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, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Legislative Defendant Intervenors.

CASE NO. 1:18-cv-1034

LEGISLATIVE DEFENDANTS' REPLY IN SUPPORT OF CONDITIONAL MOTION TO STAY PENDING APPEAL

INTRODUCTION

Absentee voting in the 2024 general election is set to begin on September 6, 2024, four weeks from now. *See* N.C. Gen. Stat. § 163-227.10. The State Board, which is now focused on last-minute election preparations, represented to the Court that counties would "need to know that they need to alter their absentee ballots by, essentially, July 1st." 5/9/24 Tr. at 1087:22–1088:2. The State Board has not informed the Court otherwise, and that date passed a full month ago. It is too late to enjoin S.B. 824 for the 2024 general election.

Plaintiffs, however, prefer to act as if election laws can change at a moment's notice, with no administrative consequences or erosion of public confidence. Indeed, even though S.B. 824 has been in force for over a year, Plaintiffs continue to label voter ID a "novel requirement[]." Resp. at 14, Doc. 341. North Carolina voters and election officials have used the law for the 2023 municipal elections, the 2024 first primary elections, and the 2024 second primary elections. S.B. 824 is not novel. The 2024 general election is too close for the "[l]ate judicial tinkering with election laws" that Plaintiffs desire. *Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 226 (4th Cir. 2024) (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring in grant of applications for stays)).

Accordingly, if the Court enters judgment in Plaintiffs' favor, the Court should simultaneously stay pending appeal its judgment and any injunction against enforcement of S.B. 824. Legislative Defendants would immediately appeal such a judgment and would have a likelihood of again prevailing on appeal. *Cf. N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). Both *Purcell* and the traditional stay factors weigh heavily in Defendants' favor.

ARGUMENT

I. <u>The Court Should Consider This Motion If the Court Rules Against S.B. 824.</u>

Legislative Defendants' conditional motion to stay pending appeal will become ripe for decision simultaneously with any judgment the Court decides to enter in Plaintiffs' favor. Of course Legislative Defendants are not, as Plaintiffs suggest, asking the Court to "premature[ly]" grant this motion before entering any sort of judgment. Resp. at 4. Indeed, as explained in Legislative Defendants' proposed findings of fact and conclusions of law, the Court should find that S.B. 824 does *not* violate the Fourteenth or Fifteenth Amendments to the U.S. Constitution or Section 2 of the Voting Rights Act. If the Court correctly upholds S.B. 824, then this motion is unnecessary. But due to the severe harm an eleventh-hour injunction against S.B. 824 would inflict on the State of North Carolina, and in light of the chaos and erosion of public confidence such an injunction would cause, Legislative Defendants are not going to "sleep upon their rights." *Perry v. Judd*, 471 F. App'x 219, 224 (4th Cir. 2012) ("equity ministers to the vigilant"). The People of North Carolina overwhelmingly voted to enshrine the photo voter-ID requirement in the State Constitution six years ago, and they should not have their policy choice frustrated once again on the eve of a presidential and gubernatorial general election.

"When there is reason to believe that an appeal will be taken, there is no reason why the district court should not make an order preserving the status quo during the expected appeal." ALAN WRIGHT & ARTHUR R. MILLER, 11 FED. PRAC. & PROC. § 2904 (3d ed.). Plaintiffs cite a decision about dissolution of a bankruptcy stay and inapposite cases from outside the Fourth Circuit for the idea that the Court must wait for Legislative Defendants

to file their notice of appeal before staying the Court's judgment. *See* Resp. at 5 (citing *Mayo v. Fed. Nat'l Home Loan Mortg. Corp.*, 2015 WL 11112409 (E.D. Va. Mar. 31, 2015), and other cases). But this "argument[] would make [Fed. R. Civ. P. 62(c)] a nullity and [is] unsound." WRIGHT & MILLER, *supra* § 2904. This Court has inherent authority under Fed. R. Civ. P. 62 to stay its own judgment. While Plaintiffs claim "Legislative Defendants cite to no authority for" the Court doing so, Resp. at 5, the Court immediately stayed its judgment in 2016 with H.B. 589, *see* Leg. Defs.' Memo. Supporting Conditional Mot. to Stay Pending Appeal at 2-3, Doc. 337 ("Memo.") (citing *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 526 (M.D.N.C. 2016) (invoking *Purcell* to extend pretrial injunction against enforcement of provisions in H.B. 589 for election two months away despite simultaneously ruling in favor of defendants)).

As in *McCrory*, the Court should enter a simultaneous order staying its own judgment if the Court enters judgment against Defendants. Otherwise, the Court would disrupt "the status quo" on the eve of the 2024 general election. *Wise v. Circosta*, 978 F.3d 93, 98 (4th Cir. 2020) (en banc). Legislative Defendants' request is not premature.

II. ***Purcell* Prohibits Altering Election Laws for the 2024 General Election.**

Because this is an election law case, and because absentee voting for the 2024 general election begins just four weeks from now, the *Purcell* principle "against federal courts enjoining state election laws in the period close to an election" applies. *Pierce*, 97 F.4th at 229. Despite Plaintiffs' insistence that the ordinary four-part standard for a stay pending appeal applies here, *see* Resp. at 5–6, the "traditional test for a stay does not apply (at least not in the same way)" if the Court issues an injunction of North Carolina's

"election law in the period close to" the 2024 general election. *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Contrary to Plaintiffs' insistence that "no court has asserted that *Purcell* is a per se rule" prohibiting last-minute injunctions of election laws, Resp. at 10, many of the Supreme "Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may *never* enjoin a State's election laws in the period close to an election." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see Petteway v. Galveston Cnty.*, 87 F.4th 721, 723 (5th Cir. 2023) (en banc) (Oldham, J., concurring and joined by majority of en banc court) (collecting examples).

But the Court does not need to reach that issue to stay any judgment against Defendants because Plaintiffs cannot satisfy even a "a relaxed version of the *Purcell* principle." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Plaintiffs have failed to establish all four requirements that Justice Kavanaugh explained a plaintiff "at least" must establish to satisfy even a relaxed version of *Purcell*. *Id.*

First, Plaintiffs have not argued that "the underlying merits are entirely clearcut in favor of the" Plaintiffs. *Id.* Instead, they completely ignore Legislative Defendants' arguments on this point and the prior rulings of this Court, the Fourth Circuit, and the North Carolina Supreme Court in favor of S.B. 824. *See* Memo. at 8–9. And Plaintiffs' read of the evidence is wrong for the reasons explained in Legislative Defendants' proposed findings of fact and conclusions of law.

Second, Plaintiffs do not explain how Plaintiffs themselves will "suffer irreparable harm absent the injunction." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Plaintiffs still fail to identify a single voter, let alone a member of their organizations, who

will not be able to vote in the 2024 general election because of S.B. 824. Nowhere in their Response do Plaintiffs identify an irreparable harm that they would suffer if S.B. 824 remains in effect for the 2024 general election. At the very most, Plaintiffs claim that the "public interest" weighs in favor of a stay. Resp. at 9. Even if that were so—it is not—Plaintiffs have not established their own need for an immediate injunction.

Third, Plaintiffs have no valid excuse for slow walking this case. Justice Kavanaugh's concurrence in *Milligan* mentioned when plaintiffs brought "the complaint to court" because that was the relevant timing concern in that case, which involved a redistricting map both enacted and immediately challenged a mere three months before the Supreme Court stayed the preliminary injunctions. 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see Singleton v. Merrill*, 582 F. Supp. 3d 924, 938–41 (N.D. Ala. 2022). Justice Kavanaugh's framing of the relaxed version of *Purcell* hardly lets plaintiffs off the hook for subsequently slow walking a case, as Plaintiffs did here. *See* Memo. 9–10. Plaintiffs did not even immediately request a trial date when they moved to lift the stay on June 9, 2023, Doc. 202. Instead, they waited until October 2023 to request an unrealistic trial date that would have fallen in the middle of early voting for the 2024 first primary election. *See* Mot. to Set a Trial Date, Doc. 215.

Defendants did not ask for trial to occur in May 2024. *Contra* Resp. at 19. Rather, Legislative Defendants warned the Court even before Plaintiffs requested a trial date that a trial in "May 2024" would trigger *Purcell* and likely "lead to confusion" and "other negative ramifications" for the 2024 general election. Ex. A, 7/26/2023 Tr. of Status Conf. at 41:5–17. Plaintiffs made the conscious decision to (unsuccessfully) seek the reopening

of discovery instead of immediately moving the case toward trial. The cost for Plaintiffs' delay should not be borne by the State of North Carolina.

Fourth, while Plaintiffs argue that enjoining S.B. 824 might "[n]ot [m]ake the [e]lection [i]mpossible to [a]dminister," Resp. at 14, they have failed to establish that there would not be "significant cost, confusion, or hardship" from doing so, *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). The State Board's instruction that July 1, 2024, was the deadline for the largest counties to finish altering their absentee ballots has not changed. *See* 5/9/24 Tr. at 1087:22–1088:2. Absentee ballot materials must be designed, procured, printed, and ready for mailing to voters 60 days before the 2024 general election. *See* N.C. Gen. Stat. § 163-227.10. Photo voter-ID impacts numerous aspects of the absentee ballots' design. *See* 5/8/24 Tr. at 723:7–25 (Karen Brinson Bell explaining that S.B. 824 required "redesign[ing] the envelope," editing instructions, including a pouch for voters "to put either the copy of their photo ID or the Exception Form" in, and adding "an arrow directing [voters] to the slot in the" pouch). Enjoining S.B. 824 would require a substantial redesign of the absentee ballot envelopes and instructions that likely is not possible at this late stage. Even if it were, procuring and printing new absentee ballot envelopes and materials would impose a substantial financial cost on the State and "cause unanticipated consequences" throughout the 2024 general election. *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

The only evidence that Plaintiffs claim suggests otherwise, Resp. at 16, is a June 26, 2024 State Board meeting that in fact finalized the Photo ID Exception Form for Absentee Voting. *See Minutes of June 26, 2024 Meeting* at 1, N.C. STATE BD. OF ELECTIONS,

https://bit.ly/3WzOU7b (last visited Aug. 5, 2024). The State Board also provided "additional direction to staff to revise the in-person voting form to match the absentee voting form in the event it is logistically possible for our IT staff to do so" by deleting a single checkbox from the in-person form. *Id.* That additional change would not apply to the absentee ballots that will be mailed to voters just four weeks from now.

Legislative Defendants did not "misrepresent," Resp. at 15, in any way the State Board's statements back in 2020 that early July was the deadline for redesigning absentee ballots in advance of the general election, Memo. at 7. If anything, the State Board has been consistent in its representations that redesigning absentee ballots is not feasible after the beginning of July, either to implement S.B. 824 or to enforce the legal regime that existed before S.B. 824. Enjoining S.B. 824 would still require redesigning and reprinting absentee ballot materials. That cannot happen overnight.

Plaintiffs' focus on the trial record is misplaced because the purpose of the trial was to determine whether S.B. 824 was *facially* unconstitutional under the U.S. Constitution or unlawful under Section 2 of the Voting Rights Act. Plaintiffs did not bring an as-applied challenge for the 2024 general election, and the purpose of trial was not to determine the costs of enjoining S.B. 824 one month (or less) before absentee voting begins. Still, Plaintiffs incorrectly assert that "Legislative Defendants do not cite to the actual trial record in this case." Resp. at 13–14. Legislative Defendants cited the testimony of Plaintiffs' witness Marcus Bass (the executive director of Advance Carolina and the deputy director of the North Carolina Black Alliance) that swift changes in election policy hinder voter engagement. *See* Memo. at 6 (citing 5/9/24 Tr. at 1043:12–13, 1058:22–24, 1059:24–

1060:4, 1083:2–11). Yet Plaintiffs ignore his testimony and ask for a last-minute election law change.

The "principles" that Plaintiffs say "emerge" from *Purcell* cases, Resp. at 11, are the exact opposite message that *Purcell* sends to lower courts: "'[F]ederal courts ordinarily should not enjoin a state's election laws in the period close to an election,' and . . . when 'lower federal courts contravene that principle,' the Supreme Court will stop them." *Pierce*, 97 F.4th at 226 (quoting *Milligan*, 142 S. Ct. at 879–80 (Kavanaugh, J., concurring)). *Purcell* does not give district courts "flexibility" to change states' election laws shortly before elections or to "consider the trial record carefully for evidence . . . of the actual risk of voter and election administrator confusion or disruption." Resp. at 11. *Purcell* presumes that last-minute election law changes upset "the stability and sense of repose that engender trust and confidence in our elections." *Pierce*, 97 F.4th at 229. That a shorthanded Supreme Court did not stay two injunctions in 2016, *see* Resp. at 11, does not give this Court license to rewrite North Carolina's election laws before the 2024 general election. *Cf. Robinson v. Callais*, 144 S. Ct. 1171 (May 15, 2024) (staying a district court ruling in advance of Louisiana's November 2024 elections); *North Carolina v. N.C. State Conf. of the NAACP*, 137 S. Ct. 27 (2016) (indicating that four of the eight Justices would have granted a stay).

III. <u>The Traditional Stay Factors Also Weigh in Defendants' Favor.</u>

Even if *Purcell* did not independently require the Court to stay an injunction of S.B. 824 so soon before the 2024 general election, Defendants are entitled to a stay under the traditional stay factors.

First, Legislative Defendants have "made a strong showing that" they are "likely to

succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The prior decisions of this Court, the Fourth Circuit, and the North Carolina Supreme Court all show that, when the correct legal standard is applied, Legislative Defendants ought to prevail. *Brnovich v. Democratic National Committee* shows how difficult it will be for Plaintiffs to prevail on their Section 2 claim. 594 U.S. 647, 680–81 (2021) (upholding Arizona laws and rejecting Plaintiffs' approach to statistical disparities). *Brnovich* does not stand for the idea that appellate courts will be "tremendously deferential," Resp. at 6, to this Court enjoining a law that "is commonplace and eminently sensible." *Middleton v. Andino*, 976 F.3d 403, 405 (4th Cir. 2020) (en banc) (Wilkinson & Agee, J.J., dissenting from denial of stay), *rev'd*, 141 S. Ct. 9 (granting stay). Legislative Defendants have not "conced[ed]" that "they cannot establish clear error" or a "likelihood of success on the merits." Resp. at 7. "[R]ational minds could resolve the issues in favor of Legislative Defendants and uphold S.B. 824," Memo. at 11–12, because that is the only correct result.

Second, the State would of course be harmed by this Court prohibiting enforcement of S.B. 824. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). The General Assembly democratically enacted S.B. 824 after 55.49% of North Carolina voters directly voted in favor of the voter-ID amendment, the validity of which Plaintiffs have not challenged. *See 11/06/2018 Official General Election Results – Statewide (Referenda)*, N.C. STATE BD. OF ELECTIONS, https://bit.ly/3zprNnL (last visited Aug. 5, 2024). The People of North Carolina want, indeed require, the use of photo voter-ID in their elections. This Court should not leave them yet again without a voter-ID law in effect for their elections.

Third, Plaintiffs again fail to explain how a stay would "substantially injure" them. *Nken*, 556 U.S. at 434. They still cannot identify a single North Carolina voter who will not be able to vote in the next election because of S.B. 824. Photo voter-ID was in effect for the 2023 municipal elections, 2024 first primary elections, and 2024 second primary elections with great success, and it did not "disenfranchise hundreds of thousands of voters," as Plaintiffs claim. Resp. at 9.

Fourth, the public interest weighs in favor of a stay. Changing election laws has unintended consequences, and enjoining S.B. 824 would not "*remove* novel requirements." Resp. at 14. The law has been in effect for over a year. The State Board, the NAACP entities, and numerous other organizations have educated voters about the law, and voters expect it to remain in effect. The public would not be served by more "judicially created confusion." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 425 (2020). If the status of S.B. 824 is going to change again, then there should be only one more change that "finally and definitively" resolves Plaintiffs' claims. *Middleton*, 976 F.3d at 407 (Wilkinson & Agee, J.J., dissenting from denial of stay), *rev'd*, 141 S. Ct. 9 (granting stay).

CONCLUSION

If the Court enters judgment in Plaintiffs' favor, Legislative Defendants respectfully ask the Court to stay pending appeal its judgment and any injunction against enforcement of S.B. 824.

Dated: August 5, 2024

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Reply, including, body, headings, and footnotes, contains 2,969 words as measured by Microsoft Word.

/s/ Nicole J. Moss
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on August 5, 2024, I electronically filed the foregoing Reply 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.

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