UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:20-cv-876-LCB-JLW

NORTH CAROLINA A. PHILIP RANDOLPH INSTITUTE, and ACTION, NC, Plaintiffs, v. THE NORTH CAROLINA STATE BOARD OF ELECTIONS; et al., Defendants.	)	**JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO EXPEDITE CONSIDERATION OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND TO SET A HEARING BEFORE THE DISTRICT COURT**

NOW COME State Board Defendants and DA Defendants, through undersigned counsel, to file this response in opposition to Plaintiffs' motion to expedite the pending summary judgment motion, request a hearing, and request to expedite briefing on this motion. [D.E. 98].

Introduction

The history and procedural status of this case indicate that there is no reason to expedite Plaintiffs' motion for summary judgment. Plaintiffs' only reason for seeking this late-breaking request is because their claims are likely to become moot after an amendment to N.C.G.S. § 163-275(5)—the law challenged in this action—is enacted. [*See* DE 98, ¶ 3 (providing the text of the amendment in the bill that is commonly referred to as "S.B. 747")]. Plaintiffs' desire to obtain a rushed final judgment on the merits before their claims become moot is not sufficient cause to expedite summary judgment. This is particularly true here, where expediting summary judgment could change an election law during an ongoing election.

Argument

A. Plaintiffs' Request to Expedite a Summary Judgment Decision Should Be Denied.

A central premise of Plaintiffs' legal theory in this action is that the challenged criminal statute has remained materially unchanged since it was originally enacted 150 years ago. [D.E. 1, ¶¶ 2]. Despite this history, Plaintiffs did not challenge the law until September 24, 2020, while voting was already underway for the 2020 general election. [D.E. 1].

This extensive delay was the principal reason this Court denied a preliminary injunction motion from Plaintiffs three years ago. [D.E. 24, p. 18 (Memo. Op. and Recommendation by Webster, M.J., reviewed de novo and adopted by the presiding District Court judge at D.E. 34)]. Specifically, the Court found the following in denying that motion:

> The challenged statute has essentially been unchanged since 1931 and a source of Plaintiffs' claims rest on prosecutions that occurred in 2018 and 2019, respectively. However, Plaintiffs delayed filing this action and request for injunctive relief until September 24, 2020, mere weeks before the North Carolina voter registration deadlines and the 2020 election. Considering both the delay in Plaintiffs' filing of this action and the fact that the election has now passed, the circumstances simply do not support the kind of irreparable harm required to support a preliminary injunction.

[D.E. 24, p. 20].

Plaintiffs' current request is no more urgent than their motion for preliminary injunction three years ago. Moreover, in the three years since this Court denied the preliminary injunction motion, Plaintiffs have exhibited little sense of urgency in this litigation.

On February 23, 2021, Plaintiffs amended their complaint to add 42 individually named District Attorneys, which drew a motion to dismiss from those newly added DA Defendants. [D.E. 36, 46, 47]. The motion to dismiss was fully briefed on May 24, 2021, yet Plaintiffs made no request to expedite the consideration of the motion. [D.E. 47, 48, 53]. In fact, there was no action on the pending motion for seven months until the Court issued a Notice of Video Conference Hearing on December 17, 2021, directing the parties to appear at an oral argument on the motion to be held on January 12, 2022. [D.E. 57]. During that same period of inaction, the 2021 municipal elections came and went without Plaintiffs seeking injunctive relief.

DA Defendants then filed a motion to stay the case on April 22, 2022. [D.E. 69]. While that motion was pending, the litigation proceeded, and DA Defendants filed an Answer to the Amended Complaint on June 17, 2022. [D.E. 75]. Plaintiffs conferred with Defendants regarding a discovery plan following the filing of DA Defendants' Answer. However, Plaintiffs did not seek to expedite consideration of the stay motion or seek an initial pretrial conference. Ultimately, the Court did not reach that motion until October 24, 2022 and only then did it schedule an Initial Pretrial Conference. *See* October 24, 2022 Text Only Order. Discovery did not formally begin until November 15, 2022 and remained open until May 15, 2023. [D.E. 76, 77]. During this period, Plaintiffs again did not seek injunctive relief in relation to either the May 2022 primary election or the November 2022 general election.

Most recently, on June 15, 2023, Plaintiffs filed their motion for summary judgment, but did not seek to expedite consideration at that time when no election was

occurring. [D.E. 85, 86]. Instead, they waited nearly three months to raise this issue with the Court.

Thus, Plaintiffs lacked urgency earlier in the case when the same challenged law was in place without providing an adequate explanation here for what has changed.

Plaintiffs claim that there is an urgent need for this Court to intervene and invalidate the challenged law while this election is in full swing on the grounds that (1) doing so would somehow reduce voter confusion, and (2) there are ongoing harmful effects arising from the challenged law in the current election cycle, even though the North Carolina Legislature's proposed amendment to the challenged law directly addresses Plaintiffs' claims. [D.E. 98, p. 2].

First, Plaintiffs' own theory of the case states that the challenged law has existed and been enforced as part of the election law scheme of North Carolina for 150 years. [D.E. 36, ¶ 2]. Yet, they now think it would cause *less* confusion to overturn that law in the middle of an election. This argument defies logic and is contrary to well-established principles of law governing considerations of election-law cases in federal court, as recognized by the Supreme Court of the United States. *See* discussion *infra.*

As Plaintiffs themselves acknowledge in their motion, voting for the 2023 municipal elections is already underway. *See* N.C. State Bd. of Elections, Upcoming Elections, *available at* https://www.ncsbe.gov/voting/upcoming-election (last visited Sept. 5, 2023). Election day for municipal primaries in multiple counties will take place in less than one week, on Tuesday, September 12, 2023. *Id.* Absentee-by-mail ballots for those primaries were mailed out 30 days in advance on August 11, voter registration

closed 25 days in advance on August 18, and in-person one-stop early voting began the third Thursday before the primary on August 24 and will close in two days on the last Saturday before the primary on September 9. *Id.* Municipal elections will take place in even more counties on October 10, 2023, and in almost every county in the state on November 7, 2023. *Id.* Both the October and November municipal elections will be conducted with similar statutorily imposed deadlines for voter registration, absentee-by-mail voting, and in-person early voting. *Id.* Under these circumstances, it is apparent that altering the law while that election is ongoing is much more likely to confuse voters and the general public during the ongoing 2023 municipal elections, not reduce it as Plaintiffs' claim.

Second, Plaintiffs leave entirely unexplained their earlier lack of urgency and how the harmful effects for this current election cycle is somehow different from the elections of 2021 and 2022. After all, when Plaintiffs believed that the "strict liability voting law" would remain unchanged and apply to all elections going forward, they exhibited no sense of urgency, made no requests to expedite proceedings, and made no interim requests for preliminary injunction, even though the case extended on for years. Prior to the introduction of S.B. 747, Plaintiffs knew that the currently existing law would be in effect for the 2023 municipal elections, yet they took no action to expedite the case. After the introduction of S.B. 747, Plaintiffs still took no action to expedite the case because it was their belief that "there is no guarantee the proposed legislation will become law in its current (or any) form. " [D.E. 92, p. 4].

But Plaintiffs have now changed course. Now, in their view, there is an urgent need for a final judgment from this Court. The only reasonable explanation for this sudden change in position is the strong likelihood that Plaintiffs' claims will be moot in the near future. Plaintiffs have provided no authority holding that impending mootness provides good cause to rush consideration of summary judgment. Indeed, as far as the State Board Defendants are aware, none exists. The assessment that one's claims are no longer viable is grounds for a voluntary dismissal—not a basis for expedition.

In an effort to support their motion to expedite, Plaintiffs cite two cases for support. [D.E. 98, ¶ 11]. The only thing in common with the cases cited and the present one is that they concern election law. Unlike here, those cases involved expedition requests made jointly by the parties, and were dissimilar in procedural status, the nature of the requests made, and the reasoning behind those requests.

First, in *Taliaferro v. N.C. State Bd. of Elections*, 489 F. Supp. 3d 433, 440-41 (E.D.N.C. 2020), a preliminary injunction had already been entered in the case before the motion to expedite was filed. *Id.* As such, the relief sought by the plaintiffs in that case, an online portal for use by disabled voters, was already being provided by the defendants when the motion to expedite was requested and granted. *Id.* Moreover, the motion to expedite in *Taliaferro* was filed jointly by both parties on *June 2, 2021*, because it was in the interests of all parties to have a final ruling well in advance of the 2021 municipal elections. *See Taliaferro v. N.C. State Bd. Of Elections*, No. 5:20-cv-411-BO, Dkt. Nos.

58, ¶¶ 5-8; 59, p. 2 (E.D.N.C. June 2, 2021).[1] This resulted in the entry of a final judgment on the merits on *June 15, 2021*, when no elections were ongoing and with more than two months before the next municipal election would begin. *Taliaferro v. N.C. State Bd. of Elections*, No. 5:20-cv-411-BO, 2021 U.S. Dist. LEXIS 112281, (E.D.N.C. June 15, 2021).

Second, in *Disability Rights N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361-BO, Dkt. No. 1 (September 9, 2021), the plaintiffs filed their complaint on September 9, 2021. Rather than seeking a preliminary injunction during an election and immediately after filing their complaint, the plaintiffs in that action made clear that it was their intent to reach a final decision or seek injunctive relief prior to the 2022 general election, which was over a year away. As a result, when it came to dispositive motions, the parties agreed to expedite briefing voluntarily and to jointly seek expedited consideration in an effort to avoid a duplicative preliminary injunction motion. *Disability Rights N.C. v. N.C. State Bd. of Elections*, No. 5:21-cv-361-BO, Dkt. No. 38, ¶¶ 4-6. Again, it was in the interests of all parties in *Disability Rights* to have a final judgment on the merits in advance of the 2022 general election. *Id.* And notably, the final judgment was entered on *July 11, 2022*, well in advance of the 2022 general election. *Disability Rights N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361-BO, 2022 U.S. Dist. LEXIS 121307, Dkt. Nos. 39, 40 (E.D.N.C. July 10, 2022).

[1] Filings referenced here not available in online legal databases are available via PACER. State Board Defendants will immediately provide copies upon request.

Neither decision to expedite proceedings in those two cases was a result of or in light of pending legislation that would moot the plaintiffs' claims.

In contrast to these two cases, Plaintiffs' motion seeks to expedite a dispositive motion, over the objections of Defendants, in an effort to obtain injunctive relief, which, if granted, would alter existing laws governing elections while an election is ongoing. Rather than supporting Plaintiffs' request, the two cases cited demonstrate the proper time and circumstances for expediting proceedings in advance of an election, particularly when the ruling sought would alter election laws, likely causing confusion of voters and the general public during an ongoing election. *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring) ("This Court has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle. … Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.") (internal citations omitted).

Plaintiffs' request should be viewed for what it is: an extremely belated request for an injunction, made during an ongoing election, which asks the Court to quickly rule on the merits and enter final judgment simply because Plaintiff's claim will become moot in

the near future. This is the only logical explanation for Plaintiffs' sudden urgency and that is not sufficient good cause to grant this motion to expedite.

B. Plaintiffs' Request for a Hearing on the Motion for Summary Judgment Should Be Denied.

Plaintiffs' secondary request for the Court to schedule a hearing on their summary judgment motion is contradictory to both their alleged urgency, as well as their claim that the issues presented are simple and can easily be expedited. [*See* D.E. 98, ¶ 12]. They urge this Court to rush to render a final judgment as quickly as possible, but, at the same time, ask the Court to schedule a hearing. Assuredly, if Plaintiffs truly believed expedited consideration were necessary, they would not also request a hearing.

Plaintiffs' request for a hearing is especially surprising, given that they also argue the issues presented in the motion for summary judgment are not complicated and can be ruled upon quickly. These circumstances, like Plaintiffs' alleged need for urgency, would seemingly lend themselves to the case being decided on the filings only and without a hearing, which is what the Local Rules expressly state is the preference of the Court for all motions. L. Civ. R. 7.3(c)(1).

In reality, the issues presented in the summary judgment filings are not simple. Contrary to what Plaintiffs imply, analysis of those issues will require the Court to review historical records, legal precedents, and legislative history dating back 150 years. The resolution of the summary judgment motion necessarily requires the determination of disputed facts arising from multiple historical periods and the application of constitutional precedents to those facts. [*See* Defs.'Joint Resp. to Plaintiffs' Mot. for

Summary J., D.E. 94, Statement of Facts - Parts C, D, E, and F]. It is not a ruling that should be rushed, so that one party has the opportunity to obtain a final judgment in its favor before the case becomes moot.

Conclusion

For the reasons stated above, the Court should deny Plaintiffs' request to expedite consideration of the motion for summary judgment and deny the request for a hearing.

Respectfully submitted this the 7th day of September 2023.

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This the 7th day of September, 2023.

/s/ Terence Steed
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