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.

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)

REPLY IN SUPPORT OF APPELLANTS' EMERGENCY MOTION TO EXPEDITE BRIEFING AND DECISION

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Plaintiffs-Appellants respectfully submit this reply in support of their motion to expedite briefing and decision in this appeal. This Court has jurisdiction to review the district court's constructive denial of Plaintiffs' motion for a preliminary injunction, and the Court should expedite this appeal to enable the adoption of remedial districts in time to hold primaries, if needed, on May 14, 2024. Legislative Defendants simultaneously urge this Court not to expedite the appeal—and insist that the district court did not constructively deny the motion by failing to decide it—while previewing that they will argue that *Purcell* already counsels against relief in time to hold primaries in two remedial districts on May 14. Those positions are irreconcilable and highlight the urgent need for the Court to expedite the appeal.

I. This Court has jurisdiction to review the district court's constructive denial of Plaintiffs' motion for a preliminary injunction

Contrary to Legislative Defendants' assertion, this appeal is proper because the district court constructively denied Plaintiffs' preliminary injunction motion. The parties can fully brief the jurisdictional issue in their merits brief but we address Legislative Defendants' arguments below because they raised them now.

To begin with, this Court's precedent establishes that a district court's "unreasonable or inexplicable delay" in deciding a time-sensitive motion constitutes an immediately appealable constructive denial if it is "tantamount to a denial." *District of Columbia v. Trump*, 959 F.3d 126, 132 (4th Cir. 2020) (en banc); *see* Pls.' Mot. for Limited Inj. Pending Appeal at 9-10 (collecting cases from other circuits).

That standard is satisfied. Legislative Defendants do not dispute that the district court's failure to decide the preliminary injunction motion made it impossible to afford relief in time to implement remedial districts for the March 5, 2024 primaries. That was the relief Plaintiffs originally requested. *See* Pls.' Mot. for a Prelim. Inj. at 22-24, ECF 17; Pls.' Emergency Mot. For Expedited Briefing at 1-2, ECF 5.

The district court has already constructively denied that relief by refusing to expedite preliminary injunction proceedings, granting Legislative Defendants an opposed extension of time to oppose the motion, and setting a preliminary injunction hearing for January 10. A January 10 hearing is seven weeks after Plaintiffs filed their motion, and importantly, it is *too late* to implement remedial districts in time for the March 5 primaries even if the court decided the motion at the hearing. As the State Board explained below, "to accommodate a new map without moving the dates for any elections contests, the State Board would need to receive the new map in sufficient time for candidate filing for the affected districts to begin during the first week of January." State Board Resp. to Pls.' Mot. for Prelim. Inj. at 3 (ECF 40). The failure to decide the motion by then is a paradigmatic constructive denial.[1]

The district court knew that its failure to decide the preliminary injunction motion would make it impossible to afford the relief Plaintiffs originally sought.

[1] Although there will not be primaries in the challenged districts (because no more than one candidate from each party filed to run in those districts), there might have been March 5 primaries in remedial districts.

Plaintiffs repeatedly asked the court to decide the motion by late December, in time to hold candidate filing in two remedial districts such that, if multiple candidates from the same party filed to run, UOCAVA and absentee ballots listing primary candidates could go out January 19, and primaries could be held March 5. Plaintiffs did not seek a constructive denial appeal after the court denied their motion to expedite the preliminary injunction proceedings, or even after it extended Legislative Defendants' time to respond. Plaintiffs appealed on the basis of a constructive denial only after the court denied Plaintiffs' request—by declining to decide it and scheduling a hearing for January 10—to give Plaintiffs relief in time for March primaries.

Contrary to Legislative Defendants' assertion, constructive denial does not require an explicit "refusal to rule" in the sense of an announcement that the district court will *never* rule on a motion. Opp. 3. If that were the law, district courts could insulate unjustifiable delays in deciding time-sensitive motions from appellate review simply by remaining silent. But even if a "refusal to rule" were required, the district court here *did* refuse to rule on the preliminary injunction motion in time to implement remedial districts without affecting the March 5 primaries, as Plaintiffs had requested. An order setting a hearing for January 10 is an affirmative "refusal to rule" on a request for relief that effectively expires the first week of January. In any event, the constructive denial doctrine is also triggered by an "implicit refusal" to

rule or "unreasonabl[e] delay" in ruling. *Trump*, 959 F.3d at 131. And as Legislative Defendants previously told this Court, "'[d]enial of a pending motion may be implied from … any order inconsistent with the granting of the motion.'" Appellants' Opening Br. at 44-45, *N.C. State Conf. of NAACP et al. v. Berger et al.*, No. 19-2048 (4th Cir. Oct. 2, 2019), Doc. 40-1 (quoting *Toronto-Dominion Bank v. Cent. Nat. Bank & Tr. Co.*, 753 F.2d 66, 68 (8th Cir. 1985)). Here there is both an implicit refusal and unreasonably delay. By allowing candidate filing to occur in the challenged districts and allowing the deadline to come and go for implementing new districts in time to hold any primaries in March, the district court implicitly denied the preliminary injunction Plaintiffs requested. And the district has unreasonably delayed ruling for the reasons described.

The district court's unreasonable delay also now risks making it impossible to implement remedial districts in time to hold primaries in those districts on May 14, as the State Board recommended below. While the district court has scheduled a *hearing* on Plaintiffs' motion for January 10, it has repeatedly declined to say, despite multiple requests from Plaintiffs, *when* it will decide the motion or whether it will do so in time to hold primaries in remedial districts on May 14. The court's refusal to decide the motion in time for March primaries, combined with its silence on when it intends to decide the motion at all, is reason for grave concern that the court will decide the motion in time for May primaries. The court has also indicated

that it may rely on *Purcell* concerns to deny a preliminary injunction, ECF 43 at 5—concerns that grow with each day the court does not decide the motion.

Plaintiffs were not required to wait to appeal until it is too late to obtain new districts for May primaries, just like it is now too late to obtain new districts for March primaries as Plaintiffs originally requested. That is the point of the constructive denial doctrine.

Legislative Defendants point to this Court's dismissal of their appeal in *NAACP v. Berger*, where they argued that a delay in deciding their intervention motion was a de facto denial. But the Court stated that its dismissal "order should not be construed to express any general view on the conditions under which a failure to act may constitute a final and appealable decision." Order, *N.C. State Conf. of NAACP*, No. 19-2048 (4th Cir. Oct. 8, 2019), Doc. 50. In *Berger*—where Legislative Defendants appealed only six days after first advising the district court that they wanted a prompt ruling—nothing was actually happening during the pendency of the intervention motion that was prejudicing Legislative Defendants, so there was no colorable argument of an unreasonable delay. Here, by contrast, there is—it is already too late to adopt new districts for March, and absent prompt appellate review, the district court's delay will make it impossible to afford relief for May primaries.

Legislative Defendants also assert that Plaintiffs' request for a liability

decision by this Court by February 2 signals that the district court has not constructively denied a preliminary injunction yet. But it cannot be the case that a litigant must wait to appeal until *the day* when a decision from the court of appeals would be needed, especially when the district court has already constructively denied the relief that Plaintiffs already sought (that is, remedial districts in time for March primaries). In any event, there is no indication that the district court will decide this by February 2. And if it does and denies relief, this Court would have to scramble to decide an appeal in time to enable an orderly remedial process.

Legislative Defendants' repeated suggestion (*e.g.*, Opp. at 6 & n.3) that January 19 was the deadline for a decision in the district court seems to willfully misread the record before the district court. January 19 is when UOCAVA and absentee ballots will be mailed to voters, including voters in the two challenged districts. But the deadline for a decision in time to adopt new districts for March primaries was late December—as Plaintiffs repeatedly advised the district court. And, until this case reached this Court, all of the parties assumed that there would be March primaries in the two challenged districts, and that ballots would go *out* on January 19 listing primary candidates in those districts, absent a preliminary injunction by January 9. That is because the State Board said it needed 7 business days to make any changes to the January 19 ballots. The fact that the State Board has now advised that there will not be primaries if the existing districts are used does

not alter what the record showed before the district court.

Plaintiffs appreciate that the district court is busy. But this is a case of enormous public import involving the voting rights of over 100,000 Black voters in northeastern North Carolina's Black Belt counties. Forcing those Black North Carolinians to vote in districts that unlawfully dilute their votes causes irreparable harm. And this case is not remotely comparable in complexity to the cases Legislative Defendants cite. This case involves only two Senate districts, and the remedy Plaintiffs seek would only change the boundary between those two districts, leaving wholly untouched the other 48 enacted districts. And the Supreme Court's recent decision in *Allen v. Milligan*, 599 U.S. 1 (2023), reaffirms all of the relevant legal principles, which are entirely straightforward to apply here. The district court and Legislative Defendants pointed to "835 pages" submitted below, Opp. at 8, 10, but that is largely items like the General Assembly's hundred-plus-page "stat pack" for the entire Senate map and briefs and expert reports from other cases that Legislative Defendants, for unclear reasons, attached to their opposition to Plaintiffs' preliminary injunction motion. Plaintiffs' preliminary injunction motion was 25 pages and attached three expert reports totaling 54 pages. As the motion explained, this is as clear a violation of VRA Section 2 as you will ever see.

In sum, the district court has constructively denied Plaintiffs' preliminary injunction motion and the Court has jurisdiction.

II. This Court should expedite this appeal to ensure that remedial districts can be implemented in time to hold primaries on May 14, 2024

Legislative Defendants' opposition only confirms the need for expedition.

As Plaintiffs' motion explained, a liability decision by this Court by February 2 will allow sufficient time for orderly remedial proceedings and implementation of two remedial districts in time to hold primaries in those new districts, if needed, on May 14. Importantly, Legislative Defendants do not dispute any of the dates and deadlines set forth in Plaintiffs' motion to expedite. And the State Board's counsel confirmed that those dates and deadlines are accurate. CA4 Doc. 30-2. Specifically, the State Board's counsel stated that "if new maps are ordered, [the State Board] would need those maps in time to complete candidate filing by March 15th in order to meet the May 14th second primary." *Id.* Plaintiffs' proposed schedule would meet that deadline, and Legislative Defendants do not contend otherwise.

Legislative Defendants emphasize that an injunction pending appeal is no longer needed *by January 9* because there will be no March primaries in the challenged districts. But that does not change the need to expedite this appeal in time to implement *remedial* districts for potential primaries in May. If remedial districts are adopted, the State Board will reopen candidate filing for those districts before March 15, and if multiple candidates from the same party file to run, there will be primaries on May 14.

Expedition would not be futile under *Purcell*. Despite Legislative

Defendants' claims, Plaintiffs' proposed remedy only affects two Senate districts. To reiterate, a majority-minority district can be created without affecting any of the 48 other districts in the enacted map. UOCAVA and absentee ballots for the May 14 primaries will not go out until March 28—12 weeks from now. That is longer than the seven weeks in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), and in any event, the key difference is that the Supreme Court's decision in *Allen v. Milligan* has now confirmed all of the relevant legal principles, and there is no reasonable doubt on the merits of this case, as Plaintiffs' briefs will show. The enacted map cleaves into pieces the sole set of whole, contiguous counties in the State with sufficient population to form a majority-Black Senate district, creating two districts where white bloc voting will submerge the Black vote and deny Black voters an opportunity to elect candidates of choice. There is no plausible justification for these districts, which illogically join counties on the Virginia line with counties on the Atlantic coast in lengthy, non-compact configurations that make no economic, cultural or historical sense.

As Justices Kavanaugh and Alito explained in *Merrill*, even where *Purcell* applies, it "might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the

complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." 142 S. Ct. at 881 (Kavanaugh, J., concurring). Each of those things is established here, and the expedited schedule Plaintiffs seek would ensure that the changes in question are feasible and adopted on a timetable the State Board has endorsed. If the Court declines to expedite proceedings on the ground that *Purcell* already bars any relief, it would allow state legislatures to insulate even the most egregious VRA violations from review simply by waiting to adopt maps. That is not the law.

Legislative Defendants say they need more than one week to enact two remedial districts. This ignores the fact that in the space of one week in October they filed bills creating 3 new, whole maps, conducted committee hearings regarding those maps and enacted those maps into law. In any event, if Legislative Defendants want two weeks—an issue that can be decided by the merits panel—that only confirms the need to expedite the appeal. Plaintiffs have no objection to an even more expedited schedule.

CONCLUSION

For the foregoing reasons, the Court should adopt Plaintiffs' proposed expedited schedule.

Dated: January 5, 2024

Respectfully submitted,

/s/ R. Stanton Jones

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 2528 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 Times New Roman font.

Dated: January 5, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2024, the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

/s/ R. Stanton Jones
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