IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:23-cv-00878-TDS-JEP

DEMOCRACY NORTH CAROLINA; NORTH CAROLINA BLACK ALLIANCE; LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA,

Plaintiffs,

vs.

ALAN HIRSCH, in his official capacity as CHAIR OF THE STATE BOARD OF ELECTIONS; JEFF CARMON III, 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 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; NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

INTRODUCTION

Plaintiffs have, from the outset of this case, sought a permanent injunction against the entire same-day registration scheme codified by Senate Bill 747. Plaintiffs have also always sought relief for the 2024 General Election and have exercised the utmost diligence in seeking that relief, working as quickly as allowed to seek evidence in support of their claims. Yet, waylaid by discovery delays entirely out of their control, including a multi-month delay of the voter data necessary to analyze the impact of Senate Bill 747, Plaintiffs have reluctantly recognized the inevitable: trial cannot take place in time for relief to be entered ahead of the 2024 General Election.

Accordingly, Plaintiffs proposed reasonable modifications to the schedule that would account for the discovery delays and other scheduling difficulties while allowing Plaintiffs to vindicate their claims as quickly as possible after the General Election and to avoid risking the passage of another election without relief. State Board Defendants consent to such an extension. Yet Legislative Defendants respond, not even with a counterproposal of their own, but by insisting that the entire litigation should be stayed because of the limited relief ordered by this Court in two related cases, as well as the speculative assertion that the North Carolina General Assembly might act to amend the law.

A stay would significantly prejudice Plaintiffs. In addition to threatening voter rights in yet another election cycle, a stay would hold Plaintiffs' ongoing third-party discovery efforts in abeyance and would jeopardize the depositions that key legislative sponsors of S.B. 747 have, pursuant to a carefully crafted discovery compromise, agreed

to sit for. Delaying this discovery—which, short of a full repeal of the challenged provisions of S.B. 747, will continue to be relevant even if hypothetical legislative amendments come to pass—may put this evidence forever out of reach, given the likelihood that the passage of time leads to faded memories, lost documents, and witnesses becoming unavailable.

For their part, Legislative Defendants do not cite any real prejudice to themselves in the absence of a stay, referencing only the costs of continuing to litigate this case. Courts have repeatedly held this does not justify a stay.

Legislative Defendants also assert that this Court's relief in related cases effectively moots Plaintiffs' case. But those temporary, limited measures do not cure the constitutional infirmities in S.B. 747. That is because Plaintiffs' claims are unique: most notably, this case involves a claim that the law was passed with the intent to discriminate against young voters in violation of the Twenty-Sixth Amendment. While the preliminary injunction offers some relief to North Carolina voters, it does not redress Plaintiffs' intentional discrimination claim and is more limited in scope than the relief Plaintiffs seek.

Legislative Defendants further suggest that the possibility of future legislative action warrants a stay because it has the *potential* to moot the case. But they have refused to make *any* representation about when such an amendment will pass or how it might operate. Moreover, Legislative Defendants can point to no ongoing legislative activity, despite the General Assembly having been in session for two weeks, that warrants a stay. It is pure speculation that legislative action would moot the case.

Plaintiffs ask for nothing more than the opportunity to continue to develop a record to prove what they have alleged: Senate Bill 747 was passed with the intent to discriminate against voters on the basis of age, constitutes a severe, undue burden on North Carolina voters, and is unconstitutional on both of those grounds. Neither the law nor the facts warrant a stay here, and Legislative Defendants' request should be denied.

STATEMENT OF RELEVANT FACTS

Plaintiffs filed this action on October 17, 2023, seeking a declaratory judgment that the Undeliverable Mail Provision of Senate Bill 747 ("S.B. 747") is unconstitutional under the First, Fourteenth, and Twenty-Sixth Amendments and a permanent injunction barring Defendants from enforcing the same. Dkt. 1.

By agreement of the parties, discovery opened in this matter on November 21, 2023, while the plaintiffs in the related cases sought preliminary injunctive relief ahead of the 2024 Primary Election. Dkt. 37 at 3; Text Order 11/21/2023. Plaintiffs promptly served written discovery on Legislative Defendants and State Board Defendants on November 30, 2023. These included requests for voter data necessary to Plaintiffs' expert analysis and reports. Dkt. 82-1 at 10 (RFPs 12-15). Plaintiffs also issued non-party subpoenas duces tecum on December 15 and 20, 2023, on two sponsors of S.B. 747—non-parties Senator Warren Daniel and Representative Grey Mills—and several other third parties involved in the legislative process, including Cleta Mitchell and the North Carolina Election Integrity Team (NCEIT).

On December 12, 2023, the Court approved the parties' Joint Rule 26(f) Report. Dkt. 44 at 1. The Report contemplated discovery by both Plaintiffs and Legislative

Defendants into the impacts of S.B. 747, including how many voters would be unable to vote under its Undeliverable Mail Provision as compared to the previous same-day registration scheme. Dkt. 43 at 3-4.[1] By agreement of the parties, production of the data necessary to this analysis was initially contemplated for the end of January 2024. This would have allowed preparation and service of initial expert reports by March 15, 2024, as originally contemplated in the Joint Report. Dkt. 43, 44. Due to unforeseen delays by the State Board, the data was not made available to the other parties until March 8, 2024. Dkt. 62 at 2. To accommodate those data production delays, on March 14, 2024, all parties agreed to Plaintiffs' Consent Motion to Extend Deadlines which requested a modest adjustment to the case schedule to allow sufficient time for expert reports (opening reports due May 1) while maintaining a trial date in advance of the 2024 General Election. *Id.* at 3.

On April 2, 2024, while the extension request was pending, the Court denied Defendants' pending motions to dismiss, Dkt. 63, noting that "Plaintiffs' third claim raises novel issues in this circuit," and that the "court would benefit from a more developed factual record and briefing" on that issue. *Id.* at 25-26. On April 4, 2024, the Court granted the enlargement motion for good cause shown and set trial for the September Civil Trial Calendar. Dkt. 69.

[1] On December 22, 2023, Legislative Defendants served written discovery on State Board Defendants that overlapped substantially with the data requests made by Plaintiffs. Dkt. 82-2.

There were, however, more unanticipated problems with the State Board's data production. Plaintiffs discovered significant limitations on the election data that had been produced and took immediate steps to obtain the full data set initially requested. For example, on March 11, 2024, the very first business day after receiving the initial data production, Plaintiffs informed the State Board that its production lacked documentation defining the various data fields and variables (often referred to as a "data dictionary"). Dkt. 82-3 at 9-10. Once equipped with that missing information, received days later, Plaintiffs were able to confirm that the dataset was missing historical address data and then worked with the State Board to fast-track the production of a supplement. Dkt. 81 at 6-8; Dkt. 82-3 at 1-6. Plaintiffs eventually obtained the necessary records, but not until April 19, 2024, less than two weeks before Plaintiffs were slated to disclose their opening expert reports pursuant to the modified discovery schedule. Dkt. 82-4 at 1-6.

Throughout the original and extended discovery periods, Plaintiffs also continued to diligently pursue discovery from non-parties Cleta Mitchell, NCEIT, Senator Daniels, and Representative Mills.

On January 31, 2024, Plaintiffs filed a Motion to Compel Discovery and Authorize Alternative Service of Subpoenas for non-parties Cleta Mitchell and NCEIT. Dkt. 54. By way of that motion, Plaintiffs detailed their extensive attempts to serve Mitchell and NCEIT's registered agent in person, through several process servers, and through the Moore County Sheriff beginning as early as December 15, 2023, and their successful service via USPS Certified Mail. *See generally* Dkt. 55; Dkts. 56 to 56-16. Non-parties Mitchell and NCEIT opposed the motion on February 19, 2024, Dkt. 58, and Plaintiffs

replied on February 26, 2024, Dkt. 61. That motion remains under consideration with the Court.

Plaintiffs' pursuit of the non-party legislator discovery followed a similar pattern, with efforts beginning promptly in November 2023, then stalling, through no fault of Plaintiffs, in the weeks preceding this Motion. In short, Plaintiffs negotiated an agreement with Senator Daniels and Representative Mills to partially waive their legislative privilege and sit for depositions in exchange for reducing the number of non-party legislator subpoenas issued. Dkt. 82-5 at 3 (reserving rights to seek additional legislative discovery based on the issued subpoenas). On April 8, 2024, Plaintiffs emailed counsel requesting dates of availability for the two legislators in "the last week of April into the first half of May." Dkt. 82-6 at 1-2. Plaintiffs sought these deposition dates pursuant to the modified schedule that contemplated fact depositions "primarily in April and May 2024" and because Plaintiffs correctly anticipated that the outstanding document productions for these witnesses would be resolved by then. Dkt. 81 at 7-8 (final document production on April 11, 2024). To date, no deposition dates have been provided.

The issues with the State Board data productions, coupled with these outstanding non-party discovery issues, necessitated a further modification of the case schedule. Plaintiffs contacted Defendants via email on April 24, 2024, to discuss the schedule given the "timing of the most recent data productions [on April 19]" and "opening expert reports due next week [on May 1]." Dkt. 82-7 at 13. The parties conferred on April 25, 2024, and all parties represented that they would consider adjustments to the current discovery schedule, with Legislative Defendants stating that they were having similar

issues with the data from the State Board and saw the benefit of more time for expert reports. Plaintiffs agreed to circulate a scheduling proposal following the meeting, which they did. *Id.* at 9-10.

On April 26, 2024, the parties exchanged emails discussing the various scheduling options. *Id.* at 5-9. It was at this juncture that Legislative Defendants shifted from discussing a modified schedule to insisting upon a temporary stay of all proceedings. *Id.* at 8-9. Legislative Defendants rejected three separate scheduling proposals by Plaintiffs for reasons that were internally inconsistent and shifted based on the proposal being considered. *Id.* at 2-9. On April 30, 2024, Plaintiffs filed an Opposed Motion to Extend Deadlines, Dkt. 80. State Board Defendants have now consented to that proposal. Dkt. 85. Legislative Defendants instead filed the instant motion for a stay, which Plaintiffs oppose.

LEGAL STANDARD

When considering a motion to stay, courts will weigh "(1) the interests of judicial economy; (2) the hardship and equity 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." *N.C. State Conf. of the NAACP v. Cooper*, 397 F.Supp.3d 786, 797 (M.D.N.C. 2019) (internal quotations omitted). The moving party bears the burden of demonstrating that "'clear and convincing circumstances outweigh potential harm' to the opposing party." *Id.* (quoting *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983)). "'[I]f there is even a fair possibility that the stay . . . will work damage to someone else,' the party seeking the stay 'must make out a clear case of hardship or inequity in being required to

go forward.'" *Id.* (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Where plaintiffs bring constitutional challenges that allege discriminatory burdens on the right to vote, the delay introduced by a stay introduces a "significant[] prejudice" to plaintiffs' ability to "resolve their . . . claims in advance of the upcoming election." *Id.* at 797-98.

ARGUMENT

I. PLAINTIFFS WOULD SUFFER SIGNIFICANT PREJUDICE FROM A STAY

When properly contextualized in the full scope of Plaintiffs' claims, Legislative Defendants' requested stay would result in substantial and irreparable prejudice to Plaintiffs. "Any restrictions" on the right to vote freely "strike at the heart of representative government." *Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and affirming district court's denial of a stay). As many courts have observed, any stay in election-law challenges jeopardizes the likelihood of a final resolution of Plaintiffs' claims in time for the next election, and the inherent "importance and immediacy" of voting-related challenges, *id.*, requires denying a stay absent exceptional circumstances. *See, e.g.*, *Cooper*, 397 F.Supp.3d at 798 (M.D.N.C. 2019) (denying stay that would jeopardize ability to resolve claims in advance of the next election); *Covington v. North Carolina*, No. 1:15CV399, 2018 U.S. Dist. LEXIS 12945, at *20 (M.D.N.C. Jan. 26, 2018) (denying stay pending appeal and noting that "limiting the right to vote in a manner that violates the Equal Protection Clause constitutes irreparable harm"); *League of Women Voters of Mich. v. Johnson*, No. 2:17-cv-14148, 2018 U.S. Dist. LEXIS 42049, at *3 (E.D. Mich. Mar. 14, 2018) (denying stay and noting the "risk that this case will not be resolved" in time for the next election).

A. Legislative Defendants Mischaracterize Both the Scope of Plaintiffs' Claims and this Court's Preliminary Injunction.

Legislative Defendants' arguments in their Motion for Stay (Dkt. 77, "Memo."), rely on a simple but critical error: that the Preliminary Injunction issued by this Court in related cases affords the full and final relief Plaintiffs seek in this case. Their motion leads with and revolves around this misunderstanding. "Legislative Defendant-Intervenors seek a stay in this matter *in light of* the Court's order preliminarily enjoining the Undeliverable Mail Provision of S.B. 747[.]" Memo. at 1 (emphasis added); *see id.* at 3, 9, 12. Legislative Defendants assert that the limited injunction makes litigation of Plaintiffs' claims "tenuous at best." *Id.* at 7.

But Defendants' characterization of the status quo both overrepresents the breadth of the January 21 Preliminary Injunction Order in *Voto Latino v. Hirsch*, No. 1:23-CV-861, 2024 U.S. Dist. LEXIS 11180 (M.D.N.C. Jan. 21, 2024) ("PI Order"), and erroneously narrows Plaintiffs' claims and their prayer for relief. First, the PI Order does not address Plaintiffs' Twenty-Sixth Amendment claim; nor could it, since the claim was not before the Court in those proceedings. And while the PI Order did consider procedural due process and *Anderson-Burdick* claims similar to those brought by Plaintiffs, the Order did so on the basis of an extraordinarily limited factual record—a dynamic which the Court repeatedly referenced in its reasoning. *See*, *e.g.*, PI Order at *69 n.31, *70 n.33, *74-75, *82.

Accordingly, it does not afford the broader relief Plaintiffs have sought in this case. *See* Dkt. 1 (Complaint) at 41-42 (seeking a permanent injunction against the entire

Undeliverable Mail Provision). Given the nature of Plaintiffs' claims, it is very possible the final relief afforded at trial will be different, and indeed broader, than that afforded in the PI Order. Plaintiffs' Twenty-Sixth Amendment claim clearly reaches beyond the scope of the PI Order, a point that even Legislative Defendants concede. Memo. at 3; *see N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016). Further, when an undue burden on the right to vote is shown under *Anderson-Burdick*, relief is shaped to remedy the specific undue burden shown, which is a fact-dependent inquiry. *See, e.g.*, *Graveline v. Benson*, 992 F.3d 524, 546-47 (6th Cir. 2021). This inquiry will necessarily change when undertaken with a fully developed record concerning the nature and contours of S.B. 747's burden on voters, rather than the truncated evidentiary record available to the Court at the preliminary injunction stage.

There is no reason to think that the Court's full merits consideration should be limited to preliminary injunction evidence, nor that the PI Order represents the full scope of relief potentially available to Plaintiffs on either their *Anderson-Burdick* claim or their Twenty-Sixth Amendment claim. Put another way, final relief does not always track preliminary relief. "[T]he district court's preliminary injunction . . . is not final for resolution of the merits . . . and not impervious to modification or adjustment in the event the trial court determines future evidence or judicial rulings so warrant." *dmarcian, Inc. v. dmarcian Eur. BV*, 60 F.4th 119, 145 (4th Cir. 2022). "[P]reliminary relief is just that: preliminary." *Pierce v. N.C. State Board of Elections*, No. 24-1095, 2024 U.S. App. LEXIS 7349, at *70 (4th Cir. Mar. 28, 2024).

Nor does the existence of the revised Numbered Memo somehow render Plaintiffs' claims unripe. Though Legislative Defendants are correct in their observation that no one has challenged the Numbered Memo to date, Memo. at 3, Plaintiffs do not concede that the Numbered Memo is adequate permanent relief and believe quite strongly that it is not. Even if the Numbered Memo were codified, it should not be equated with the broader permanent relief Plaintiffs seek here.

Legislative Defendants nonetheless assert that "there is no current harm" from the current legal regime for same-day registration. Memo. at 10. To the contrary, even with the limited ameliorative provisions required by the PI Order and implemented by the Numbered Memo, S.B. 747's Undeliverable Mail Provision will continue to disenfranchise voters through no fault of their own. And this harm will continue in every election in which S.B. 747's scheme is operative. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (finding voters' injury from discriminatory law to be "completely irreparable" because "once the election occurs, there can be no do-over and no redress").

Legislative Defendants' attempt, despite these realities, to constrain all future developments in this case to the confines of the PI Order is both illogical and plainly self-serving. "[Defendant] would have to fully remedy *each* of Plaintiffs' claims outlined above in order to render them moot." *Ctr. for Biological Diversity v. Ross*, 419 F.Supp.3d 16, 23 (D.D.C. 2019) (emphasis added). Continued factual development on S.B. 747's Undeliverable Mail Provision is crucial to the disposition of this case. Plaintiffs are entitled to develop that record in support of their allegations and in pursuit of their

broader requested relief. *See* Dkt. 1 at 41-42; *McCrory*, 831 F.3d at 239-40 ("[T]he proper remedy for a legal provision enacted with discriminatory intent is invalidation.").

Because they are unable to show that Plaintiffs' claims are moot, Legislative Defendants' motion should be rejected.

B. Legislative Defendants Ignore the Constitutional Harm Caused by a Stay.

Legislative Defendants contend that a stay would cause no harm because Plaintiffs are no longer able to seek relief in advance of the 2024 election. Memo. at 9-10. But this argument ignores both the ongoing harm caused by S.B. 747 and the substantial risk that these delays will metastasize into yet another missed election, despite Plaintiffs' best efforts. Legislative Defendants "incorrectly minimize[] the possible duration of this case as well as the prejudice to Plaintiffs and the public interest that would arise if this case were to persist through [multiple] election cycles." *Johnson*, 2018 U.S. Dist. LEXIS 42049, at *3; *see also id.* at *3 ("Voting rights litigation is notoriously protracted."); *Covington*, 2018 U.S. Dist. LEXIS 12945, at *21 (declining to issue a stay that would give Legislative Defendants the "fruits of victory for another election cycle") (internal quotations omitted); *Common Cause v. Rucho*, No. 1:16-CV-1026; No. 1:16-CV-1164, 2017 U.S. Dist. LEXIS 145590, at *23 (M.D.N.C. Sept. 8, 2017) (denying stay in election law case where a stay would "create[] a substantial risk that, in the event Plaintiffs prevail, this Court will not have adequate time to afford Plaintiffs the relief they seek").

Unforeseen delays outside of Plaintiffs' control have *already* foreclosed the possibility of a final decision on the merits and full relief before the 2024 General

Election, despite Plaintiffs' diligence. *See* Dkt. 81 at 6-8 (detailing discovery delays). Legislative Defendants have not—and cannot—represent that there will be enough time to have a final disposition on the merits of this case in time for 2026 if their request is granted. The risk of such a delay should not be countenanced.

And this risk is far from hypothetical. Plaintiffs have already faced substantial delays in their ability to receive requested discovery, having first attempted to issue subpoenas to two non-parties six months ago and receiving no testimony and documentary evidence to date. *See* Dkts. 54-56. The motion to compel discovery from these non-parties remains pending, Dkt. 54, and would be held in abeyance if a stay is granted. Two non-party legislators who were key proponents of S.B. 747, Representative Mills and Senator Daniel, have agreed to sit for depositions; these would also be held in abeyance. Furthermore, even once decided, this and any other discovery motions may in turn result in lengthy interlocutory appeals that further delay discovery and trial, as has occurred recently in other election-related cases. *See, e.g.*, Order Denying Joint Motion Regarding Trial Schedule, *LULAC v. Abbott*, No. 3:21-cv-259 at Dkt. 696 (W.D. Tex. Feb. 10, 2023) (holding, in redistricting challenge, that while "the Court would prefer to conduct a trial as soon as possible, it cannot determine when that trial will be until the Fifth Circuit resolves various pending appeals") (appended as Exhibit A). While Plaintiffs anticipate negotiating in good faith on future discovery disputes, the history of certain non-parties avoiding and refusing to accept service, Dkt. 55 at 4-6, strongly suggests additional motions practice is likely. Any assumption that this case would resolve quickly upon dissolution of a stay is unfounded.

The PI Order currently in place, and stays granted in the parallel cases,[2] do not ameliorate this risk of prejudice as Legislative Defendants contend. Memo. at 9. Short of a full repeal of the challenged provisions, the discovery Plaintiffs seek will be relevant (and required) for a final disposition on the merits in this matter, further demonstrating that a stay is inappropriate. *See Bell v. Am. Int'l Indus.*, No. 1:17CV111, 2020 U.S. Dist. LEXIS 207623, at *28 (M.D.N.C. Nov. 6, 2020) (denying stay where movant failed to establish a clear case of hardship or inequity because they will have to participate in the case regardless).

Plaintiffs continue to seek discovery around the legislative process that led to the passage of S.B. 747 under the framework in *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). *See* Dkt. 63 at 26 (acknowledging potential applicability of this framework to Plaintiffs' Twenty-Sixth Amendment claim). Even if further legislative amendment occurs, the legislative history of S.B. 747 will remain "relevant to the extent [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the [amending] Legislature." *Abbott v. Perez*, 138 S. Ct. 2305, 2327 (2018).

In the event Plaintiffs establish discriminatory intent on their Twenty-Sixth Amendment claim, Legislative Defendants will also bear the burden of proof to show that

[2] The existence of stays in other litigation is a non-sequitur. Whatever the motivations of the parties in the other cases challenging S.B. 747, Plaintiffs are under no obligation to conform their litigation strategy to that pursued by a different party. "Having filed their complaint plaintiffs have a right to move forward." *Udeen v. Subaru of Am., Inc.*, 378 F.Supp.3d 330, 333 (D.N.J. 2019); *see also Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980) ("Any plaintiff in the federal courts enjoys the right to pursue [their] case and to vindicate [their] claim expeditiously.").

any legislative change has cleansed the discriminatory taint of the original enactment. *McCrory*, 831 F.3d at 240 (invalidating discriminatory voter photo ID law after finding subsequent amendments to add a reasonable impediment exception did not "completely cure[] the harm in this case"); *cf. United States v. Fordice*, 505 U.S. 717, 731 (1992) ("If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects . . . and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system [and] such policies run afoul of the Equal Protection Clause . . .."). As the Fourth Circuit held in *McCrory*, even a "lingering burden" on voters does not "completely cure" the "broader injury" of a law enacted with discriminatory intent. 831 F.3d at 240-41. "[T]he Supreme Court has invalidated a state constitutional provision enacted with discriminatory intent even when its 'more blatantly discriminatory' portions had since been removed." *Id.* at 239 (citing *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985)).

Further delay arising from the requested stay will "increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Clinton v. Jones*, 520 U.S. 681, 707-08 (1997). As another court of this Circuit has noted,

> "there is evidence that can be negatively affected by the passage of time, [such as] the memories of the witnesses and the parties. It is also possible that documents could be misplaced over time, including any internal documents prepared by Defendants that have not yet been acquired by Plaintiff."

Nazario v. Gutierrez, No. 2:21CV169 (RCY), 2021 U.S. Dist. LEXIS 122352, at *8 (E.D. Va. June 29, 2021) (denying stay because delay would prejudice plaintiff's ability to get evidence).

This risk of prejudice to plaintiffs has been cited by many courts in denying similar requests to stay. *See, e.g.*, *Herd v. Cnty. of San Bernardino*, No. ED CV 17-02545-AB (SPx), 2018 U.S. Dist. LEXIS 225891, at *8 (C.D. Cal. Sep. 17, 2018) (denying defendants' motion to stay discovery because, *inter alia*, "[w]itnesses may also become unavailable, posing the danger of prejudice both in terms of the loss of critical evidence and also in terms of added costs associated with securing that evidence") (internal quotation omitted); *Schroeder v. Hess Indus.*, No. 1:12-cv-668, 2013 U.S. Dist. LEXIS 75726, at *4 (W.D. Mich. May 30, 2013) (denying motion to stay and finding that the "risk that witnesses'[] memories may fade, witnesses may relocate or become unavailable, and documents may be misplaced" would prejudice plaintiff); *Del Valle v. Bechtel Corp.*, 24 Mass. L. Rep. 412, at *3 (Suffolk Cnty. Super. Ct. 2008) (denying stay on similar grounds); *Gladish v. Tyco Toys, Inc.*, No. CIV. S-92-1666, 1993 U.S. Dist. LEXIS 20211, at *5-6 (E.D. Cal. Sept. 15, 1993) (same); *cf. United States v. Rudy's Performance Parts, Inc.*, 647 F.Supp.3d 408, 419 (M.D.N.C. 2022).

This dynamic is particularly concerning for the non-party legislators who have agreed to sit for depositions, as the indefinite stay that Defendants request would risk future unavailability for any number of reasons outside Plaintiffs' control. One of those members, Representative Mills, will be leaving office at the end of the year, introducing

further uncertainty as to his future availability.[3]

At base, "[t]he passage of time can certainly prejudice a plaintiff," and "[t]he public clearly has an interest in the just and constitutional resolution of disputes with minimal delay." *Rudy's Performance Parts, Inc.*, 647 F.Supp.3d at 414, 418. Plaintiffs, and the voting public, have a significant interest in avoiding the inevitable "danger of denying justice by delay." *Blue Cross and Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007) (citation omitted). And as the Court itself observed just one month ago when denying Legislative Defendants' motion to dismiss, it will "benefit from a more developed factual record and briefing" on Plaintiffs' Twenty-Sixth Amendment claim. Dkt. 63 at 26.

Legislative Defendants' request for a stay fails to acknowledge, much less grapple with, these issues and runs counter to the Court's vision of a fully developed record. What is more, delays like that sought by Legislative Defendants have forced other courts to allow elections to proceed under unlawful schemes. *See, e.g.*, *Covington v. North Carolina*, 316 F.R.D. 117, 176-77 (M.D.N.C. 2016) (recognizing that racial gerrymanders had "already caused Plaintiffs substantial stigmatic and representation injuries," but that

[3] Ben Gibson, *Grey Mills announces candidacy for North Carolina's 10th congressional district*, Mooresville Tribune (Dec. 16, 2023), https://mooresvilletribune.com/grey-mills-announces-candidacy-for-north-carolinas-10th-congressional-district/article_c734da4c-9b97-11ee-9c49-6f2b859edffd.html ("Grey Mills won't be running for his current position representing the 95th District in the North Carolina House in 2024."); Naomi Kowles, *Pat Harrington declares victory in 10th Congressional District*, WBTV.com (Mar. 5, 2024), https://www.wbtv.com/2024/03/06/pat-harrigan-declares-victory-10th-congressional-district/ (reporting Pat Harrigan's "narrow victory over four-term state representative Grey Mills").

the upcoming election was "regrettably" too soon for those injuries to be remedied before the election was conducted). The Court has the opportunity, now, to prevent such a scenario, and thereby minimize the risk of irreparable harm and prejudice to Plaintiffs by allowing discovery to proceed.

II. ANY HARDSHIP TO LEGISLATIVE DEFENDANTS ABSENT A STAY IS MINIMAL AND BETTER ADDRESSED BY MODIFYING THE SCHEDULE

Legislative Defendants' representations about the harms they will face should this case not be stayed are similarly overstated and conclusory, revolving almost solely around the ordinary costs of the litigation. Memo. at 11-12. The examples cited by Legislative Defendants are prosaic—they contend that "preparing for a [] trial," "continuing discovery and costly expert discovery," "motions for summary judgment," "motions in limine," "and other pre-trial briefs and hearings" all represent "hardship and inequity." Memo. at 11. But courts have consistently rejected the ordinary incidents of litigation as burdens that could support a stay. "Here, the only purported 'hardship' identified by Defendant is the possibility that the parties may engage to some extent in unnecessary discovery and/or motion practice." *Konopca v. Comcast Corp.*, No. 15-6044, 2016 U.S. Dist. LEXIS 55274, at *11 (D.N.J. Apr. 26, 2016) (finding that this is "not…sufficient to constitute the requisite hardship or inequity" and denying stay). "Importantly, the burden to the parties to engage in discovery absent a stay is not onerous." *Chapman v. Portfolio Recovery Assocs.*, No. 2:18-cv-426, 2018 U.S. Dist. LEXIS 243794, at *9 (E.D. Va. Dec. 14, 2018). "Defendant does not demonstrate a hardship in moving forward with inevitable discovery and motion practice." *Mendez v.*

Optio Sols., LLC, 239 F.Supp.3d 1229, 1234 (S.D. Cal. 2017). "The potential that Defendant could engage in greater discovery, if the case is not stayed, does not constitute a 'rare circumstance' which justifies an indefinite stay." *Jones v. Ad Astra Recovery Servs.*, No. 16-1013, 2016 U.S. Dist. LEXIS 73561, at *16 (D. Kan. June 6, 2016) (citing *Kafatos v. Uber Technologies, Inc.*, No. 15-cv-03727-JST, 2016 U.S. Dist. LEXIS 2526, at *4 (N.D. Cal. Jan. 8, 2016)).

To the extent that Legislative Defendants do suffer any cognizable hardship from these costs, and if the Court finds those costs uniquely compelling, Plaintiffs submit these are better balanced by modifying the schedule, rather than staying the entire case. Indeed, Plaintiffs have already offered multiple iterations of just such a schedule, addressing every concern identified by Legislative Defendants. Dkt. 81 at 9-11 (recounting these good-faith efforts by Plaintiffs in detail). Plaintiffs continue to be willing to work with Legislative Defendants to alleviate these burdens, but the avoidance of normal litigation costs should not be prioritized over Plaintiffs' ability to pursue their case, especially since "the potential of prejudice to Plaintiff[s] in delaying discovery is likely and severe." *Mendez*, 239 F.Supp.3d at 1235.

Legislative Defendants also argue, based on an unspecified and speculative chance of modification of the current statutory scheme, that legislative change is likely to moot Plaintiffs' claims. Memo. at 7, 11. But Legislative Defendants have not provided a *single* representation in their Motion that legislation modifying the current statutory structure is forthcoming. Furthermore, and as set forth above in Section I, much if not all of the discovery Plaintiffs seek will remain germane to their Twenty-Sixth Amendment claim

notwithstanding legislative modification and will in all likelihood need to be adduced to achieve final disposition in this matter.

Accordingly, this factor fails to justify entry of a stay.

III. JUDICIAL ECONOMY WEIGHS AGAINST A STAY

The interests of judicial economy also do not support a stay. The Court has an interest in managing its docket and resolving cases expeditiously. A stay of proceedings would frustrate that objective by disrupting ongoing discovery efforts, increasing the risk of evidence becoming unavailable, jeopardizing Plaintiffs' ability to seek relief ahead of the next election for which it is feasible, and substantially prejudicing Plaintiffs' interests. *See* Section I, *supra.*

In their attempt to make a contrary showing, Legislative Defendants heavily rely on two cases. But both are inapposite here. Legislative Defendants cite *Crowell v. North Carolina*, No. 1:17CV515, 2018 U.S. Dist. LEXIS 195753 (M.D.N.C. Nov. 16, 2018), for the proposition that "when a statute is preliminarily enjoined by one court," the controversy is no longer ripe. Memo. at 7-8. The *Crowell* Court, however, was not considering the effect of a preliminary injunction against *one portion* of a challenged law, but a permanent injunction which rendered the *entire* statute "no longer in force." *Crowell*, 2018 U.S. Dist. LEXIS 195753, at *10.[4] Furthermore, in *Crowell*, the issue was

[4] And even if the entirety of the Undeliverable Mail Provision were read to be unenforceable under the PI Order upon expiration of the Numbered Memo, the State Board has customarily issued updated Numbered Memos to continue implementing court orders where no legislative action has occurred. *See* Numbered Memo 2021-03 at 1 (issued June 11, 2021) (appended as Exhibit B). ("The preliminary injunction in *Democracy NC v. State Board of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. Aug. 4,

whether to permit the plaintiff to amend the operative complaint to account for future legislation that the plaintiff believed was imminent. Because the statute had been permanently enjoined and was "no longer in force," the court concluded it was more appropriate to stay rather than dismiss the action. *Id.* (finding plaintiff's claim was "entirely contingent on future actions"). *Crowell* does not support a stay here, where it is undisputed that much of a challenged legislative enactment is still in force and effect, and Plaintiffs maintain claims that could result in further relief being granted.

Nor does *Stinnie v. Holcomb*, 396 F.Supp.3d 653 (W.D. Va. 2019), support the Legislative Defendant's argument. Memo. at 8. In *Stinnie*, the court granted the defendant's motion to stay after concluding that legislative action was actually "pending" based on testimony that "the process of drafting legislation to codify" a resolution that "eliminate[d]" the problematic provision had begun. *Id.* at 658. That is not the case here. All parties agree that the cure process in the Numbered Memo is set to expire, *see* Memo. at 3 ("[T]he cure provisions of Numbered Memo 2023-05 expire on March 9, 2025[.]"), and the "possibility" that "legal development" in the "near future" may render the case moot is purely hypothetical; even Legislative Defendants concede it could not fully ameliorate Plaintiffs' concerns. Memo. at 5, 11. "[S]peculation as to legislative action . . . is not alone sufficiently concrete to justify labeling Plaintiffs' expectation of repeated

2020), was not limited to a particular election. This numbered memo revises the cure process that was first established for the 2020 general election and applies to all elections going forward.") (filed in *Democracy NC v. State Bd. of Elections*, No. 1:20-cv-00457-WO-JLW, at Dkt. 199-1). This Numbered Memo was superseded by statute, but not until the passage of S.B. 747 over two years later. *See* N.C.G.S. § 163-230.1(e).

harm unreasonable[.]" *Stinnie*, 396 F.Supp.3d at 659. And as explained above, any discovery taken now will remain relevant to Plaintiffs' claims even if the law substantially changes (a proposition that is again, wholly speculative at this juncture). *See Abbott*, 138 S. Ct. at 2327; *McCrory*, 831 F.3d at 240.

Judicial economy is best served by allowing Plaintiffs to prosecute their claims now. This is particularly true where the discovery sought will remain relevant to Plaintiffs' claims no matter what happens legislatively, and when that evidence bears a substantial risk of becoming unavailable. Section I, *supra*.

Courts have found that a stay of proceedings is "premature" even where pending governmental action "undoubtedly will provide legal direction to the District Court in weighing the legal issues presented by this litigation[.]" *Chapman*, 2018 U.S. Dist. LEXIS 243794, at *10 (holding that "judicial economy and the competing interests of the parties are best served by ensuring cases on the Court's docket continue to move forward"). This is all the more true where future governmental action is not certain but merely speculative. Declining to stay a case "is not a penalty. It is nothing more than a decision to permit the litigation to run its ordinary course." *Sierra Club v. Nat'l Marine Fisheries Serv.*, No. DLB-20-3060, 2024 U.S. Dist. LEXIS 4183, at *15 (D. Md. Jan. 9, 2024).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that Legislative Defendants' Motion to Stay should be denied.

Dated: May 8, 2024 Respectfully Submitted,

/s/Christopher Shenton

Michael Dockterman
Jamie Witte
Maria O'Keeffe
Geneva C. Ramirez
STEPTOE LLP
227 West Monroe Street, Suite 4700
Chicago, IL 60606
Telephone: (312) 577-1300
mdockterman@steptoe.com
jwitte@steptoe.com
mokeeffe@steptoe.com
gramirez@steptoe.com

Jeffrey Loperfido (State Bar #52939)
Christopher Shenton (State Bar #60442)
Hilary H. Klein (State Bar #53711)
Mitchell D. Brown (State Bar #56122)
Lily A. Talerman (State Bar #61131)
Southern Coalition for Social Justice
5517 Durham-Chapel Hill Blvd.
Durham, NC 27707
Telephone: 919-794-4213
Facsimile: 919-908-1525
jeffloperfido@scsj.org
chrisshenton@scsj.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
lily@scsj.org

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.3(d), I hereby certify that this brief contains 6,083 words as counted by the word count feature of Microsoft Word.

/s/Christopher Shenton

Christopher Shenton

CERTIFICATE OF SERVICE

I, Christopher Shenton, hereby certify that I have this day electronically filed the foregoing document with the Clerk using the CM/ECF system which will provide electronic notice to counsel of record.

Date: May 8, 2024

/s/Christopher Shenton

Christopher Shenton