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 State Board of Elections, JEFF CARMON, in his official capacity as Secretary of the State Board of Elections, STACY EGGERS IV, in his official capacity as Member of the State Board of Elections, KEVIN N. LEWIS, in his official capacity as Member of the State Board of Elections, SIOBHAN O'DUFFY MILLEN, in her official capacity as Member of the State Board of Elections, KAREN BRINSON BELL, in her official capacity as Executive Director of the State Board of Elections,

Defendants.

Case No.1:23-cv-00837-WO-JLW

PLAINTIFF'S REPLY IN SUPPORT OF RULE 65 MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS

INTRODUCTION

This case turns entirely on a pure dispute of law: whether North Carolina's 30-Day Residency Requirement violates the Voting Rights Act and the U.S. Constitution, where North Carolina allows eligible voters to register less than 30 days before Election Day. Answering that legal question requires neither discovery nor the resolution of any factual dispute. The Court's decision on the preliminary injunction motion will therefore, as a practical matter, be dispositive whether or not the Court consolidates the preliminary injunction with a trial on the merits: the Court will either accept or reject Plaintiff's legal argument. It is therefore no surprise that the State Defendants do not oppose consolidation under Fed. R. Civ. P. 65(a)(2). Denial of consolidation would only needlessly prolong this case.

Intervenors alone oppose consolidation, and their opposition misapprehends what Plaintiff requests. Plaintiff is not asking for an expedited, full-dress trial on its preliminary injunction motion; Plaintiff does not believe that any such trial is needed, because there are no disputes of material fact. Rather, Plaintiff's request is simply that the Court's decision on the preliminary injunction motion—however the Court rules, and after whatever hearing (or lack thereof) the Court deems appropriate—become the final judgment in this case. And the reason is simple: that decision will, in effect, be dispositive regardless.

The Court should therefore grant consolidation under Rule 65(a)(2).

ARGUMENT

I. The Court's preliminary injunction motion will be dispositive of the merits.

As a practical matter, the Court's ruling on the preliminary injunction motion will be dispositive of the merits of this case whether the Court grants consolidation or not. The case presents the purely legal question of whether North Carolina's 30-Day Residency Requirement violates the Voting Rights Act and the Fourteenth Amendment. As the parties' preliminary injunction briefs make clear, that question implicates no disputes of material fact. However the Court resolves that question at the preliminary injunction stage, nothing about the analysis will or could change after further discovery or an additional trial on the merits. To prolong the case past the preliminary injunction stage would merely delay the inevitable and waste judicial and party resources. Consolidation is particularly appropriate under those circumstances. *See, e.g.*, *Singleton v. Anson Cnty. Bd. of Educ.*, 387 F.2d 349, 351 (4th Cir. 1967) (ordering consolidation sua sponte to "save court time"); *Y.K. Enters., Inc. v. City of Greensboro*, No. 1:07CV0289, 2007 WL 2781706, at *4 (M.D.N.C. Sept. 21, 2007).

The same is true with respect to the Intervenors' laches and standing defenses. Intervenors' laches argument is based entirely on undisputed facts regarding the timing of this lawsuit and the age of the challenged law. *See* Intervenors' Resp. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 14–16, ECF No. 40. Similarly, Intervenors'

standing challenge turns entirely on whether the injury evidence that Plaintiff has put forward satisfies Article III's requirements. *Id*. at 7–10. Nowhere do Intervenors challenge the veracity of that evidence, or raise a factual dispute that could potentially be resolved differently on a preliminary injunction motion and then at trial.

II. Intervenors do not need discovery, but if they wanted it, they could have sought it.

Intervenors complain that consolidation would deprive them of an opportunity for discovery. Intervenors' Resp. in Opp'n to Pl.'s Rule 65 Mot. at 11, ECF No. 50 ("Resp."). They do not, however, identify any discovery they need that would be relevant to the merits of their claims. And while they say they need discovery on the question of the Alliance's standing, *id*. at 11–12, *they have not sought any such discovery*, even though Plaintiff's preliminary injunction motion has now been pending for more than three-and-a-half months and was fully briefed over a month ago.

If Intervenors really thought they needed discovery from the Alliance on standing, they would surely have pursued it months ago. Even without consolidation, a preliminary injunction will be highly significant in this case, because it will determine the rules that govern the November 2024 election. Courts in this district often order early discovery where a party requests it in connection with a preliminary injunction motion. *See, e.g.*, *Teamworks Innovations, Inc. v. Starbucks Corp*., No.

1:19CV1240, 2020 WL 406360, at *7 (M.D.N.C. Jan. 24, 2020) (granting expedited discovery due to a pending preliminary injunction motion); *Intercollegiate Women's Lacrosse Coaches Ass'n v. Corrigan Sports Enters., Inc.*, No. 1:20CV425, 2020 WL 4227546, at *6 (M.D.N.C. July 23, 2020) (same). But Intervenors made no such request; they focused instead on challenging the legal adequacy of Plaintiff's evidence supporting standing, without disputing the facts themselves. *See* ECF No. 40 at 7–10. Even now, Intervenors merely cite the specter of discovery as a reason to deny consolidation: they *still* have not moved for early discovery, much less served a concrete request for it. If discovery were needed, the appropriate remedy would be to allow limited, expedited discovery before the pending motion is decided—not to deny consolidation entirely. *See, e.g.*, S*martSky Networks, LLC v. Wireless Sys. Sols., LLC*, No. 1:20CV834, 2020 WL 13043410, at *2 (M.D.N.C. Oct. 13, 2020) (granting motion for expedited discovery before preliminary injunction hearing, and ordering document production and depositions to conclude within 33 days of order).

III. Intervenors will not otherwise be prejudiced by consolidation.

Finally, Intervenors will not be prejudiced in any other way by consolidation, either. Their other prejudice arguments assume that they would need to prepare for an expedited, full-dress trial, but that is not what Plaintiff seeks. Plaintiff's position is instead simply that the Court should issue a final decision in this case based on

whatever procedures the Court concludes are necessary to resolve the preliminary injunction motion, whether that is a decision on the papers, a decision after oral argument, or a decision after an evidentiary hearing.

There is no procedural problem with that approach. This is an equitable case that will be tried to the Court, not a jury, and the Court's obligation to find facts is the same under Rule 52 whether it does so to decide an interlocutory injunction or to enter a final judgment. *See* Fed. R. Civ. P. 52. The Court has considerable flexibility in the procedures it uses to make those findings. It has "enhanced leeway" over questions of fact in non-jury cases like this one; indeed, even on a summary judgment motion, the Court would be free "to decide that the same evidence, presented to him or her as trial of fact in a plenary trial, could not possibly lead to a different result." *Fleming v. Bayou Steel BD Holdings II LLC*, 83 F.4th 278, 294 (5th Cir. 2023) (quoting *In re Placid Oil Co.*, 932 F.2d 394, 398 (5th Cir. 1991)). And even without consolidation, the Court could properly consider everything in the preliminary injunction record when entering a final judgment later on. *See* Fed. R. Civ. P 65(a)(2); *N.C. State Conf. of NAACP v. Hirsch*, No. 1:18CV1034, 2024 WL 1093769, at *11 n.7 (M.D.N.C. Mar. 13, 2024). Thus, if the Court orders consolidation, it need not change the procedures it intends to use to decide the pending preliminary injunction motion; it would just enter a final judgment now, rather than a mere preliminary ruling.

AttorneyFirst, LLC v. Ascension Entertainment, Inc., 144 F. App'x 283 (4th Cir. 2005), and *Gellman v. State of Maryland*, 538 F.2d 603 (4th Cir. 1976), are not to the contrary. *See* Resp. at 10–11. Both cases concluded that the district court's failure to give the parties "clear and unambiguous notice" of its intention to consolidate before ruling on the merits deprived the plaintiff of the opportunity to present its full case. *AttorneyFirst, LLC*, 144 F. App'x at 290–91; *see also Gellman*, 538 F.2d at 606 (finding consolidation improper where court granted judgment on the merits under Rule 65(a)(2) "without any notice of such intention until the conclusion of the evidentiary hearing"). Here, in contrast, Plaintiff has sought consolidation before the preliminary injunction motion is decided. If, given the prospect of consolidation, Intervenors really have something else to say, then they are free to move the Court for an opportunity to say it.

IV. An expedited resolution is appropriate here.

Intervenors also use their opposition to argue, again, that no expedited relief is needed here. Not so. For the reasons detailed in Plaintiff's preliminary injunction brief, expedited resolution is appropriate here to prevent disenfranchisement in the 2024 election. *See* Pl.'s Br. in Supp. of Mot. for Prelim. Inj. at 22–24, ECF No. 34. Because the harm to voters is so great, the balance of equities favors facilitating voter participation in elections—including the 2024 election. *See Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 237 (M.D.N.C. 2020). Contrary

to Intervenors' claim that "no real exigency exists," Resp. at 14, courts regularly find that infringement of voting rights is an irreparable harm justifying expedited relief before an upcoming election. See *Democracy N.C*, 476 F. Supp. 3d at 170–71 (in voting rights case during presidential election year, granting preliminary injunction within two months of plaintiffs' motion); *Action NC v. Strach*, 216 F. Supp. 3d 597, 648 (M.D.N.C. 2016) (in voting rights case during presidential election year, granting preliminary injunction six months after plaintiffs' motion); *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 120 F. Supp. 3d 479, 492 (M.D.N.C. 2015) (granting preliminary injunction 10 days after plaintiffs' motion in order to prevent equal protection violation in imminent city council election).

Moreover, Plaintiff's motion is not "belated," as Intervenors claim. Resp. at 1. To the extent Intervenors argue that Plaintiff's request is belated because the 30-Day Residency Requirement has been in effect for years, the timing of Plaintiff's complaint does not inform whether its preliminary injunction and consolidation motions are timely.[1] Further, before both sets of defendants filed their response in opposition to the preliminary injunction motion, Plaintiff had no way of knowing

[1] The issue of laches is fully developed in the motion to dismiss and preliminary injunction briefing. *See* Pl.'s Resp. in Opp. to Mot. to Dismiss at 31–32, ECF No. 45; Pl.'s Reply in Supp. of Mot. for Prelim. Inj. at 16–17, ECF No. 48. As explained in those filings, (1) the passage of time alone does not insulate unconstitutional practices from challenge, and (2) Intervenors do not contest that laches is inapplicable to Plaintiff's claims on behalf of its members.

whether defendants would raise factual defenses to the preliminary injunction motion such that resolving them might be different from resolution of the merits of this case. Therefore, Plaintiff's consolidation motion was timely.

Above all else, the need to resolve this case ahead of the upcoming 2024 presidential election militates in favor of either preliminary relief or consolidation. *See Singleton*, 387 F.2d at 351 (noting that "[c]ivil rights cases are especially suitable" for consolidation to expeditiously advance the litigation). Plaintiff seeks to resolve this case in a manner that avoids any last-minute disruption to election administration, *see Purcell v. Gonzalez*, 549 U.S. 1, 5–6 (2006), and moved for expedited relief as soon as it became clear that seeking final judgment in any other way would likely come too slowly. There is more than enough time to resolve the preliminary injunction motion well in advance of the November election, which is still more than seven months away. *See* Resp. at 17.

Intervenors concede that there is enough time for the Court to decide Plaintiff's preliminary injunction motion "well in advance of the 2024 general election." *Id.* Any dispute over timeliness therefore has no bearing on consolidation. Because the preliminary injunction motion and ultimate merits turn on the same questions, the ultimate merits can also be resolved "well in advance of the 2024 general election," *id.*, avoiding last-minute changes in election administration that could confuse voters and burden administrators. *Cf. Purcell*, 549 U.S. at 5–6. The

question is just whether the Court should make that expedited determination its final judgment, given that it will invariably, as a practical matter, fully resolve the issues in this case.

CONCLUSION

For the foregoing reasons, this Court should consolidate its decision on the pending preliminary injunction motion with a final judgment on the merits under Rule 65(a)(2).

Dated: March 26, 2024.

Respectfully submitted,

/s/ Narendra K. Ghosh
Narendra K. Ghosh
N.C. Bar No. 37649
PATTERSON HARKAVY LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27217
Telephone: (919) 942-5200
nghosh@pathlaw.com

David R. Fox*
Marilyn Gabriela Robb*
Tina Meng Morrison*
Ian U. Baize*
ELIAS LAW GROUP LLP
250 Massachusetts Ave, N.W., Suite 400
Washington, D.C. 20001
Telephone: (202) 968-4490
dfox@elias.law
mrobb@elias.law
tmengmorrison@elias.law
ibaize@elias.law

** Participating via Notices of Special Appearance*

Counsel for Plaintiff

CERTIFICATE OF WORD COUNT
PURSUANT TO LOCAL RULE 7.3(d)

Undersigned counsel certifies that this Reply complies with Local Rule 7.3(d), in that the word count function of Microsoft Word shows the brief to contain 2,029 words, excluding those portions of the brief permitted to be excluded by the Rule.

This 26th day of March, 2024.

/s/ Narendra K. Ghosh
Narendra K. Ghosh

Counsel for Plaintiff