No. 24-1095

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)

OPPOSITION OF LEGISLATIVE DEFENDANTS-APPELLEES TO EMERGENCY MOTION TO EXPEDITE

Phillip J. Strach
Thomas A. Farr
Alyssa M. Riggins
Cassie A. Holt
Alexandra M. Bradley
301 Hillsborough Street
Suite 1400
Raleigh, North Carolina 27603
(919) 329-3800
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
cassie.holt@nelsonmullins.com
alex.bradley@nelsonmullins.com

Richard B. Raile
Katherine L. McKnight
Trevor M. Stanley
Benjamin D. Janacek
1050 Connecticut Ave. NW,
Suite 1100
Washington, DC 20036
(202) 861-1711
rraile@bakerlaw.com
kmcnight@bakerlaw.com
tstanley@bakerlaw.com
bjanacek@bakerlaw.com

Patrick T. Lewis
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
plewis@bakerlaw.com

Plaintiffs' emergency motion to expedite proposes severe burdens for no possible benefit. Plaintiffs did not move for an injunction pending appeal, and that is likely because they know they cannot show a likelihood of success on the merits. The district court found nearly all contested facts, credibility questions, and equitable considerations against Plaintiffs. Moreover, voting in North Carolina's 2024 primary elections is *happening right now*, the district court found that Plaintiffs' proposed remedy would require reconfiguration of the entire senate plan—and threaten a statewide election meltdown—and an injunction is plainly foreclosed by the *Purcell* doctrine. There is no point to imposing the stark burdens Plaintiffs propose to the near-certain result that the order below will be affirmed. Moreover, Plaintiffs have not fulfilled their obligation to order a relevant transcript and are in no position to demand expedition in light of this failing. Even if there were good cause to expedite, the Court should adopt a more reasonable schedule than what Plaintiffs demand, as outlined below. In opposition to Plaintiffs' motion, Legislative Defendants-Appellees state as follows:

1. Far from presenting an "egregious and entirely clear-cut" Voting Rights Act §2 violation, Mot. 2, this is an exceptionally weak appeal that cannot yield the relief Plaintiffs demand on any time frame. The district court found Plaintiffs' evidence woefully short of the mark. "[T]he ultimate finding of vote dilution [is] a question of fact subject to the clearly-erroneous standard of Rule 52(a)." *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986). Plaintiffs lost on most all

contested fact questions below and have no realistic prospect of success on appeal.

Most importantly, as to Plaintiffs' burden to show legally significant racially polarized voting, *see id.* at 55–56, the district court discredited the analysis of Plaintiffs' polarized voting expert, Dr. Barreto. Order Denying Motion for Preliminary Injunction, D. Ct. Doc. 61 at 38–39 (PI Order). After a damaging admission in his report was identified during the January 10, 2024, preliminary-injunction hearing, Plaintiffs tried to walk it back—after incorrectly asserting in court that it was just a "typo," *id.* at 38—by serving a supplemental report from the expert two days later that changed methodologies to try to explain away the admission. The district court correctly found that inexplicable assertions in the supplemental report "undercut[] all of Dr. Barreto's conclusions." *Id.* at 39. The court found the analysis plagued by "profound discrepancies between the methods of analysis he performed in his initial report" and the baffling statements of his "supplemental declaration." *Id.* Plaintiffs will not show clear error in those eminently supportable factual findings. Their appeal will fail on that basis, because the failure to show racial bloc voting, standing alone, dooms a §2 claim. *See Growe v. Emison*, 507 U.S. 25, 41–42 (1993).

Plaintiffs do not mention that dispositive credibility determination and instead attack the district court's finding that, in all events, the evidence shows that voting is not polarized at legally significant levels. *See* Mot. 3. But that holding is not essential to the outcome, given the failure of Plaintiffs' expert

report. And, besides, the court's determination was correct. It observed that other federal courts (including the Supreme Court) have found an absence of legally significant racially polarized voting in North Carolina. PI Order 10. The court also found significant evidence that, since 2003, black senators have been regularly elected *without* majority-black districts—including in northeast North Carolina—which is indicative of high white crossover voting. *Id.* at 10–11. The Supreme Court has explained that "[i]n areas with substantial crossover voting it is unlikely that" §2 challengers will "be able to establish the third *Gingles* precondition—bloc voting by majority voters." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). The district court's finding that Plaintiffs here are unlikely to prove this precondition stands on two firm, independent grounds.

Moreover, Plaintiffs also had to show—as a predicate to §2 liability—that a reasonably configured majority-minority district can be fashioned in the relevant area, and the findings on that point, too, are adverse to Plaintiffs. *See* PI Order 16–35. The district court found that one of Plaintiffs' proposed districts was not a majority-minority district because the decennial census results show its black voting-age population (BVAP) to be 48.41%, and the alternative method Plaintiffs' proposed (citizen voting-age population (CVAP)) was plagued by too high a margin of error—which Plaintiffs' expert made no effort to account for—that rendered the assertion of majority-black CVAP status unreliable. *Id.* at 33–35. While the court assumed another proposal satisfied the first precondition, it recognized that Legislative Defendants' fact-based challenges to it "have force." *Id.* at 30. At best, if Plaintiffs somehow overcame

all other flaws in this appeal, this Court would be obliged to remand the case to the district court for a factual determination on that question. *See, e.g.*, *Hill v. Coggins*, 867 F.3d 499, 510 (4th Cir. 2017).

There is more. A §2 plaintiff must ultimately "prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group." *Abbott v. Perez*, 138 S. Ct. 2305, 2331 (2018). Far from being inevitably shown, as Plaintiffs erroneously suggest, *see* Mot. 4, the Supreme Court recently explained that §2 claims "rarely" succeed because the statute's "exacting requirements, instead, limit judicial intervention to those instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." *Allen v. Milligan*, 599 U.S. 1, 29–30 (2023) (quotation and alteration marks omitted). The district court found that this is not one of the rare cases where judicial intervention will be justified. Its findings of fact were not clearly erroneous.

The court performed a detailed analysis of the expert and lay evidence submitted on the nine so-called "Senate Factors" that guide a totality-of-circumstances analysis, PI Order 45–57, finding that at least four (2, 3, 7, 9) affirmatively favor Legislative Defendants, *id.* at 47–49, 51, and that Plaintiffs failed to show that other factors (1, 4, 5, 6, 8) favored their case. *See, e.g.*, *id.* at 47–50. But *none* were found to favor Plaintiffs. *See id.* at 47–58. Further, the court credited the analysis of Legislative Defendants' expert, Dr. Alford, showing that "under the totality of circumstances, voting is politically polarized, not racially polarized." *Id.* at 51; *see also id.* at 51–57. Plaintiffs have no realistic prospect of

showing clear error in the ultimate vote-dilution determination. Even if they identified some error, the appellate remedy would be vacatur and remand—not reversal and the instantaneous imposition of a remedial plan, as Plaintiffs demand.

2. Plaintiffs have effectively conceded the weakness of their appeal by declining to move this Court for an injunction pending appeal, as they did in a previous appeal they took in this case—prior to the district court's ruling—before withdrawing the same motion.[1] *See Pierce v. N.C. Board of Elections*, No. 23-2317, Doc. Nos. 4, 30, and 34 (4th Cir. 12/29/23; 01/03/24; 01/04/24). The typical path for appellants seeking interim relief on a highly expedited basis is through an emergency motion for a stay or injunction pending appeal (which is often brought in conjunction with a motion to expedite). But that requires a showing of, among other things, a likelihood of success. Plaintiffs appear to recognize that the many adverse findings of fact foreclose their ability to meet that standard.

But the same considerations undercut their demand for expedition. The Court should not ratify Plaintiffs' effort to transform this entire *appeal* into an emergency motion where Plaintiffs implicitly admit they cannot succeed on an emergency motion. Plaintiffs' demand (if granted) would impose stark burdens on the Court and the parties. The schedule Plaintiffs propose is not just expedited; it is extremely expedited. Plaintiffs would have Legislative

[1] The Court promptly dismissed that appeal for lack of jurisdiction.

Defendants file a full-length answering brief just three business days after they file a full-length opening brief and be prepared to deliver oral argument just two days after briefing closes. *See* Mot. 6. They demand a ruling from the Court—reviewing a thorough, 69-page preliminary-injunction order based on a record of more than 700 pages, *see* PI Order 4—in just three to five days after oral argument. Mot. 6. The burdens bound up in Plaintiffs' demand are too severe to impose in a case where Plaintiffs (rightly) display so little faith in their own odds of success.

3. Moreover, the effort of an expedited appeal is certain to be futile. The district court rightly held that "the requested injunction would constitute a textbook violation of *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006) (per curiam), and its progeny," which hold that election-related injunctions should not issue "just weeks before an election, much less [during] an ongoing state election." PI Order 3. The court explained: "**Absentee ballots are in the mail**." *Id.* (emphasis added). On February 15—the date of a requested appellate ruling—"**in-person early voting begins**." *Id.* at 15 (emphasis added). The district court therefore had no choice but to conclude that the *Purcell* doctrine bars federal judicial intrusion, as an injunction will (if granted) inflict "chaos and voter confusion" on North Carolina. *Id.* at 66. The district court did not clearly err in its findings, and Plaintiffs have no realistic prospect of proving otherwise on appeal.

Indeed, any other ruling would have been reversible error, given "that federal appellate courts should stay injunctions when . . . lower federal courts contravene [the *Purcell*] principle." *Merrill v. Milligan*, 142 S. Ct. 879 (2022)

(Kavanaugh, J., concurring). In *Milligan*, the Supreme Court intervened to stay a three-judge panel's redistricting injunction, which was issued "seven weeks" before delivery of ballots for absentee voting in "the primary elections." *Id.* at 879 (Kavanaugh, J., concurring). According to the two Justices whose votes were decisive, the strength of the *Purcell* principle, standing alone, compelled that result. *Id.* at 879–82. That principle applies with overwhelming force here, where there are not *weeks* until voting: it is *happening now*. The Supreme Court has not been shy to stay injunctions in far less severe circumstances than those present here. *See, e.g.*, *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers); *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018); *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Chabot v. Ohio A. Philip Randolph Inst.*, 139 S. Ct. 2635 (2019); *Michigan Senate v. League of Women Voters of Michigan*, 139 S. Ct. 2635 (2019); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Clarno v. People Not Politicians Oregon*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020). The district court wisely decided not to make itself the latest "textbook" example of a lower-court *Purcell* error. PI Order 3.

Plaintiffs insist *Purcell* poses no problem because no primary elections are scheduled in the districts they challenge, and (in the manner of a television infomercial) Plaintiffs say there is much benefit to be had in this appeal—but

only if the Court *acts now*. *See* Mot. 3, 7. Plaintiffs ignore that the district court found Plaintiffs' proposed remedy would in fact "*necessitate a new statewide Senate districting plan*." PI Order 28 (emphasis added). That is because Plaintiffs' demonstration district severed Vance County from its county grouping,[2] leaving the remaining counties in the grouping (Franklin and Nash) without enough population to form a senate district, requiring those counties to be paired with counties in other groupings to balance population. *Id.* To implement such a proposal, "the General Assembly would then have to regroup the remaining 92 counties under" the North Carolina whole-county formula "and *redraw all other Senate districts*." *Id.* at 63 (emphasis added). There is no "simple" remedy that leaves "wholly untouched the 48 other districts" in North Carolina's senate plan, *contra* Mot. 3. A remedy would instead "reset the county grouping algorithm," PI Order 30, requiring a new statewide plan.

Make no mistake: Plaintiffs are asking this Court to order North Carolina to halt voting in senate contests across the State, cancel ballots already cast, reissue and resend ballots for new primary elections, and conduct all senate

---

[2] Under the North Carolina constitution's Whole County Provision, counties are grouped together by population for purposes of redistricting. PI Order 18–24 (discussing *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002), and its progeny). In 2021, the General Assembly adopted an algorithm produced by a group of mathematicians, one of whom was Plaintiffs' expert, Blake Esselstyn, *see* PI Order 27–28, to determine county groupings for each chamber in the General Assembly that minimize the number of counties traversed by district lines. The county groupings used in the challenged senate plan produced two optimal county groupings for the districts at issue. Vance County is not included in either grouping.

primaries at an unconventional time. Simply put, they ask this Court to place the State at a severe risk of an election meltdown. The *Purcell* doctrine forbids federal courts from inflicting that "chaos and voter confusion." *Id.* at 66.

4. For all these reasons, the hyper-expedited schedule Plaintiffs demand is pointless. Redistricting litigation is "complex," and it should not become "a game of ambush." *In re Landry*, 83 F.4th 300, 303 (5th Cir. 2023). That is what Plaintiffs demand here.

Plaintiffs' rocket-docket proposal demands a merits decision from this Court by February 15, just 17 days from today, and demands that this Court order the district court to "adopt remedial districts by February 28," so that this Court may then adjudicate future remedial appeals and "enter a final decision adopting remedial districts by March 6," allowing just a week for candidate qualifications and a special primary election on May 14. *See* Mot. 8. But Plaintiffs have virtually no chance of success, and even if they did—given the number of factual determinations at issue—the only plausible appellate remedy would be vacatur and remand for the district court to conduct further fact-finding consistent with the Court's decision. *Hill*, 867 F.3d at 510; *see also, e.g.*, *Levy v. Lexington Cnty., S.C.*, 589 F.3d 708, 720 (4th Cir. 2009) (vacating and remanding §2 ruling based on legal errors).

Moreover, Plaintiffs have not fulfilled their duty to complete the appellate record. As noted, the court conducted a hearing on January 10, it contains information relevant to this appeal, and Plaintiffs have not ordered the transcript as required by this Court's rules. *See* Local Rule 10(c) ("The appellant has the

duty of ordering transcript of all parts of the proceedings material to the issues to be raised on appeal whether favorable or unfavorable to appellant's position."). The January 10 transcript contains information relevant to Dr. Barreto's credibility and potentially to issue preservation. Plaintiffs were therefore obligated to order it and include it in the joint appendix. Now, 19 days after the hearing, Plaintiffs still have not ordered the transcript, even though they were clearly planning this appeal all along (as evidenced by their baseless appeal *prior* to the district court's ruling). Legislative Defendants are ordering the transcript to make up for this failing, but the appeal cannot be fairly considered on an expedited basis due to this failing.

Plaintiffs' contention that the "stakes" justify their unreasonable approach, Mot. 6, cannot overcome their own failure to complete the record promptly or the fact that their proposal is entirely unrealistic and not worth the burdens. Besides, the stakes in this case are not particularly high as a comparative matter. As the district court noted, other redistricting cases are pending now in North Carolina, including a challenge before a three-judge district court to the State's congressional, senate, and house plans. PI Order 64; *N.C. State Conf. of the NAACP v. Berger*, No. 1:23-cv-1104 (M.D.N.C. Dec. 19, 2023); *see also Williams et al. v. Hall et al.*, No. 1:23-cv-1057 (M.D.N.C. Dec. 4, 2023). Those cases impact significantly more voters than this one, the stakes are considerably higher, and any appeals will go directly to the U.S. Supreme Court. *See* 28 U.S.C. § 1253. But they have not been expedited in any way, and the plaintiffs' counsel in those matters appear to recognize that it is not possible for

those cases to be resolved in time to impact the 2024 elections. There is no reason under the circumstances for expedition in this comparatively lower-stakes case. The Court therefore should deny the motion to expedite in full.

5. Alternatively, even if the Court sees value in an expedited appeal, Legislative Defendants request a sufficient time to prepare an adequate appellees' case. Expedition can admit various degrees, and Plaintiffs are demanding perhaps the most expedited schedule imaginable, permitting only three business days for an answering brief and setting oral argument as soon as the second day after briefing is closed. Mot. 6. Those burdens are patently unreasonable. Plaintiffs tendered their request for the first time less than two weeks from the proposed answering-brief due date and two weeks from the oral argument date they request, Legislative Defendants' legal teams are occupied with a full panoply of other cases, and scheduling had long been made in numerous other matters well before Plaintiffs tendered the instant motion. It would be highly prejudicial to Legislative Defendants to be compelled into the stark deadlines Plaintiffs demand.

Accordingly, if the Court somehow sees value in considering this exceptionally weak case on an expedited time frame, it should at a minimum afford Legislative Defendants 10 days to prepare and file an answering brief from the date of service of Plaintiffs' opening brief[3] and at least five days from the

[3] Legislative Defendants take no position on appropriate filing deadlines to govern Plaintiffs.

close of briefing to make arrangements and prepare for oral argument. Indeed, the Court should consider resolving this case without oral argument, given that just one unassailable credibility determination commands affirmance and that it would be a waste of the parties' and the Court's resources to conduct an oral argument.

For the foregoing reasons, the motion to expedite should be denied or, alternatively, denied in part.

/s/ Richard B. Raile

Phillip J. Strach
Thomas A. Farr
Alyssa M. Riggins
Cassie A. Holt
Alexandra M. Bradley
301 Hillsborough Street
Suite 1400
Raleigh, North Carolina 27603
(919) 329-3800
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
cassie.holt@nelsonmullins.com
alex.bradley@nelsonmullins.com

Richard B. Raile
Katherine L. McKnight
Trevor M. Stanley
Benjamin D. Janacek
1050 Connecticut Ave. NW,
Suite 1100
Washington, DC 20036
(202) 861-1711
rraile@bakerlaw.com
kmcnight@bakerlaw.com
tstanley@bakerlaw.com
bjanacek@bakerlaw.com

Patrick T. Lewis
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
(216) 621-0200
plewis@bakerlaw.com

Counsel for Legislative Defendants-Appellees

CERTIFICATE OF COMPLIANCE

1. This opposition brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 3,065 words.

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

Dated: January 29, 2024

/s/ Richard B. Raile

Richard B. Raile
1050 Connecticut Ave. NW,
Suite 1100
Washington, DC 20036
(202) 861-1711

Counsel for Legislative Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2024, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 29, 2024

/s/ Richard B. Raile

Richard B. Raile
1050 Connecticut Ave. NW,
Suite 1100
Washington, DC 20036
(202) 861-1711

Counsel for Legislative Defendants-Appellees