UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, *et. al.*, *Plaintiffs,* v. ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, *et. al.*, *Defendants,* and PHILIP E. BERGER, *et. al.*, *Legislative Defendant Intervenors.*	CASE NO. 1:18-cv-01034-LCB-LPA **LEGISLATIVE DEFENDANTS' OPPOSITION TO PLAINTIFFS' PROPOSED DISCOVERY**

Legislative Defendant Intervenors ("Legislative Defendants") submit this response in opposition to Plaintiffs' Notice of Proposed Discovery, Doc. 203 (Aug. 2, 2023). While the Legislative Defendants defer to the State Board Defendants, to whom Plaintiffs' discovery demands are now directed,[1] regarding any objections the State Board may wish to assert to individual requests, Legislative Defendants oppose the overall attempt by Plaintiffs selectively to reopen discovery in an apparent bid to expand upon the evidentiary record that was settled years ago. Legislative Defendants, at the insistence of Plaintiffs, were foreclosed from participation in this matter and had no opportunity to engage in discovery, take any depositions, or submit any rebuttal expert reports or other rebuttal evidence in response to the record created by Plaintiffs. Reopening discovery just for Plaintiffs under these circumstances would be inequitable and highly

[1] The Court ruled at the status conference on July 26, 2023 that discovery from the Legislative Defendants would not be permitted.

prejudicial. Legislative Defendants further oppose Plaintiffs' efforts to reopen discovery because doing so would almost certainly ensure there would be no final resolution of the issues in this case until after the 2024 election-cycle—a delay that is neither warranted nor necessary.

I. Selectively Reopening Discovery Would Be Inequitable and Highly Prejudicial

Discovery in this case closed over three years ago, on June 1, 2020 – a date agreed to by Plaintiffs and reflected in the order entered by the Court on October 1, 2019. *See* Joint Rule 26(f) Report, Doc. 77 (Sept. 23, 2019); Joint Add. to Joint Rule 26(f) Report, Doc. 87 (Sept. 30, 2019); and Text Order dated October 1, 2019 (adopting Joint Rule 26(f) Report). While discovery was open, Plaintiffs steadfastly refused to allow the participation of Legislative Defendants, opposing their intervention by arguing, in part, that doing so would cause harmful delays. *See e.g.*, Pls.' Opp'n to Mot. to Intervene, Doc. 38 at 10 (Feb. 19, 2019) (claiming allowing intervention would "unduly delay and prejudice the adjudication of the original parties' rights."); Prop. Intervenors' Resp. to Pls.' Mot. for Scheduling Conf. and Order, Doc. 55 at 2 (Feb. 19, 2019) (noting Plaintiffs' refusal to include Legislative Defendants in discussions of scheduling issues). Consequently, Legislative Defendants have not had the opportunity to engage in *any* discovery or to contribute to the existing evidentiary record. Plaintiffs, conversely, have had a full and fair opportunity to seek the discovery they deemed necessary to develop the existing record, including but not limited to, identifying fact and expert witnesses and submitting expert reports. Now, years later, Plaintiffs, apparently recognizing the deficiencies in their case, having failed to obtain a preliminary injunction and having failed to identify experts by the April 15, 2020 deadline they agreed to, *see* Doc. 77 at 3, seek to reopen discovery to correct their past errors. This should not be permitted.

It would be entirely inequitable to Legislative Defendants to allow Plaintiffs to alter the existing evidentiary record and obtain and introduce new evidence, when Legislative Defendants,

at the insistence of Plaintiffs, had no opportunity to conduct discovery, depose Plaintiffs' witnesses, or submit rebuttal expert reports of their own. Further, this is a situation entirely of Plaintiffs' own making. While Plaintiffs attempt to excuse their neglect by pointing to the fact that this case was stayed pending resolution of the Legislative Defendants' intervention motion, Plaintiffs' decision to not identify experts and submit expert reports (beyond what was filed in support of Plaintiffs' motion for preliminary injunction) by the agreed April 15, 2020 deadline predates the order staying this case. *See* Stay Order, Doc. 194 (Dec. 30, 2021), entered over a year and half after Plaintiffs ignored the April 15, 2020 expert disclosure deadline. Likewise, while Plaintiffs argue that the passage of time and recent efforts by the State Board to implement the Voter ID law justifies allowing them additional discovery, the Supreme Court ruled that Legislative Defendants should be permitted to intervene over a year ago, with the mandate issuing on July 27, 2022. *See* Doc. 200. Plaintiffs made no attempt in the intervening year to have the stay in this case lifted. Under these circumstances it would be highly prejudicial to Legislative Defendants to be foreclosed from having any opportunity to develop the evidentiary record while permitting Plaintiffs to benefit from ignoring deadlines they chose while also contributing to the very delay they cite to as necessitating the new discovery they seek.

This is also not the first time Plaintiffs have sought to amend the case schedule they agreed to and to extend missed, expired deadlines. *See* Joint Status Report pursuant to FRCP 26(f), Doc. 135 (Apr. 14, 2020). The Court rejected that previous attempt, and it should do so again now. As the Court opined in denying the Joint Motion for Reconsideration of its April 15 Order Declining to Adopt a Joint Report intended to Alter case deadlines, "a scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." Doc. 140, at 1 (May 4, 2020) (citing *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C. 1987)). The

Court previously found there was no good cause to extend discovery deadlines that had previously been agreed to and that there was no excusable neglect for missing them. Nothing impacting that prior decision has changed. Legislative Defendants' status as parties cannot justify reopening discovery because they are content to go forward on the record as it existed when discovery closed on June 1, 2020.

II. Reopening Discovery Will Cause Substantial Delay

Legislative Defendants are willing to stand on the existing preliminary injunction record and to proceed with obtaining a decision on the pending summary judgment papers to bring an end to this litigation. Plaintiffs, who had a full and complete opportunity to obtain discovery and develop the existing record and who decried the prejudice that would result from any delay in a resolution, are ironically the ones asking the Court to proceed down a path destined to create a substantial delay. This substantial delay is inevitable because there is no equitable way to permit Plaintiffs to reopen discovery and add to the existing evidentiary record without giving Legislative Defendants a full and complete opportunity for discovery as well. In short, if Plaintiffs are not bound by the record they have developed, then neither should Legislative Defendants be so bound.

Legislative Defendants respectfully submit that if the Court is inclined to allow Plaintiffs to reopen the record and pursue additional discovery (which the Court should not), then Legislative Defendants must have an equal opportunity to seek discovery of Plaintiffs, to depose Plaintiffs' identified fact and expert witnesses, to submit rebuttal expert reports, and to develop their own evidence for summary judgment and trial. The first steps would be drafting a new Rule 26(f) Report, convening a new Rule 26(f) conference with the Court, and the Court entering a new case management schedule that affords Legislative Defendants the discovery opportunities they have not had to date and appropriate time to pursue those discovery opportunities, including time for

written discovery, depositions of identified fact witnesses, identification of affirmative expert witnesses, depositions of affirmative expert witnesses, time for drafting expert rebuttal reports, depositions of any rebuttal experts, and time for new dispositive motions.

Further, all of this must also take into account that there will be elections throughout the remainder of 2023 and 2024, and to avoid voter confusion, the Court must avoid issuing opinions that could change election rules on the eve of an election. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*,140 S. Ct. 1205, 1207 (2020) (per curiam) (invoking its decision in *Purcell v. Gonzalez*, 549 U.S. 1, (2006) (per curiam), to emphasize "that lower federal courts should ordinarily not alter the election rules on the eve of an election."). Indeed, in *Purcell* the Supreme Court noted that court orders themselves can result in voter confusion and create a disincentive to vote. *Purcell*, 549 U.S. at 4–5.

When all of these considerations are taken into account, if summary judgment is not granted, it is almost inevitable that reopening discovery now will lead to a trial only after the 2024 election-cycle in order to have sufficient time to allow for equitable discovery, avoid voter confusion, and not violate the teachings of *Purcell*. This delay is entirely avoidable by proceeding on the record as it existed at the preliminary injunction stage and as it stood when discovery closed. If Legislative Defendants, who have had no opportunity for discovery, are willing to proceed with the current evidentiary record, then Plaintiffs, who have claimed for years that they want this case resolved expeditiously and who have had every discovery opportunity, on a schedule they agreed to, have no basis for seeking a different result.

Dated: August 16, 2023

Respectfully submitted,

/s/ Nicole J. Moss
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on August 16, 2023, 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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