No. 23-2317

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,

Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III, in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS IV, in his official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS, in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN, in her official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER, in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants-Appellees.

On Appeal From the United States District Court for
the Eastern District of North Carolina
The Honorable James E. Dever III (No. 4:23-cv-193-D-RN)

LEGISLATIVE DEFENDANTS-APPELLEES'
MOTION TO DISMISS

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LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), counsel for Appellants and The North Carolina State Board of Elections have been informed of Legislative Defendants-Appellees' intent to seek the relief requested in this motion. Counsel for Appellants advised that they do not consent to the motion and intend to file a response. Counsel for the Board indicated they do not take a position on the motion.

The Court should dismiss this appeal because it lacks jurisdiction. As explained more fulsomely in Legislative Defendants' Opposition to Plaintiffs' Motion to Expedite, C.A.4.Doc.31 at 3–10; *see also* Opposition to Motion for Injunction Pending Appeal, C.A.4.Doc.32 at 1–3, this appeal fails for lack of an appealable order. Plaintiffs noticed their appeal from scheduling orders related to a preliminary-injunction motion that has not been resolved. D.Ct.Doc.44 at 1; *see also* D.Ct.Docs.43, 28, and 23. This Court has jurisdiction over interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions," but not orders scheduling proceedings related to injunctions. 28 U.S.C. § 1292(a)(1). Plaintiffs' efforts to work around that doctrine do not work.

1. Although Circuit precedent suggests appellate jurisdiction may lie in cases of a "district court's actual refusal to rule" on a matter that would become appealable once adjudicated, *District of Columbia v. Trump*, 959 F.3d 126, 130 (4th Cir. 2020), the district court here did not refuse to rule. It set an argument date for January 10, 2024, "to hear from the advocates and to have the advocates answer the court's questions after the court has had sufficient time to review the 835 pages of filings concerning plaintiffs' motion for a preliminary injunction" D.Ct.Doc.43 at 5–6 (internal footnote omitted). That is no refusal. Plaintiffs' insistence that there is no refusal standard, *see* Reply in Support of

Motion to Expedite, C.A.4.Doc.39 at 3–4, ignores the plain rule of *District of Columbia v. Trump*, which requires an "explicit" or "implicit" "refusal to rule" that is "clear" in "establishing that the ruling is the court's final determination in the matter." 959 F.3d at 130. Plaintiffs' abstract hypotheticals about when that line may be crossed, C.A.4.Doc.39 at 3, miss the point that in *this* case the district court has said it is actively reading a large preliminary-injunction record and has questions for counsel, which cannot be a final determination of the motion.

Moreover, even Plaintiffs acknowledge that their alternative test would require an "unreasonable" delay, C.A.4.Doc.39 at 4, but they have little to say of Legislative Defendants' demonstration that the district court has not unreasonably delayed, C.A.4.Doc.31 at 7–9. Plaintiffs waited 28 days to file their motion and then demanded patently unreasonable deadlines that did not afford time for adversarial proceedings or vetting of their claims. No plausible rule could require a district court to grant whatever request a plaintiff might demand, and Plaintiffs do not explain why it matters that the district court has not said "*when* it will decide the motion." C.A.4.Doc.39 at 4. Plaintiffs cite no authority that district courts must announce such things. At a minimum their assertion would at least be stronger had they attended the hearing, answered the

court's questions, and requested that the court indicate by when it expected to rule (and, if no answer was given, tried their appeal then).

2. Nor is there merit to Plaintiffs' suggestion that the timing of the hearing rendered it too late to afford them meaningful relief. That position does not argue to Circuit precedent, which turns on a refusal to rule, and it is factually unfounded. Plaintiffs built their constructive-denial argument on a January 19 deadline for effective relief. Motion to Expedite, C.A.4.Doc.5 at 2–3 (¶¶ 5–6); Motion for Injunction Pending Appeal, C.A.4.Doc.4-1 at 1, 3, 8–11. But Plaintiffs have since abandoned the assertion that January 19 might be a drop-dead date, C.A.4.Doc.30-1, which they did not seem to genuinely assert as the drop-dead date in the first place, *see* C.A.4.Doc.4-1 at 22. Next, Plaintiffs claimed February 2 is the deadline. C.A.4.Doc.30-1 at 2 (¶ 7). Setting aside that Plaintiffs' shifting representations of deadlines do not seem credible, Plaintiffs have no colorable argument that a January 10 preliminary-injunction hearing date constructively denies them a ruling prior to February 2.

Plaintiffs' more recent change of theories is difficult to follow. They criticize Legislative Defendants for supposedly "willfully" misreading "the record before the district court," C.A.4.Doc.39 at 6, but Legislative Defendants are correctly reading *Plaintiffs'* representations to *this* Court in making *their* assertion of jurisdiction—January 19 is all over their papers. Moreover, the

candidate-qualification information that has undercut Plaintiffs' assertion of a January 19 date is public information that Plaintiffs could have consulted before bringing this case into this Court. *See* C.A.4.Doc.31 at 5 & n.2 (providing this information); C.A.4.Doc.30-2 at 2 (counsel for the Board noting that the "information [is] publicly available on the State Board's website, including candidate filing").

Next, Plaintiffs propose that their appellate jurisdiction theory turns on the fact that "the deadline for a decision in time to adopt new districts for March primaries was late December." C.A.4.Doc.39 at 6. It is odd that Plaintiffs did not make that argument in this Court in identifying a good-faith belief that appellate jurisdiction is sound. *See, e.g.*, C.A.4.Doc.5 at 2 (¶ 5) (citing January 19). It is equally odd that Plaintiffs think their "late December" deadline still works when it has already passed. If no relief can be fashioned after that time, the entire preliminary-injunction motion (and this appeal) is moot. *See, e.g.*, *In re Cigar Assn. of Am.*, 812 Fed.Appx. 128, 136 (4th Cir. 2020) ("Because this court can offer no relief…[the] appeal has become moot."); *Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 72 (1st Cir. 2004); *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998).

3. The Court should not be confused by the mess Plaintiffs have brought here. The bottom line is that Plaintiffs do not identify a drop-dead date

that plausibly shows the district court *cannot* rule in time while this Court *can* rule in time. And there is good reason for that omission: it is impossible under these facts. Plaintiffs are complaining of a January 10, 2024 hearing date in the district court but ask *this* Court to conduct a *hearing* "the week of January 22-26." C.A.4.Doc. 5 at 4 (¶ 11). If January 10 is too late, so is January 22. Notably, this Court has not indicated by when it will rule, nor have Plaintiffs asked it to. Simply put, Plaintiffs do not have a coherent constructive-denial position. This appeal rests on a bald request that this Court exercise the equivalent of original jurisdiction to conduct a *later* preliminary-injunction hearing than the district court set (which is now stayed pending this appeal).

Plaintiffs have no response to Legislative Defendants' observation that this forum-shopping request, if rewarded, contains no limiting principle. Election litigation often proceeds "in [a] short time period," "leaving little time for review," *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 737 (2021) (Thomas, J., dissenting from the denial of certiorari), and courts often do not impose the schedules challengers would most prefer. And virtually all election cases are "of enormous public import," C.A.4.Doc.39 at 7, so everything Plaintiffs have said here can typically be said. Plaintiffs' theory is not one of constructive denial but of original jurisdiction in the court of appeals.

Plaintiffs did not address the point that this Court lacks competency to make the fact-finding essential to their claim. *See* C.A.4.Doc.31 at 10.

For these reasons, and those identified in Legislative Defendants' briefing on Plaintiffs' two emergency motions, the Court should dismiss this appeal.

/s/ Richard B. Raile

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 1,219 words.

2. This motion complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Calisto MT font.

Dated: January 5, 2024

/s/ Richard B. Raile

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 5, 2024

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