IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF THE NAACP, et al.,	)	
Plaintiffs,	)	
v.	)	1:18CV1034
ROY ASBERRY COOPER, III, et al.,	)	
Defendants.	)	

ORDER

Nearly five years ago, Plaintiffs commenced this action against the Governor of North Carolina and members of the North Carolina State Board of Elections (see Docket Entry 1),[1] alleging that "[North Carolina] Senate Bill 824 ('S.B. 824') . . . []imposes an unconstitutionally burdensome and discriminatory voter photo ID requirement" (id. at 2). More specifically, as summarized by the United States Court of Appeals for the Fourth Circuit, Plaintiffs have asserted that S.B. 824 "violated § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments because [it] had been enacted with racially discriminatory intent." North Carolina State Conf. of NAACP v. Raymond, 981 F.3d 295, 301 (4th Cir. 2020). North Carolina legislative leaders (the "Legislative Leaders") promptly moved to intervene to defend S.B. 824. (See Docket Entry

[1] The Court (per United States District Judge Loretta C. Biggs) later dismissed the Governor from the case. (See Docket Entry 57.) This Order will refer to the other named Defendants collectively as the "Elections Board."

7.) Plaintiffs opposed such intervention (see Docket Entry 38), including because "participation by the [Legislative Leaders] will, at a minimum, delay the resolution of this case" (id. at 22).[2]

The Court (per Judge Biggs) denied without prejudice the Legislative Leaders' intervention request (see Docket Entry 56), emphasizing the need for "swift resolution on the merits to bring certainty and confidence to the voting process" (id. at 21), as well as concerns about "delay[ing] the various stages of this case" (id. (internal quotation marks omitted)) and "jeopardiz[ing] the Court's ability to reach final judgment in advance of the impending election cycle" (id.).[3] When the Legislative Leaders renewed their request to intervene (see Docket Entry 60), Plaintiffs again responded in opposition (see Docket Entry 66), arguing that the Legislative Leaders intended to "delay the various stages of this case" (id. at 6 (internal quotation marks omitted); see also id. at 21 (accusing Legislative Leaders of "gratuitously slowing this lawsuit")). The Court (per Judge Biggs) denied intervention (this time with prejudice). (See Docket Entry 100 at 9.)

In the interim, the Clerk noticed an initial pretrial conference (see Docket Entry 68), after which Plaintiffs and the

[2] Pin cites to the above document (and others in the record which likewise feature a combination of Roman and Arabic numerals or unnumbered cover pages) refer instead to the page numbers which appear in the footer appended to the document(s) at the time of docketing in the CM/ECF system.

[3] That Order allowed the Legislative Leaders "to participate in this action by filing amicus curiae briefs." (Docket Entry 56 at 23 (italics omitted).)

Elections Board filed a Joint Report under Federal Rule of Civil Procedure 26(f) (Docket Entry 77), supplemented by an Addendum (Docket Entry 87). The Court (per the undersigned Magistrate Judge) adopted those filings as the scheduling order for this case, except as to the proposed trial date (leaving that matter to the Clerk). (See Text Order dated Oct. 1, 2019.) As a result:

1) the deadline for "disclos[ing] witnesses [was] March 15, 2020" (Docket Entry 77 at 3);

2) "[e]xpert reports and disclosures pursuant to Fed[eral] Rule of] Civ[il] P[rocedure] 26(a)(2) [we]re due . . . [f]rom Plaintiffs by April 15, 2020 . . . [and were due f]rom [the Elections Board] by May 8, 2020" (id.);

3) "[f]act discovery . . . close[d] on May 15, 2020" (id. at 4); and

4) "expert discovery . . . close[d] on June 1, 2020" (Docket Entry 87 at 1).[4]

A few months into the discovery period, Plaintiffs secured a preliminary injunction barring "implement[ation of] any of S.B. 824's voter ID requirements and ballot-challenge provisions with respect to any election, until otherwise ordered by this Court." (Docket Entry 120 at 59.) Not long after, pursuant to parallel litigation in North Carolina state court originally instituted

[4] The Local Rules further mandated the filing of "[a]ll dispositive motions . . . within 30 days following the close of the discovery period," M.D.N.C. LR 56.1(b), i.e., July 1, 2020. In light of that deadline, by separate Notice, the Clerk set this case for trial in January 2021. (See Docket Entry 130.)

"[o]n the same day S.B. 824 became law," Holmes v. Moore, 270 N.C. App. 7, 11 (2020), "the North Carolina Court of Appeals reversed a state trial court and ordered that [S.B. 824] be preliminarily enjoined," Raymond, 981 F.3d at 301 (citing Holmes, 270 N.C. App. at 35-36). Around that same time, Plaintiffs appear to have lost the concern about litigation delays which they previously expressed in opposition to the Legislative Leaders' intervention requests, as – on April 14, 2020, i.e., six-and-a-half months into the eight-month discovery period Plaintiffs and the Elections Board chose, a month after their self-selected cut-off for disclosure of witnesses, and the evening before Plaintiffs' hand-picked, expert report/disclosure deadline – Plaintiffs and the Elections Board suddenly "proposed [a new] discovery schedule" (Docket Entry 135 at 1), which the Court (per the undersigned Magistrate Judge) "declin[ed] to adopt" (Text Order dated Apr. 15, 2020), for failure to establish "'good cause' as required by Federal Rule of Civil Procedure 16(b)(4) . . . to modify [unexpired] scheduling order deadlines (much less 'excusable neglect' under Federal Rule of Civil Procedure 6(b)(1)(B) for belated extension of the lapsed witness disclosure deadline)" (id.).

Plaintiffs and the Elections Board moved for reconsideration (see Docket Entry 138), but the Court (per the undersigned Magistrate Judge) again rejected their "after-the-fact attempt to revive expired deadlines and/or their eleventh-hour effort to

effectively double the discovery period" (Docket Entry 140 at 8). That Order observed that Plaintiffs and the Elections Board failed (A) to "describe one fact-witness deposition . . . they had taken a single step to schedule" (id. at 13), or (B) to show they had "consult[ed] with any witnesses about any scheduling issues" (id. (emphasis omitted); see also id. at 12 (explaining that Plaintiffs' and Elections Board's "approach [to discovery] bespeaks neither of diligence nor of good faith")). Additionally, the Order concluded that "extending the discovery deadlines . . . would unreasonably risk an adverse impact on the trial . . . as well as related prejudice to the interests of the Court, the [p]arties, and the public in the timely and orderly administration of justice." (Id. at 16 n.5.) Plaintiffs (with the consent of the Elections Board) objected to the denial of their requests to alter the scheduling order (see Docket Entry 143), but Judge Biggs overruled those objections (see Docket Entry 148).

After the close of discovery (as scheduled), a panel of the Fourth Circuit "vacate[d] th[is C]ourt's order denying the [Legislative Leaders's intervention request] and remand[ed] for further consideration," North Carolina State Conf. of NAACP v. Berger, 970 F.3d 489, 495 (4th Cir. 2020); however, "[u]pon petitions for rehearing by [Plaintiffs] and the [Elections] Board, [the full Fourth Circuit] vacated th[at] panel opinion [in favor of] consider[ing] the case en banc," North Carolina State Conf. of

NAACP v. Berger, 999 F.3d 915, 923 (4th Cir. 2021) (en banc), rev'd, ___ U.S. ___, 142 S. Ct. 2191 (2022); see also North Carolina State Conf. of NAACP v. Berger, 825 F. App'x 122, 123 (4th Cir. 2020) ("[R]ehearing en banc is granted."). Due to that (then-ongoing) appellate litigation over the Legislative Leaders' participation, the Court (per Judge Biggs) ordered "the jury trial scheduled for January 6, 2021 . . . continued to a date to be determined." (Text Order dated Nov. 3, 2020.)

A short time later, the Fourth Circuit reversed the preliminary injunction in this case. See Raymond, 981 F.3d at 298. In doing so, the Fourth Circuit explained that Plaintiffs' claims require them "to prove that [S.B. 824] was passed with discriminatory intent and has an actual discriminatory impact." Id. at 302. The Fourth Circuit further expressly determined that Plaintiffs had "fail[ed] to meet their burden of showing that the General Assembly acted with discriminatory intent in passing [S.B. 824]." Id. at 305; see also id. at 311 (holding that "evidence in the record fails to meet [Plaintiffs'] burden"). As part of that determination, the Fourth Circuit clarified that considerations regarding whether the manner of "enforcement of [S.B. 824] would prevent eligible voters from [voting]," id. at 310, could not aid Plaintiffs' cause because "an inquiry into the legislature's intent in *enacting* a law should not credit disparate impact that may result from poor *enforcement* of that law," id. (emphasis in

original); see also id. ("[I]t is hard to say that [S.B. 824] does not sufficiently go out of its way to make its impact as burden-free as possible." (internal quotation marks omitted)).

By Notice dated March 23, 2021 (and with the issue of intervention by the Legislative Leaders still unresolved), the Clerk re-set the case for trial in January 2022. (See Docket Entry 158 at 1; see also Docket Entry 173 at 1 (setting trial date of January 24, 2022).) Then, on June 7, 2021, the full Fourth Circuit affirmed the denial of the Legislative Leaders' request to intervene, see Berger, 999 F.3d at 918, but the appellate process continued as the Legislative Leaders filed a "petition for a writ of certiorari . . . on August 19, 2021" (Docket Entry 168 at 1).

In the midst of all that activity (and despite the fact that the dispositive motions deadline had long since passed), the Elections Board filed a motion "request[ing] that the deadline to file such a dispositive motion be [re-]set for August 31, 2021." (Docket Entry 163 at 1.) At that point, Plaintiffs' perturbation with possible delay resurfaced. (See Docket Entry 165 at 2 (arguing that said "motion should be denied because it will prejudice Plaintiffs by potentially delaying trial[and] it is inconsistent with this Court's prior orders on scheduling the trial").) The Court (per the undersigned Magistrate Judge) declined to extend the dispositive motions deadline (see Text Order dated Aug. 25, 2021), ruling that the Elections Board had failed

"to justify altering the established time-line for this case" (id.; see also id. (citing "risk of prejudice to Plaintiffs and of negative impact on judicial proceedings")).

On November 24, 2021, the United States Supreme Court agreed to review the Legislative Leaders' intervention request. See Berger v. North Carolina State Conf. of NAACP, ___ U.S. ___, 142 S. Ct. 577 (2021). The Elections Board thereafter "request[ed] . . . that th[is] Court either allow [the Legislative Leaders] to intervene permissively, stay the matter, or continue the trial pending the outcome of the appeal to the [United States] Supreme Court." (Docket Entry 192 at 2; see also id. at 1 ("submitt[ing] that proceeding with the trial as scheduled, without the [Legislative Leaders], before the [United States] Supreme Court decides the issue creates a significant risk that a second trial would be necessary after the [United States] Supreme Court's ruling, ultimately delaying final resolution").) Plaintiffs opposed that request (see Docket Entry 193), contending, inter alia, that (A) "permitting intervention . . . w[ould] completely derail trial" (id. at 4), including because it "[c]ould require the Court to reopen discovery" (id. at 5), which would impose "very real burdens on Plaintiffs and the Court" (id. (emphasis omitted)), and (B) ordering a stay or continuance "that would significantly delay the upcoming trial would unduly prejudice Plaintiffs" (id.; see also id. (noting priority the Court gave to setting trial date

in time "to ensure that Plaintiffs' voting rights claims could be adjudicated prior to the [next] elections")).

The Court (per Judge Biggs) ultimately concluded that "the balance of [pertinent] factors weigh[ed] in favor of a stay." (Docket Entry 194 at 2.) In particular, as that Order explained:

> In addition to the risks of needlessly expending tremendous resources of time and effort of this Court, counsel, and litigants, the Court [wa]s very concerned that 'court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.' North Carolina's voter ID requirements have already been subject to extensive judicial intervention at both the federal and state levels . . . . The potential risks of adding to such confusion by a second trial . . . likewise favors a stay.
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> These risks far outweigh the potential prejudice to all litigants.

(Id. (internal brackets and citations omitted) (quoting Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006)).) Judge Biggs, however, also emphasized that "[s]taying this case d[id] not reopen discovery, require additional litigation, or require the parties to change litigation strategies." (Id. (emphasis added).)

Judge Biggs's foregoing decision proved wise, as the United States Supreme Court subsequently ruled that "[the L]egislative [L]eaders [we]re entitled to intervene in this litigation," Berger v. North Carolina State Conf. of the NAACP, ___ U.S. ___, ___, 142 S. Ct. 2191, 2206 (2022). Meanwhile, in the parallel state court litigation, "[t]he trial court . . . found that [S.B.] 824 . . . was enacted with a racially discriminatory purpose," Holmes v.

Moore, 383 N.C. 171, 174 (2022), withdrawn and superseded, 384 N.C. 426 (2023), and (at the request of the plaintiffs in that case) the North Carolina Supreme Court agreed to take up "discretionary review . . . prior to a determination by the North Carolina Court of Appeals," Holmes v. Moore, 868 S.E.2d 315, 315 (N.C. 2022). Subsequently, on December 16, 2022, the North Carolina Supreme Court "affirm[ed] the [state] trial court's final judgment and order and h[e]ld that S.B. 824 violate[d] article I, section 19 of the North Carolina Constitution because the law was enacted with discriminatory intent to disproportionately disenfranchise and burden African-American voters in North Carolina." Holmes, 383 N.C. at 205. "Following [that] decision, [the] defendants [there] timely filed a petition for rehearing," Holmes v. Moore, 384 N.C. 426, 433 (2023), which the North Carolina Supreme Court granted via "order entered 3 February 2023," id. "After supplemental briefing and oral argument, . . . [the North Carolina Supreme Court] withdr[e]w the prior decision," id., and "reverse[d] and remand[ed that case] to the [state] trial court for entry of an order dismissing [the] plaintiffs' claim with prejudice," id. at 460.[5]

A month and a half after that ruling, Plaintiffs (without objection from the Elections Board or the Legislative Leaders) "request[ed] that this Court lift the stay in th[is case] and schedule a status conference." (Docket Entry 202 at 5; see also

[5] The North Carolina Supreme Court issued its above-cited (final) decision on April 28, 2023. See Holmes, 384 N.C. at 426.

id. at 1 n.1 ("The [Elections] Board [] consent[s] to this motion, and the Legislative [Leaders] do not oppose this motion.").) Plaintiffs also indicated that they wanted "to update discovery previously provided by the [Elections Board] and [to] take discovery from [the] Legislative [Leaders]." (Id. at 5.) The Court (per the undersigned Magistrate Judge) "grant[ed] in part . . . [Plaintiffs' request by (A) setting] a status conference" (Text Order dated July 5, 2023), (B) directing "Plaintiffs [to] provide copies of any proposed discovery (including the names of any proposed deponents) to all opposing counsel" (id.; see also id. (requiring same of "any other party/intervenor who also wishe[d] to conduct any discovery")), and (C) mandating that, prior to the status conference, counsel "meet and confer in person or by video teleconference about any proposed discovery" (id.).

At the status conference (held before the undersigned Magistrate Judge), Plaintiffs requested that the Court reopen the discovery period to allow them to serve the Elections Board and the Legislative Leaders with a raft of new discovery demands, as well as to conduct depositions Plaintiffs previously had not pursued, whereas the Elections Board and the Legislative Leaders opposed the reopening of discovery and voiced objections to the discovery Plaintiffs proposed.[6] "Based on the arguments presented by counsel, the Court d[id] not see a basis for allowing discovery to

[6] The Clerk's Office audio-recorded that status conference. (See Minute Entry dated July 26, 2023.)

be reopened [for Plaintiffs] to serve the [proposed] discovery on the Legislative [Leaders] and Plaintiffs' request [on that front wa]s [t]here[fore] denied[.]" (Minute Entry dated July 26, 2023 (all-caps font omitted).)[7] To facilitate resolution of Plaintiffs' request for another opportunity to demand discovery from the Elections Board, "Plaintiffs [were] instructed to file a Notice . . . includ[ing] the exact discovery requests and deposition notice to be served on the [Elections] Board . . . [with] up to ten pages of argument . . . stating why [P]laintiff[s] should be allowed to serve [such] discovery . . . ." (Id.; see also id. (documenting deadlines set for response(s) by Elections Board and Legislative Leaders, as well as reply by Plaintiffs).)

Plaintiffs timely made the required filing (see Docket Entry 203), attaching 20 proposed requests for production (see Docket Entry 203-1), ten interrogatories (see Docket Entry 203-2), and a notice pursuant to Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)") listing 11 deposition topics (see Docket Entry 203-3). Both the Elections Board and the Legislative Leaders timely responded in opposition (see Docket Entries 204, 205) and Plaintiffs timely replied (see Docket Entry 208). After carefully considering the parties' arguments and the record, the Court

[7] Most significantly (and as made clear on the record at the status conference), Plaintiffs could not reasonably explain why they failed to serve subpoenas for documents or for deposition testimony on the Legislative Leaders during the discovery period or why the Court now should grant Plaintiffs another chance to pursue the same basic discovery they previously elected not to timely pursue from the Legislative Leaders.

declines to reopen the discovery period to permit Plaintiffs to pursue the proposed discovery from the Elections Board.

As previously documented, the scheduling order in this case mandated completion of discovery in the summer of 2020. This Court's Local Rules further dictate that "[m]otions seeking an extension of the discovery period . . . must be made or presented prior to the expiration of the time within which discovery is required to be completed." M.D.N.C. LR 26.1(d). The Federal Rules of Civil Procedure, in turn, provide that, "[w]hen an act may or must be done within a specified time, the [C]ourt may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B) (emphasis added). Because Plaintiffs have requested an extension of the discovery period long after the discovery deadline (which also served as the deadline to request an extension of the discovery period), the Elections Board rightfully has argued that, "to obtain an extension of [the] expired discovery deadline, Plaintiffs must show that they failed to act due to 'excusable neglect'" (Docket Entry 205 at 3 (quoting Fed. R. Civ. P. 6(b)(1)(B))). The Elections Board also properly has noted that:

1) "'"[e]xcusable neglect" is not easily demonstrated, nor was it intended to be'" (id. (quoting Thompson v. E.I. DuPont de Nemours & Co., 76 F.3d 530, 534 (4th Cir. 1996))); and

2) it requires "[the C]ourt[to] consider 'the danger of prejudice to the opposing party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith'" (id. (internal brackets and numbering omitted) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993))).[8]

In their initial argument, Plaintiffs did not attempt to establish excusable neglect (see Docket Entry 203 at 1-10), despite the fact that the Court earlier denied a request from Plaintiffs to revive an expired discovery-related deadline for failure to show "'excusable neglect' under Federal Rule of Civil Procedure 6(b)(1)(B) for belated extension of the lapsed [] deadline" (Text Order dated Apr. 15, 2020). Then, after the Elections Board explicitly invoked Federal Rule of Civil Procedure 6(b)(1)(B) and outlined controlling authority elaborating on the excusable neglect

[8] Plaintiffs' reply contends that Federal Rule of Civil Procedure 6(b)(1)(B) does not apply because "the [C]ourt did not ask [] Plaintiffs to file [] a motion [to serve discovery after the close of discovery] – rather, they were asked to file a Notice of Proposed Discovery." (Docket Entry 208 at 2 n.2.) That contention lacks merit. In their motion requesting a status conference, Plaintiffs stated that they wanted to obtain discovery after the discovery deadline. (See Docket Entry 202 at 5.) The Court then held a status conference at which Plaintiffs expressly requested the Court's permission to demand discovery from both the Elections Board and the Legislative Leaders after the discovery deadline, which request constituted a motion. See Fed. R. Civ. P. 7(b)(1)(A) (defining "motion" as "request for a court order" and permitting oral motions "during a hearing"). The Court denied relief as to Plaintiffs' request for an order allowing post-deadline discovery from the Legislative Leaders and deferred a ruling as to Plaintiffs' request for an order allowing post-deadline discovery from the Elections Board, pending review of the actual proposed discovery items and written arguments. (See Minute Entry dated July 26, 2023.) Plaintiffs cannot evade Federal Rule of Civil Procedure 6(b)(1)(B)'s standard for post-deadline relief from a deadline by making an oral motion for such relief.

standard (as documented above), Plaintiffs again failed to develop any argument for the Court to find excusable neglect (see Docket Entry 208 at 1-5) and even declared that they "have demonstrated that there has been no 'excusable neglect' on their part with regards to this request" (id. at 2 n.2 (emphasis added)). Those failures alone warrant denial of Plaintiffs' request to demand discovery from the Elections Board after the discovery deadline. See, e.g., Hensley on behalf of N.C. v. Price, 876 F.3d 573, 580 n.5 (4th Cir. 2017) ("[Judges] are not like pigs, hunting for truffles buried in briefs. Similarly, it is not [the court's] job to wade through the record and make arguments for either party." (internal quotation marks and citation omitted)); Young v. American Talc Co., No. 1:13CV864, 2018 WL 9801011, at *3 (M.D.N.C. Aug. 3, 2018) (unpublished) (Biggs, J.) ("[I]t is not th[is C]ourt's job to sift through the record and make the plaintiff's case for her." (internal brackets and quotation marks omitted)); Hughes v. B/E Aerospace, Inc., No. 1:12CV717, 2014 WL 906220, at *1 n.1 (M.D.N.C. Mar. 7, 2014) (Schroeder, J.) ("A party should not expect a court to do the work that [the party] elected not to do.").

Nor does the record support a finding of excusable neglect. Beginning with "the danger of prejudice to the [opposing party]," Pioneer Inv. Servs., 507 U.S. at 395, the Court agrees that "[the Elections] Board [] will be prejudiced by Plaintiffs' request to reopen discovery" (Docket Entry 205 at 4), because reopening

discovery (A) likely will "require additional litigation[and] require the parties to change litigation strategies" (id. (internal quotation marks omitted); see also id. at 7 (reasonably deducing that "reopening fact discovery will also threaten to reopen expert discovery")), i.e., "the precise consequences that this Court was specifically trying to avoid [when it stayed the case]" (id. at 4 (referring to Docket Entry 194)), and (B) "will have the effect of setting back this litigation by months, possibly longer" (id.), particularly given that Plaintiffs propose (i) to serve "numerous new discovery demands" (id.), which "are also extremely burdensome" (id. at 5; see also id. at 6 (noting that one request "effectively asks for every document that is even tangentially related to two and a half years' worth of state court litigation")), as well as (ii) to conduct an expansive Rule 30(b)(6) deposition, which "would likely take three or more days of deposition preparation to educate an agency witness about all information . . . reasonably known to the [Elections] Board for each of the subjects designated in th[e proposed Rule 30(b)(6) notice]" (id. at 5 n.1).

In sum, "[t]he reopening of discovery . . . would lead to additional delay and expense . . . [which are] recognized source[s] of prejudice to the opposing party." Plotkin v. Association of Eye Care Ctrs., Inc., 710 F. Supp. 156, 159 (E.D.N.C. 1989); see also Bartell v. Grifols Shared Servs. NA, Inc., No. 1:21CV953, 2023 WL 4868135, at *10 (M.D.N.C. July 31, 2023) (unpublished) (Osteen, J.)

(holding that "[r]equiring the parties to reopen discovery at [late] stage would prejudice [the d]efendants"); Wiles v. Black & Boone, P.A., No. 1:21CV84, 2022 WL 16836204, at *2 (M.D.N.C. Aug. 4, 2022) (unpublished) (Webster, M.J.) ("[R]eopening discovery for the purposes [the p]laintiff has outlined will cause prejudice to [the d]efendants and will undoubtedly delay progress towards resolution of this case."); Lighting Retrofit Int'l, LLC v. Constellation NewEnergy, Inc., Civ. No. 19-2751, 2021 WL 2338377, at *4 (D. Md. June 8, 2021) (unpublished) (reiterating that "prolong[ing] an already lengthy litigation . . . itself is a burden to the litigants" (internal quotation marks omitted)).

Next, as to "the length of the delay," Pioneer Inv. Servs., 507 U.S. at 395, Plaintiffs (as documented above) waited years past the (summer 2020) discovery deadline before seeking permission to serve their proposed discovery demands on the Elections Board, with a year-and-a-half of that delay occurring before the Court entered a stay on December 30, 2021 (see Docket Entry 194 at 3). Accordingly, "the length of the delay is significant." Brown v. Nucor Corp., No. 2:04CV22005, 2018 WL 6818997, at *3 (D.S.C. Dec. 7, 2018) (unpublished) (referring to "delay of one full year"). The Court also may consider Plaintiffs' failure to pursue the reopening of discovery after the impetus for the stay – i.e., the pendency "of certiorari [review] by the U.S. Supreme Court [of the Legislative Leaders' intervention request]" (Docket Entry 194 at 2)

– dissipated, when the United States Supreme Court issued its ruling on June 23, 2022, see Berger, ___ U.S. at ___, 142 S. Ct. at 2191.[9] The Court did not immediately thereafter re-set a trial date, because, as Plaintiffs' reply points out, "[a]t the time the U.S. Supreme Court permitted [the] Legislative [Leaders] to intervene in this case, the [parallel state court l]itigation was already on its way to the [state] court of last resort, where a final decision was imminent" (Docket Entry 208 at 5), which created "the potential for conflicting orders in the state and federal litigations" (id.); however, that circumstance (which weighed against proceeding to a final judgment in this Court at that point) did not preclude Plaintiffs from moving at that juncture for relief from the discovery deadline here, as a ruling on such a motion (or the conduct of any discovery allowed as a result) would not have created any conflict with any order in the state court litigation.

In any event, allowing Plaintiffs to serve their proposed discovery demands on the Elections Board now certainly will cause still more delay, with a corresponding negative "potential impact

[9] Indeed, the plain language of the order staying this case appears to have provided for the automatic termination of the stay upon "the resolution of the grant of certiorari by the U.S. Supreme Court" (Docket Entry 194 at 2), without the necessity of a further order from this Court, particularly given that the stay order specifies a "further [o]rder of this Court" (id.) as an alternative (not an exclusive) basis for termination of the stay (see id.). As the Elections Board has observed, "[a]t the least, Plaintiffs should have asked for clarification of the Court's [stay] order to see whether the Court might be amenable to a motion to lift the stay [to allow the reopening of discovery], particularly given the positions that Plaintiffs had previously taken on the relevance of the state court case." (Docket Entry 205 at 8-9 (citing Docket Entry 193 at 5-6 and noting that Plaintiffs there "argu[ed] that delay would unduly prejudice [them] despite the existence of a state court injunction").)

on judicial proceedings," Pioneer Inv. Servs., 507 U.S. at 395. That delay likely will extend beyond the time allotted under Federal Rules of Civil Procedure 33 and 34 for the Elections Board to respond to interrogatories and requests for production, as well as the time needed to identify and to prepare the Rule 30(b)(6) witness(es), because the Elections Board has made clear that it considers "most of [the proposed discovery] objectionable" (Docket Entry 205 at 4; see also, e.g., id. at 4-5 (articulating relevance and/or undue burden objections to four proposed document requests, nine proposed interrogatories, and one proposed deposition topic), 6 (describing another proposed document request as "example" of "overly broad" discovery demands)). "[T]hus, reopening discovery will likely result in the need for [the] Court['s] intervention (i.e., motions to compel) to resolve any disputes regarding such [discovery]. This would cause further delay in this matter." Wiles, 2022 WL 16836204, at *2.

Such delay would negatively impact judicial proceedings, because, "[a]lthough no trial date has been [yet re-]set, this case has been pending for [almost five] year[s] and is otherwise ready for trial," Larson v. Great Lakes Ins. SE, No. DR:21CV36, 2023 WL 2711103, at *2 (W.D. Tex. Feb. 24, 2023) (unpublished); see also Advanced Fluid Sys., Inc. v. Huber, 958 F.3d 168, 181 (3d Cir. 2020) (approving of fact that district court "did not wish to further delay a case that was ready for trial and had taken four

years to get to that point"); Geiserman v. MacDonald, 893 F.2d 787, 792 (5th Cir. 1990) ("[Discovery] delays are a particularly abhorrent feature of today's trial practice. . . . Adherence to reasonable deadlines is critical to restoring integrity in court proceedings."). Moreover, as detailed earlier, the Court consistently has enforced scheduling order deadlines (against all parties) in the interest of keeping the case on track for trial. (See, e.g., Docket Entry 140 at 16 n.5; Text Order dated Aug. 25, 2021.)[10] The specter of the 2024 elections on the horizon strongly supports sticking to that tack and concomitantly counsels against any "delays [that] could [] jeopardize the Court's ability to reach final judgment in advance of the impending election cycle" (Docket Entry 56 at 21), in light of the importance of "bring[ing] certainty and confidence to the voting process" (id.; see also Docket Entry 204 at 2 ("Legislative [Leaders] 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 . . . .")).

Plaintiffs' "reason for the delay," Pioneer Inv. Servs., 507 U.S. at 395, in seeking the proposed discovery from the Elections Board similarly weighs against a finding of excusable neglect. Put simply, Plaintiffs made a tactical choice not to timely serve the

[10] That approach adhered to long-established practices in this Court. See, e.g., Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., No. 1:03CV537, 2005 WL 6043267, at *3 (M.D.N.C. July 7, 2005) (unpublished) (citing this Court's "history of strict adherence to discovery schedules").

proposed (or apparently any) discovery demands on the Elections Board and now regret that choice; however, for decades, courts have held that "[d]eliberate tactics do not create excusable neglect," People's Tr. Fed. Credit Union v. National Credit Union Admin. Bd., 350 F. Supp. 3d 1129, 1146 (D.N.M. 2018); see also, e.g., African Am. Voting Rts. Legal Def. Fund, Inc. v. Villa, 54 F.3d 1345, 1350 (8th Cir. 1995) ("[T]actical decisions do not amount to affirmative showings of excusable neglect under [Federal] Rule [of Civil Procedure] 6(b)."); Linabary v. Maritime Overseas Corp., 376 F. Supp. 688, 689 (S.D.N.Y. 1973) ("[I]n short, tactical moves do not constitute excusable neglect."). By way of background, when Plaintiffs and the Elections Board filed their discovery plan on September 23, 2019, they reported that:

> 4. Discovery will be needed on the following subjects:
>
> a. The legislative history of [S.B. 824].
>
> b. The [Elections] Board's implementation of [S.B. 824] and a prior voter identification law.
>
> c. The impact of [S.B. 824] on North Carolina voters and discrete categories of voters.
>
> d. The impact of a prior voter identification law on North Carolina voters and discrete categories of voters.
>
> e. The impact that similar voter identification laws have had on voters in other states.
>
> f. [P]laintiff[s'] alleged injuries.

(Docket Entry 77 at 2-3 (emphasis added).)

Despite recognizing in 2019 a need for discovery on "[t]he [Elections] Board's implementation of [S.B. 824]" (id. at 3 (emphasis added)) and "[t]he impact of [S.B. 824] on North Carolina voters and discrete categories of voters" (id. (emphasis added)), Plaintiffs waited until 2023 to formulate their "proposed First Requests for Production, proposed First Interrogatories and proposed [Rule] 30(b)(6) Deposition Notice, . . . seek[ing] . . . discovery regarding the present impact of S.B. 824, particularly on Black and Latino North Carolinians; and information on how S.B. 824 is being implemented for the 2023 municipal elections and beyond" (Docket Entry 203 at 3 (emphasis added)). Why the delay? The roots of the answer lie in the discovery plan Plaintiffs and the Elections Board filed in 2019, specifically the provision stating:

> [The Elections Board] ha[s] volunteered to provide and ha[s] been providing a large number of discovery exchanges from a pending state court case challenging the same law, *Holmes v. Moore*, 19 CVS 15292 (Wake Cty. Super. Ct.). Plaintiffs agreed to review that production before making any new discovery requests on [the Elections Board], to protect the parties' and judicial resources, to promote the efficiency of the litigation, and to avoid unnecessary duplication of effort or expense.

(Docket Entry 77 at 2.) As the emphasized language makes clear, the Elections Board voluntarily produced a large volume of material to Plaintiffs, but Plaintiffs retained the right to serve any discovery demands they wished at any point during the discovery period they wished. (See id.; see also id. (clarifying that "[f]ormal discovery in this case will open immediately").)

By eschewing that latter course, Plaintiffs saved time and money, which they could direct to other aspects of the litigation, such as pursuing preliminary injunctive relief and contesting intervention by the Legislative Leaders (as described above), but Plaintiffs also thereby forfeited the protections afforded by formal discovery mechanisms, including the obligation the Federal Rules of Civil Procedure place on:

> [a] party . . . who has responded to an interrogatory[or] request for production . . . [to] supplement or correct its . . . response . . . in a timely manner if the party learns that in some material respect the . . . response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]

Fed. R. Civ. P. 26(e)(1) ("Rule 26(e)(1)"); see also Fed. R. Civ. P. 26 advisory committee notes, 1993 amend., subdiv. (e) ("Supplementations . . . should be made . . . with special promptness as the trial date approaches."); Covil Corp. by & through Protopapas v. United States Fid. & Guar. Co., 544 F. Supp. 3d 588, 595-96 (M.D.N.C. 2021) (collecting cases establishing that "duty to supplement continues beyond the close of discovery").

To illustrate, if Plaintiffs had timely served production requests on the Elections Board like (for example) their proposed demands for "[a]ny completed no-match analysis conducted by [the Elections Board] to meet the requirements of Section 1.5(a)(8) or 1.5(b) of S.B. 824" (Docket Entry 203-1 at 10) or "[a]ll documents estimating, reporting, studying, or analyzing the number, political

party affiliation, race, and/or ethnicity of registered voters who do not have photo identification required to vote under S.B. 824" (id. at 12), the Elections Board would have borne an ongoing duty (up through trial) to supplement the responses given to those production requests, if/when (due to the passage of time) those responses became incomplete or no longer accurate. Rule 26(e)(1) would have imposed the same continuing, supplementation obligation on the Elections Board, if Plaintiffs had timely served interrogatories requiring (for instance) "[i]dentif[ication of] any and all efforts [the Elections] Board [] ha[s] undertaken to educate registered voters and/or potential voters about the [p]hoto [i]dentification [r]equirements" (Docket Entry 203-2 at 6) or "[i]dentif[ication of] all instances of in person voter fraud in North Carolina of which [the Elections] Board [is] aware from 2020 to the present" (id. at 7). Because Plaintiffs did not timely serve such (or any other) production requests or interrogatories, however, they retain no such right to receive updated information.

For a period of time, Plaintiffs' bet paid off, as (without ever serving discovery demands on the Elections Board) Plaintiffs secured a preliminary injunction and with it a finding "that Plaintiffs ha[d] demonstrated a clear likelihood of success on the merits of their discriminatory intent claims for at least the voter-ID and ballot-challenge provisions of S.B. 824" (Docket Entry 120 at 46; see also id. at 38 ("The preliminary evidence

demonstrates a clear likelihood that Plaintiffs will establish that discrimination was behind the law . . . .")). Eventually, the Fourth Circuit overturned that ruling, see Raymond, 981 F.3d at 298, but – by then (in the parallel state court litigation) – "the North Carolina Court of Appeals . . . [had] ordered that [S.B. 824] be preliminarily enjoined," id. at 301 (citing Holmes, 270 N.C. App. at 35-36), after which "[t]he [state] trial court . . . found that [S.B.] 824 . . . was enacted with a racially discriminatory purpose," Holmes, 383 N.C. at 174, and the North Carolina Supreme Court fast-tracked appellate review, see Holmes, 868 S.E.2d at 315. Whether due to those developments in state court or Plaintiffs' confidence (at that time) in the strength of the evidence they had assembled without resort to formal discovery from the Elections Board (see Docket Entry 165 at 9 (declaring, after Fourth Circuit's reversal of preliminary injunction, that "record in support of the preliminary injunction motion, without even considering the more fulsome evidentiary record Plaintiffs will produce at trial, contains ample evidence that the General Assembly acted with discriminatory intent")), Plaintiffs continued to bide their time, rather than to request leave to reopen discovery.

Regardless of what precise considerations animated Plaintiffs' thinking during that period, the fact remains that "[w]ait-and-see is a risky tactic, not . . . excusable neglect," United States Fire Ins. Co. v. Korea Foreign Ins. Co., No. 92C5770, 1993 WL 54643, at

*2 (N.D. Ill. Mar. 2, 1993) (unpublished). Only after the North Carolina Supreme Court dismissed the state court litigation, see Holmes, 384 N.C. at 460, a possibility Plaintiffs always knew could occur and always knew they must guard against within the confines of this case (see Docket Entry 193 at 5-6 (acknowledging that "North Carolina Supreme Court could dissolve [state trial court's] injunction at any time," that Elections Board was "actively pursuing" that outcome, and that "Plaintiffs . . . ha[d] no ability to protect their interests [via] or affect the outcome of the state court proceedings")) – and it became clear that the trial of this case remained necessary – did Plaintiffs request that the Court reopen the discovery period (see Docket Entry 208 at 5 ("Once the final decision on reconsideration was issued in the *Holmes* [l]itigation, Plaintiffs promptly . . . sought a status conference.")). In other words, "Plaintiffs made a calculated decision to save time and money by not seeking th[is] discovery sooner because there was a risk that the discovery would not be necessary . . . ." Yeoman v. Ikea U.S.A. W., Inc., No. 11CV701, 2013 WL 3467410, at *7 (S.D. Cal. July 10, 2013) (unpublished), aff'd, 2013 WL 5727547 (S.D. Cal. Oct. 22, 2013) (unpublished). Thus, "[t]here is no doubt that the reason for the delay was completely in Plaintiffs' control." Id. at *8.[11]

[11] For reasons detailed above in the discussion of the "the length of the delay," Pioneer Inv. Servs., 507 U.S. at 395, Plaintiffs can attribute to the Court's stay of this case (while the United States Supreme Court considered the (continued...)

"Deciding, based on twenty-twenty hindsight, that their decision to delay or forgo [serving formal discovery demands] was in error or that they should have conducted more discovery at an early time does not amount to excusable neglect under [Federal] Rule [of Civil Procedure] 6(b)(1)(B)." Hartman v. United Bank Card, Inc., 291 F.R.D. 591, 595 (W.D. Wash. 2013). "Indeed, the delay was not neglect at all – rather, it was a conscious decision by [Plaintiffs] to avoid the expense [and effort] of [formal discovery] . . . until absolutely necessary." Whitney v. United States, 251 F.R.D. 1, 2 (D.D.C. 2008) (internal quotation marks omitted). Under these circumstances, "reopening discovery would unfairly allow [Plaintiffs] another attempt to find support for [their] claim[s] when [they] had ample opportunity previously." Givens v. Prime Off. Prods., Civ. No. 04-731, 2005 WL 8174325, at *1 (D. Md. Aug. 10, 2005) (unpublished). "Plaintiff[s have] fail[ed] to demonstrate why [they] could not have sought th[is] discovery earlier . . . or, at a minimum, sought an extension of the discovery period earlier. . . . This factor, too, weighs against reopening discovery." Wiles, 2022 WL 16836204, at *2.

"The final factor is whether Plaintiffs acted in good faith." Yeoman, 2013 WL 3467410, at *8. The Elections Board has stated

[11](...continued)
Legislative Leaders' intervention request) no more than six months (from December 30, 2021, through June 23, 2022) of the three-year period that elapsed between the close of discovery (in the summer of 2020) and Plaintiffs' request for the reopening of discovery (in the summer of 2023).

that it "ha[s] no reason to question Plaintiffs' good faith in moving to reopen discovery or in these proceedings more generally." (Docket Entry 205 at 9.) The Legislative Leaders take a less charitable stance. (See, e.g., Docket Entry 204 at 2 ("Plaintiffs, apparently recognizing the deficiencies in their case, . . . seek to reopen discovery to correct their past errors. This should not be permitted."), 3 (objecting to "Plaintiffs [attempting] to benefit from ignoring deadlines they chose while also contributing to the very delay they cite to as necessitating the new discovery they seek" and emphasizing that "[t]his is also not the first time Plaintiffs have sought to amend the case schedule they agreed to and to extend missed, expired deadlines"), 4 ("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.").) "The Court is loathe to go to the extreme and characterize Plaintiffs' actions with respect to waiting to [raise these issues] as bad faith. It does not appear, however, that the calculated decision to wait this [long] before asking to reopen discovery was in good faith." Yeoman, 2013 WL 3467410, at *8.

In that regard, the Court notes particularly the shifting nature of Plaintiffs' positions regarding delay. See generally Telesaurus VPC. LLC v. Power, 888 F. Supp. 2d 963, 974 (D. Ariz.

2012) ("[I]nconsistent positions evince a lack of good faith."), aff'd, 584 F. App'x 905 (9th Cir. 2014). First, when resisting the Legislative Leaders' participation, Plaintiffs trumpeted their opposition to "delay[s in] the resolution of this case" (Docket Entry 38 at 22) and even went so far as to accuse the Legislative Leaders (A) of plotting to "delay the various stages of this case, to include discovery . . . and trial" (Docket Entry 66 at 6 (internal quotation marks omitted)), and (B) of "gratuitously slowing this lawsuit" (id. at 21). Within less than a year, however, Plaintiffs (not the Legislative Leaders) came before the Court having missed discovery-related deadlines and seeking a lengthy extension of the discovery period (without any meaningful explanation). (See Text Order dated Apr. 15, 2020.) And, when Plaintiffs belatedly offered new justifications through a reconsideration motion, the Court still concluded that their conduct of discovery to that point "besp[oke] neither of diligence nor of good faith." (Docket Entry 140 at 12.)

By the following year, Plaintiffs had switched back to adamant, anti-delay advocacy, as part of their objection to the Elections Board's request for relief from the dispositive motions deadline. (See Docket Entry 165 at 2.) Plaintiffs then reiterated their disdain for delay when the Elections Board (quite reasonably) questioned whether the Court should hold the trial without allowing the participation of the Legislative Leaders while the United

States Supreme Court considered that matter and, in so doing, Plaintiffs expressly inveighed against "reopen[ing] discovery" (Docket Entry 193 at 5) and declared that "[t]he rights of North Carolina voters are too important to leave . . . unadjudicated before[] the upcoming federal and statewide elections" (id. at 6). But now Plaintiffs have asked that the Court reopen discovery and risk a delay in the resolution of this case beyond the next major election season. (See Docket Entry 203 at 10 ("request[ing] that the Court grant Plaintiffs' request to serve the additional discovery attached [t]hereto"); Docket Entry 204 at 5 ("[I]t 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*."); Docket Entry 205 at 4 ("Plaintiffs have served [the Elections Board] with numerous new discovery demands . . . which will have the effect of setting back this litigation by months, possibly longer."), 7 ("[R]eopening fact discovery will also threaten to reopen expert discovery.").)

Even adopting the most generous reading of the foregoing events, "the Court cannot say that [Plaintiffs'] conduct was in good faith," Yeoman, 2013 WL 3467410, at *8. At best (for Plaintiffs), "this factor does not weigh in [any] party's favor." Id. With all of the other pertinent factors tilting decidedly against Plaintiffs, the Court concludes that they have not

established excusable neglect under Federal Rule of Civil Procedure 6(b)(1)(B) for their untimely request to serve discovery demands on the Elections Board.

IT IS THEREFORE ORDERED that Plaintiffs' oral motion to reopen the discovery period (made at the status conference on July 26, 2023) is **DENIED.**

/s/ L. Patrick Auld
L. Patrick Auld
United States Magistrate Judge

September 12, 2023