move for a preliminary injunction. Instead, it waited for State Board Defendants to answer, Doc. 27, and for Intervenors to file their proposed motion to dismiss, Doc. 28-1. In January 2024, the Alliance amended its complaint, Doc. 32, and finally requested a preliminary injunction, Doc. 33. Plaintiff did not request a hearing on its preliminary injunction motion at that time. *Contra* Local Rule 65.1(b). Rather, the Alliance filed this motion only *after* briefing concluded on the preliminary injunction motion and Intervenors' motion to dismiss. Plaintiff's sluggishness is consistent with Plaintiff's facial challenge not turning on the qualification law's "actual application to any particular election" or to any particular member, Resp. to Mot. to Dismiss, Doc. 45, at 16, but inconsistent with Plaintiff's sudden desire for the

Court to expedite trial on the merits before the 2024 general election.

Plaintiff's dilatory request would prejudice Intervenors. Intervenors' motion to dismiss or, alternatively, to transfer is fully briefed. The Court's decision on that motion will determine whether this case can continue in this Court at all or will otherwise influence how the parties approach jurisdiction, laches, and the merits. Further, no discovery has occurred. Even if the Court were to deny the motion to dismiss, the Court could still grant relief for the 2024 election *before* trial by granting Plaintiff's preliminary injunction motion. There is no need for the Court to race toward trial after Plaintiff's decades of delay.

STATEMENT OF FACTS

North Carolina amended its voter qualification law in 1973 to require that every citizen must "have resided in the State of North Carolina and in the precinct in which the person offers to vote for 30 days next preceding an election" to "be qualified to vote in the precinct in which the person resides." N.C. Gen. Stat. §163-55; *see* N.C. Laws 1973, c. 793, §18 (similar). Current North Carolina residents who "[r]emov[e] from one precinct to another in this State" have

"the right to vote in the precinct from which the person has removed until 30 days after the person's removal." N.C. Gen. Stat. §163-55(a). Potential North Carolina voters cannot register to vote without attesting that they qualify to vote. *See id.* §163.82.4(c)(1).

On October 2, 2023, the Alliance filed its original complaint, Doc. 1, challenging the 30-day qualification and the constitutional provision that authorizes it, N.C. Const. art. VI, §2, ¶1. Plaintiff did not request a preliminary injunction at that time. Three months later—on the last day Plaintiff could amend its complaint as a matter of course, *see* Fed. R. Civ. P. 15—the Alliance amended its complaint, Doc. 32, and requested a preliminary injunction, Doc. 33. According to its president, the Alliance has existed since at least 2002. Dworkin Decl., Doc. 33-1 ¶2. In its amended complaint and preliminary injunction briefing, the Alliance did not identify any specific member who needs relief before the 2024 general election or explain how any Alliance mission would be frustrated by not receiving injunctive relief before the 2024 general election in particular. In the Alliance's own words, its claims do not turn on the qualification law's "actual application to any particular election." Resp. to

Mot. to Dismiss at 16.

The Alliance's preliminary injunction motion did not include a "request for leave to present oral argument or testimony in support of . . . such motion," even though Local Rule 65.1(b) requires that such a request "must be included in the motion." The motion itself did not even reference the 2024 general election or limit the requested relief to that election. *See* Mot. for Preliminary Injunction, Doc. 33. Nor did the accompanying affidavit by the Alliance's president reference the 2024 general election or explain why relief before that specific election was necessary. *See* Dworkin Decl., Doc. 33-1. Plaintiff's brief supporting the preliminary injunction motion appeared to limit the request to "the November general election" because the Alliance anticipated gaining "multiple new members within the month before the November 2024 election," as it alleged occurred in numerous other elections. Br. Supporting Mot. for Preliminary Injunction, Doc. 34, at 7, 11-12. Plaintiff did not identify specific future members or allege harm to current members.

The 2024 general election will conclude with election day on November 5, 2024. Thus, for this election, the 30-day qualification applies to citizens who move into the State or

to a different precinct starting on Sunday, October 6, 2024. The voter registration deadline is October 11, 2024, and the in-person early voting period will run from October 17, 2024, through November 2, 2024. *See* N.C. State Board of Elections, *Calendar of Elections*, https://perma.cc/FHS8-QPRU (last accessed Mar. 12, 2024).

After moving for a preliminary injunction, the Alliance asked Intervenors if they would have a position on consolidation under Rule 65(a)(2). On January 8, 2024, Intervenors informed Plaintiff that Intervenors would not consent to such a motion. For the next six weeks, Plaintiff did not communicate again with Intervenors about the consolidation possibility or request such consolidation. On February 20, 2024, the day briefing concluded on the preliminary injunction motion, Plaintiff informed the other parties that it would request consolidation and filed the consolidation motion. Doc. 49.

Intervenors had filed a proposed motion to dismiss the original complaint or, alternatively, to transfer to the Eastern District of North Carolina on December 11, 2023. Doc. 28-1. After Plaintiff amended its complaint, Intervenors moved to dismiss the amended complaint or, alternatively, to

transfer. Doc. 37. Briefing on this motion concluded the same day briefing on Plaintiff's preliminary injunction motion concluded.

ARGUMENT

"[I]t is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). "There is no requirement that consolidation be ordered," "which means that the trial court should consider whether a real exigency has been shown that justifies giving the case preference over other disputes that are on the docket." Wright & Miller, 11A Fed. Prac. & Proc. Civ. §2950 (3d ed.).

Here, there is no real exigency justifying Plaintiff's delayed request to set a consolidated trial date before the 2024 general election. Granting Plaintiff's motion would prejudice Intervenors. This Court has not yet ruled on Intervenors' fully briefed motion to dismiss or, alternatively, to transfer. Moreover, such a trial schedule would unnecessarily abbreviate discovery and the briefing and consideration of other motions. Plaintiff's facial challenge against the longstanding voter qualification does not require

resolution before any specific election, as evidenced by the Alliance's two-decade delay. The Alliance's lack of urgency before and during this litigation does not justify forcing on Intervenors an expedited schedule that might also result in a final judgment "just weeks before" the 30-day qualification would start to apply in early October 2024 to the 2024 general election. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Even if Plaintiff could establish entitlement to the equitable relief of an injunction before the 2024 general election (and to be clear, it cannot), that relief could be obtained through Plaintiff's pending preliminary injunction motion and therefore provides no basis for precipitately reaching the merits. Rushing to trial is unnecessary.

I. Expediting the Case for a Consolidated Trial Would Prejudice Intervenors.

Expediting this case to a consolidated trial before the 2024 general election will prejudice Intervenors and the State of North Carolina as a whole. Plaintiff waited over twenty years to sue yet now asks this Court to conclude the case with haste. The North Carolina General Assembly and the citizens of this State deserve the opportunity for Intervenors to prepare a defense of the longstanding voter qualification law and the constitutional provision that

authorizes it. When considering a Rule 65(a)(2) motion, courts often consider "if the parties consent, if discovery has been concluded or if it is manifest that there is no occasion for discovery." *Pughsley v. 3750 Lake Shore Drive Co-op Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972) (Stevens, J.).

Here, all three of those considerations weigh against granting the Alliance's motion. Plaintiff knew for over a month before requesting consolidation that Intervenors would not consent. Discovery has not begun. And if this Court denies Intervenors' motion to dismiss, discovery will be necessary.

Plaintiff has not proposed a specific schedule or attempted to work with Intervenors on preparing a schedule for this litigation. Nevertheless, Plaintiff belatedly demands "that this Court consolidate a hearing on plaintiff['s] preliminary injunction motion with an expedited trial on the merits." Mot. 4. Plaintiff presumably wants this Court to enter final judgment before the 30-day qualification begins to prevent potential voters from qualifying or registering in early October for the 2024 general election. A decision in August or September 2024 facially enjoining enforcement of the 30-day qualification would violate the

Purcell principle by changing North Carolina's election laws and voter registration forms within a couple months of the qualification law's use in the 2024 general election. *See Purcell*, 549 U.S. at 3-6 (vacating order enjoining election-day photo ID requirement that the Ninth Circuit issued slightly more than one month before the law's use in the election). The schedule would, therefore, need to conclude with a trial by mid-July 2024 at the latest, leaving some time for the Court to give due consideration to the issues in the litigation before issuing judgment by the end of July 2024.[1] Thus, granting Plaintiff's consolidation motion would require trial starting four months from now.

Forcing Intervenors to prepare for trial so quickly after Plaintiff's inordinate delay would prejudice Intervenors. The motion to dismiss or, alternatively, to transfer is fully briefed. This Court should not force Intervenors to bear the

[1] Even then, Intervenors do not concede that a decision at that time would be consistent with the *Purcell* principle, especially because (1) the underlying merits are not "entirely clearcut in favor of the plaintiff"; (2) the Alliance has failed to demonstrate that any particular member will "suffer irreparable harm absent" such an injunction; (3) Plaintiff "unduly delayed bringing the complaint to court"; and (4) the changes would impose costs on North Carolina and cause confusion during the election process. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

expense and inconvenience of preparing for trial in a few months without the Court first deciding that motion. The Court's resolution of Intervenors' motion to dismiss might prevent this case from moving forward in its entirety or could require transfer to the Eastern District of North Carolina. Even if the Court only grants the motion to dismiss in part, that would still narrow and clarify the issues in dispute. Such a decision might, for example, dismiss one of Plaintiff's claims but not the other or might treat interstate travel differently from intrastate travel. And defending a law under the strict-scrutiny standard Plaintiff argues should apply to its constitutional claim is not the same as defending a law under the "less exacting review" of the *Anderson-Burdick* framework. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Rushing to trial while Intervenors' motion to dismiss remains pending would thus prejudice Intervenors and risk wasting judicial resources.

Moreover, "the factual record here is not developed sufficiently to permit adjudication on the merits." *AttorneyFirst, LLC v. Ascension Ent., Inc.*, 144 F. App'x 283, 291 (4th Cir. 2005) (reversing due to Rule 65(a)(2) consolidation). The party opposing a motion to consolidate

"should have some reasonable opportunity to develop additional evidence through discovery" and need not specify the "additional evidence [it] might produce" if allowed a normal amount of time to prepare for a trial on the merits. *Gellman v. Maryland*, 538 F.2d 603, 606 (4th Cir. 1976) (reversing due to erroneous Rule 65(a)(2) consolidation). Intervenors have had no such opportunity to conduct discovery.

Plaintiff, of course, wants no "further factual development." Mot. 2. The Alliance knows the contents of its own records and apparently thinks the four-page declaration of its president, Doc. 33-1, is the only one of its documents that Intervenors should have access to before trial. Intervenors deserve an "opportunity . . . to engage in discovery" and probe the validity of Plaintiff's factual allegations. *Gellman*, 538 F.2d at 605. For example, as Intervenors have already pointed out, the Alliance's description of its mission is *not* how it delineated its purposes in the organization's Articles of Incorporation. *See* Intervenors' Resp. to Preliminary Injunction Mot., Doc. 40, at 9. Furthermore, Intervenors should be able to conduct discovery to determine whether the Alliance has any

indication that one of its members *ever* has been denied the ability to vote in a presidential election in North Carolina due to the challenged qualification. Plaintiff's consolidation motion would leave Intervenors little to no opportunity to test the Alliance's allegations before trial. Especially in light of Plaintiff's lengthy delays in filing suit, moving for a preliminary injunction, and requesting a consolidated hearing, this Court should allow Intervenors at least a standard amount of time to prepare the record they desire for "a full and fair adversarial testing of the State's interests and arguments." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 192 (2022).

In addition, the standards for a motion to dismiss are not the same as the standards for adjudicating a case on the merits. Plausibly alleging facts is not the same as proving them. Even if the Court allows this case to proceed beyond the motion-to-dismiss stage, which it should not, that does not mean Plaintiff has proven all the facts necessary to establish its entitlement on the merits to the relief it seeks. "Nor[] were the legal issues" all "fully addressed by the parties" in the briefing of that motion. *AttorneyFirst*,

144 F. App'x at 291; *see, e.g.*, Memo. Supporting Mot. to Dismiss, Doc. 38, at 15 n.6 (reserving defenses).

Therefore, depending on how the case progresses, Intervenors might want to move for summary judgment. But the consolidated trial date Plaintiff asks this Court to impose—again, based on the desire for an effective ruling before the 2024 election, would have to be in July of this year at the latest—would cut short the time for the parties to brief and for this Court to decide motions for summary judgment before trial. Intervenors might thus suffer the prejudice of engaging in an unnecessary trial for a law that has been on the books for over half a century. To the extent any urgency to reach trial exists, the fault lies with Plaintiff, not Intervenors.

II. Plaintiff Does Not Need Consolidation Before the 2024 General Election.

The Alliance has failed to establish the existence of a real exigency that would justify imposing such prejudice on Intervenors and the State of North Carolina. A "long delay in seeking relief indicates that speedy action is not required." *Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (denying preliminary injunction). Here, the Alliance failed to make "a prompt application for

an injunction" or for consolidation. *Gellman*, 538 F.2d at 604 (quoting *Pughsley*, 463 F.2d at 1057). The Alliance waited over twenty years to initiate this case, waited several months after the case's initiation to move for a preliminary injunction, and then waited seven more weeks to ask "the Court to advance the trial on the merits and consolidate it with the preliminary injunction hearing." Mot. 2. Plaintiff's slow walking of its own case demonstrates there is no real exigency "that justifies giving the case preference over other disputes that already are on the docket." Wright & Miller, *supra*, at §2950.

The Alliance has not brought an as-applied challenge focusing on the 2024 general election or on any specific member who will vote in the 2024 general election. To the contrary, Plaintiff describes its claims as "a straightforward facial challenge." Resp. to Mot. to Dismiss at 7. In the organization's own words, "Plaintiff's facial challenge to the 30-Day Residency Requirement does not depend on any facts about the 30-Day Residency Requirement's application to any particular election." Mot. 3. Therefore, no real exigency exists to resolve this case before the 2024 general election.

If the 30-day voter qualification really were injuring the Alliance as an organization, then the organization could have sued years ago. The voter qualification has been on the books since the Alliance was allegedly founded in 2002. Nothing in Plaintiff's pleadings explains why the organization needs relief before the 2024 general election but did not require relief for any election in the first two decades of its existence. And if Plaintiff claims a need for relief that has not changed for two decades, then it inexcusably and unreasonably failed to assert these facial claims in a timely manner. *See White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990).

On a representational basis, Plaintiff refuses to identify with particularity any member, or even any future member, who needs relief before the 2024 general election. *See* Br. Supporting Mot. for Preliminary Injunction at 11-13; Reply Supporting Mot. for Preliminary Injunction, Doc. 48, at 7-8. Even if that were sufficient for standing purposes, which it is not, *see* Intervenors' Resp. to Preliminary Injunction Mot. at 7-8; Reply Supporting Mot. to Dismiss at 2-4, the Alliance's failure to identify any particular individual it claims to represent who needs relief specifically for the

2024 general election is reason enough to deny the consolidation motion. All the Alliance's current members reside in North Carolina, Amended Compl., Doc. 32 ¶16, so they do not need relief to vote in the 2024 presidential election in North Carolina. If current members move to a different precinct in North Carolina within 30 days of the 2024 general election, then they can vote in their previous precinct. N.C. Gen. Stat. §163-55(a). North Carolina law, therefore, provides every otherwise qualified Alliance member who moves within 30 days of the 2024 general election the opportunity to vote in every statewide election and, depending on where the member moves to and from, potentially in *all* the same elections on the ballot in the new precinct. The Alliance's members as of January 2024—when Plaintiff amended its complaint—do not need urgent relief before the 2024 general election.

To be sure, the Alliance anticipates "gain[ing] multiple new members within the month before the November 2024 election" whom the qualification might impact. Br. Supporting Mot. for Preliminary Injunction at 11-12. But the Alliance simultaneously claims that same membership expansion has occurred at numerous previous elections and still fails to

identify any current Alliance member whom the qualification has ever harmed. *Id.* Moreover, the Alliance lacks a "close relationship" with unidentified potential voters who are not currently Alliance members. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 190 (M.D.N.C. 2020). Just as the Alliance did not seek relief before any past election, this Court should not rush to trial on current non-members' behalf. The existence of Plaintiff's preliminary injunction request does not justify rushing "to alter the status quo" before the 2024 general election. *Perry v. Judd*, 471 F. App'x 219, 223-24 (4th Cir. 2012).

But even if this Court denies Intervenors' motion to dismiss and believes Plaintiff has shown a likelihood of success on the merits and equitable entitlement to relief before the 2024 general election, the Court could still issue such relief well in advance of the 2024 general election by granting Plaintiff's fully briefed motion for a preliminary injunction *without* consolidating for a trial on the merits. That normal approach to litigation—first deciding whether to dismiss or transfer, then determining whether Plaintiff has established entitlement to a preliminary injunction, and finally reaching trial on the merits after discovery

concludes—is far more appropriate than prejudicing Intervenors by restricting their ability to obtain discovery and cutting short the time for dispositive motions. After all, the usual "purpose of a preliminary injunction is merely to preserve the relative positions of the parties *until* a trial on the merits can be held." *Univ. of Texas*, 451 U.S. at 395 (emphasis added). This Court could then proceed to a trial sometime in 2025 without contorting its docket around an expedited trial on the merits in this case.

Finally, even if Plaintiff truly had some need for a consolidated trial before the 2024 general election, such need would not be so great as to override Intervenors' opposition to consolidation and desire to obtain discovery from Plaintiff. Unlike the cases Plaintiff relies upon in its consolidation motion, Intervenors neither consent to consolidation nor, before resolution of the motion to dismiss, agree that further factual development is unnecessary. *See Phillips v. Hechler*, 120 F. Supp. 2d 587, 587-88 (S.D. W. Va. 2000) (all parties consented and agreed the case "did not require factual development" so that specifically identified individuals could obtain relief before a specific election); *Hess v. Hughes*, 500 F. Supp.

1054, 1056 (D. Md. 1980) (all parties "joined in the request" and agreed that "all the evidence and arguments" would be the same for the preliminary injunction hearing and trial). Bringing a facial challenge to a half-century-old law on behalf of no particular voter lacks the urgency of *Underwood v. City Council of Greenville*, 316 F. Supp. 956 (E.D.N.C. 1970). In *Underwood*, plaintiffs brought a class action on behalf of university students to stop enforcement of a new parade permitting ordinance that had already led to the arrest of 27 university students. *Id.* at 958. The Fourth Circuit had even entered a temporary restraining order against a prior, substantively identical ordinance after plaintiffs filed their original complaint. *Id.* at 957. Unlike the students in *Underwood*, the Alliance slept on its supposed rights and has no urgent need for a consolidated trial.

CONCLUSION

The Court should deny Plaintiff's motion to consolidate a hearing on Plaintiff's preliminary injunction motion with an expedited trial on the merits at an unspecified time before the 2024 general election.

Dated: March 12, 2024

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Response, including body, headings, and footnotes, contains 3,688 words as measured by Microsoft Word.

/s/ Nicole J. Moss
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Counsel for Intervenors

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on March 12, 2024, I electronically filed the foregoing Response with the Clerk of the Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
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