

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS; CHRISTINE)
BOWSER; and SAMUEL LOVE,)

Plaintiffs,)

v.)

PATRICK MCCRORY, in his capacity)
as Governor of North Carolina; NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS; and JOSHUA HOWARD,)
in his capacity as Chairman of the North)
Carolina State Board of Elections,)

Defendants.)

**DEFENDANTS' BRIEF
REGARDING SCHEDULING
AND REQUEST FOR ORAL
ARGUMENT**

INTRODUCTION

This is not a standard case. It is an exceptional case with complex issues of law and fact. Nevertheless, the Court has already expedited this case by adopting a discovery schedule that allows for less time for discovery than what is routinely allowed in all other cases in this district.

Defendants ask that the court set further scheduling deadlines in a manner that provides defendants with the minimal due process protections established by the Local Rules of the Middle District. More specifically, defendants ask that dispositive motions be due thirty days after discovery is completed and that any trial date be scheduled no earlier than 18 August 2014 or on such date thereafter as may be convenient to the Court.

There is no precedent whatsoever for permanently enjoining precleared congressional elections for all thirteen of North Carolina's congressional districts at this stage of the 2014 election cycle. Thus, there is no reason why defendants should be singled out and denied the standard due process procedures that are given to all litigants in this district. If the Court feels compelled to consider injunctive relief for this election cycle, defendants respectfully request that the Court set a hearing on plaintiffs' motion for a preliminary injunction.

BACKGROUND

On 20 February 2014, the Court approved a Joint 26(f) report, filed by the parties, following prior conferences with the Court. Under this report, at the instruction of the Court, discovery was set to end on 1 May 2014. Thus, this case has already been "expedited" to the extent the parties have been granted substantially less time to complete discovery as compared to the four-month period allowed for even "standard cases" under the local rules. *See* Local Rule 26.1(a)(1).

On 17 March 2014, the Court entered a text order directing the parties to confer and then to submit proposals regarding the scheduling of dispositive motions and a trial date.

On 21 March 2014, plaintiffs submitted a schedule that would require the filing of summary judgment motions on 7 April 2014 (or three weeks before the close of an already expedited discovery period), responses on 7 May 2014 (or only 6 days following the close of discovery), replies on 19 May 2014, and a trial on 23 June 2014. (See Exhibit 1.)

On 21 March 2014, defendants responded with a proposal that summary judgment motions be filed on 2 June 2014, thirty days after the close of discovery. This is the standard amount of time given to all litigants under the local rules. *See* Local Rule 56.1(b). Defendants also suggested that responses be filed on 23 June 2014 and any that replies be filed on 3 July 2014.

Defendants also suggested a trial date in late August or September or later as may be convenient for the court.

Defendants' proposal mirrors the type of schedule that is anticipated by the local rules for all cases. Defendants also suggested this schedule because of other equally important case and client responsibilities. These include, but are not limited to, substantial responsibilities that must be met by defendants counsel in three complex voting rights cases pending in the middle district. *See North Carolina State Conference of the NAACP, et al v. Patrick Lloyd McCrory, et al.*, 1:13-CV-658; *League of Women Voters of North Carolina, et al. v. The State of North Carolina, et al.*, 1:13-CV-660; *United States of America v. The State of North Carolina, et al.*, 1:13-CV-861. These cases involve challenges under the United States Constitution and Section 2 of the Voting Rights Act of several election law changes made by the General Assembly in 2013.¹

¹ We ask that the Court review the complaints filed in these cases to understand the daunting task facing defendants' counsel in these cases. One of the plaintiffs is the United States Department of Justice. Other plaintiffs include several national organizations. Discovery in this case has been extensive and the issues are complex. Notably, while the Court expedited the scheduling of a preliminary injunction hearing in these cases, it did not expedite the schedule for dispositive motions or trial. Attached is a scheduling order for these cases showing that expert reports are due in April. Briefing related to motions for plaintiffs' motion for preliminary injunctions and defendants' motions under Rule

ARGUMENT

As has been briefed by the parties, the claims in this case involve Congressional districts established by the General Assembly in July of 2011 that were promptly precleared by the United States Department of Justice. The two plaintiffs are members of organizational plaintiffs who made identical claims in the combined state court cases of *Dickson et al v. Rucho et al* and *North Carolina States Conferences of Branches of the NAACP v. State of North Carolina*, Nos. 11 CVS 16896 and 11 CVS 16940, now pending before the North Carolina Supreme Court under Docket No. 201PA12-2 (“the *State Redistricting Cases*”). Defendants have submitted the detailed opinion by the three-judge superior court in the *State Redistricting Cases* entered on 8 July 2013. (See D.E. 30-1, 30-2.) Plaintiffs in this case elected not to file their complaint in this action until 24 October 2013, more than three months after the trial court issued its decision in the *State Redistricting Cases* and nearly a year after elections were held in the challenged districts in November 2012. Plaintiffs’ preliminary injunction motion was not filed until 24 December 2013.

As we have fully explained, and as plaintiffs here have failed to rebut, there is no legal precedent for permanently enjoining congressional elections under precleared plans this late in the election cycle. Defendants, who represent the interests of the people of North Carolina, do not understand why plaintiffs, as a matter of equity, should be entitled

12(c), Fed. R. Civ. P., all commence in May and continue through June. (See Exhibit 2.) The parties have proposed that a hearing on these motions be set for July but no date has yet been set.

to have any aspect to this case expedited simply because they purposefully waited to file this action until after the results of the first election in the now-challenged districts were known and the trial court in the *State Redistricting Cases* had already rejected the same claims they seek to bring here with respect to the First and Twelfth Congressional Districts.

Moreover, as shown by the briefs already filed in this case, plaintiffs have utterly failed to prove that they are entitled to a preliminary injunction in this matter. But even if they had made such a showing, this court should defer from making any ruling in this case until resolution of the *State Redistricting Cases*. (See D.E. 44, 52.) Finally, in addition to evidence showing that plaintiffs' claims lack substantive merit, based upon written discovery responses served by plaintiffs, defendants believe they will be able to present evidence at the summary judgment stage showing that plaintiffs are bound by the judgment of the trial court (and any judgment entered in the future by the North Carolina Supreme Court) in the *State Redistricting Cases* under the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) and that plaintiffs are therefore barred from bringing their claims in this case.

Defendants' counsel has other important client responsibilities, including significant responsibilities in three other voting rights cases described above that are also pending in this district. These three cases are equally important to the interests of the people of North Carolina. The expedited schedule proposed by the plaintiffs is completely inconsistent with even the minimal due process guarantees provided to litigants under the local rules and will work a substantial hardship on defendants and their

counsel and their ability to defend this case and the other three voting rights cases pending in this district.

The schedule proposed by the defendants is reasonable, substantially complies with the normal procedures as found in the local rules, and gives the court ample opportunity to consider all motions that will be pending after the briefing schedule for dispositive motions is completed.

If the Court determines that injunctive relief for the 2014 election cycle should be considered, defendants respectfully request that it schedule a hearing on plaintiffs' motion for a preliminary injunction rather than adopt a truncated scheduling order for dispositive motions and trial as plaintiffs have requested. Defendants also respectfully request that the Court set an in-person hearing regarding the scheduling of dispositive motions and trial before entering any order regarding these matters in this action.

CONCLUSION

For the foregoing reasons, defendants pray that the Court not adopt plaintiffs' proposed expedited schedule, that dispositive motions be due thirty days after discovery is completed, and that any trial date be scheduled no earlier than 18 August 2014 or on such date thereafter as may be convenient to the Court.

This the 25th day of March, 2014.

ROY COOPER
ATTORNEY GENERAL OF NORTH
CAROLINA

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State Board of Elections and Joshua Howard,
in his capacity as Chairman of the North
Carolina State Board of Elections*

CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Defendants' Brief Regarding Scheduling** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 25th day of March, 2014.

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17449971.1

EXHIBIT 1

Farr, Thomas A.

From: Speas, Edwin M. <espeas@poynerspruill.com>
Sent: Friday, March 21, 2014 10:05 AM
To: Peters, Alec
Cc: O'Hale, John W.; Farr, Thomas A.; Strach, Phillip J.; Mackie, Caroline P.; John Devaney; Abha Khanna
Subject: Re: Harris v. McCrory Schedule

Alec and Tom,

With regard to the schedule for going forward, Plaintiffs propose the following: our SJ papers filed on 4/7; your response on 5/7; our reply on 5/19. We also propose a 3 day trial on any reminding issues beginning 6/23.

We believe this schedule fits the parameters Judge Osteen described in our conference call.

We look forward to your response.

Eddie

Sent from my iPhone

Sent from my iPhone

On Mar 13, 2014, at 5:10 PM, "Peters, Alec" <apeters@ncdoj.gov> wrote:

John, we have no objection to the stipulation or the motion and proposed supplement.

— Alec

From: O'Hale, John W. [<mailto:johale@poynerspruill.com>]
Sent: Thursday, March 13, 2014 4:00 PM
To: Peters, Alec; thomas.farr@ogletreedeakins.com; phil.strach@ogletreedeakins.com
Cc: Speas, Edwin M.; Mackie, Caroline P.
Subject: Harris v. McCrory

Dear Alec, Tom, and Phil:

Please see the attached draft Stipulation as to Dismissal of Samuel Love. Please confirm that we may file this document with your signatures.

Please also see the attached draft Motion to Supplement Reply, Proposed Supplement, and Proposed Order. Please let us know if we may recite that the Defendants do not object to the Motion.

Thanks.

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Farr, Thomas A.

From: Farr, Thomas A.
Sent: Friday, March 21, 2014 3:31 PM
To: Speas, Edwin M.; Devaney, John (Perkins Coie); Peters, Alec; Strach, Phillip J.; McKnight, Michael D.
Subject: Harris schedule

Dear Eddie

We propose that, consistent with the rights granted to all litigants under the local rules all summary judgment motions be filed on or June 2, 2014.

We suggest that responses be filed on June 23, 2014, and that replies be filed on July 3, 2014.

The court should be asked to schedule a hearing on all pending motions in July on a date that does not conflict with the Holder preliminary injunction hearing and a trial date in August or September as may be convenient for the court.

The schedule you propose would work a hardship on the state defendants and the ability of counsel for the state to defend preliminary injunction motions that will be briefed and argued in the Holder case in May, June and July.

We believe this schedule fits within the parameters of Judge Osteen's instructions.

Also please let us know about deposition dates Michael McKnight has proposed for the plaintiffs. We should also talk about dates for expert depositions. We also probably need to discuss issues related to evidence from the Dickson case and how the parties may submit this evidence to the court.

Best wishes.

Tom

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EXHIBIT 2

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

NORTH CAROLINA STATE CONFERENCE)
OF THE NAACP, et al.,)
)
) Plaintiffs,)
)
) v.) 1:13CV658
)
) PATRICK LLOYD MCCRORY, in his official)
) capacity as Governor of North Carolina, et al.,)
)
) Defendants.)
)
 _____)

LEAGUE OF WOMEN VOTERS OF)
NORTH CAROLINA, et al.,)
)
) Plaintiffs,)
)
) v.) 1:13CV660
)
) THE STATE OF NORTH CAROLINA, et al.,)
)
) Defendants.)
)
 _____)

UNITED STATES OF AMERICA,)
)
) Plaintiff,)
)
) v.) 1:13CV861
)
) THE STATE OF NORTH CAROLINA, et al.,)
)
) Defendants.)
)
 _____)

SCHEDULING ORDER

These cases come before the Court following a scheduling hearing held on December 12, 2013. In the first case (1:13CV658), the North Carolina State Conference of the NAACP

and other individuals and churches (collectively, “the NAACP Plaintiffs”) challenge portions of the recent North Carolina Voter Information Verification Act (House Bill 589) pursuant to the federal Voting Rights Act, 42 U.S.C. § 1973, and pursuant to the Fourteenth and Fifteenth Amendments to the Constitution. In the second case (1:13CV660), the League of Women Voters of North Carolina and other individuals and groups (collectively, “the League Plaintiffs”) raise similar challenges under the Voting Rights Act, 42 U.S.C. § 1973 and § 1973a, and under the Fourteenth Amendment. Finally, in the third case (1:13CV861), the United States of America, represented by the U.S. Department of Justice, (“the U.S. DOJ Plaintiff”) also raises similar challenges pursuant to the Voting Rights Act, 42 U.S.C. § 1973. In all three cases, the claims are asserted against the State of North Carolina, the members or director of the State Board of Elections, and/or North Carolina Governor McCrory (collectively, “the Defendants”).

Prior to the scheduling hearing in this matter, the U.S. DOJ Plaintiff filed a Motion to Consolidate all three cases for discovery and trial. In addition, the NAACP Plaintiffs and the League Plaintiffs filed their own Motions to Consolidate, seeking consolidation of the cases for purposes of discovery. Defendants agree to consolidation. As discussed during the scheduling hearing on December 12, 2013, the Court has concluded that in light of the parties’ agreement and the overlapping issues and claims in the three cases, the Motions to Consolidate should be granted to the extent that all three cases will be consolidated for purposes of discovery and scheduling. However, any further determination as to how the trial will be structured or how dispositive motion briefing will be allocated among the three cases should be resolved after discovery has concluded.

With respect to the scheduling of discovery and trial, the Court heard from the parties at the hearing on December 12, 2013, and offered the parties two alternative options: (1) a July 2014 trial date, with approximately four months of discovery through April 1, 2014; or (2) a 2015 trial date, with additional time for discovery and the option of preliminary motions, including a Motion for Judgment on the Pleadings and Motions for Preliminary Injunction, during mid-2014. The Court specifically directed all of the Plaintiffs to confer to determine whether they could agree on either of those options. However, while the NAACP Plaintiffs and the League Plaintiffs requested the first option, the U.S. DOJ Plaintiff requested the second option, and took the position that the early trial date would not allow for sufficient time to prepare a full record because additional time would be required to obtain all of the evidence that the U.S. DOJ Plaintiff contends that it needs. Defendants also requested the second option given the scope of discovery contemplated by the parties and the time needed to complete that process. As noted during the hearing, the Court has concerns that the first option, with the July 2014 trial date, would not allow Plaintiffs sufficient time to complete discovery and obtain the evidence needed to proceed on their claims, particularly in light of the concerns raised by Plaintiff U.S. DOJ. In addition, as noted by both Plaintiff U.S. DOJ and Defendants, it does not appear reasonably likely that the parties could complete the discovery they have agreed to, including up to 120 depositions and extensive data collection, in the period of time between now and April 1, 2014. However, in order to allow the issues raised in this case to be presented and heard on an expedited basis prior to implementation of the challenged legislation in the November 2014

elections, the Court also considered a potential schedule for briefing on preliminary motions in 2014. The Court therefore adopts the following schedule:

Event	Deadline
Initial Disclosures	December 20, 2013 with supplementation January 8, 2014
Amendments to Pleadings	January 8, 2014
Preliminary Motions Due (including any Motion for Judgment on the Pleadings by Defendants and any Motions for Preliminary Injunction by Plaintiffs)	May 5, 2014
Responses to Preliminary Motions	May 26, 2014
Replies to Preliminary Motions	June 9, 2014
Expert Reports and Disclosures under Rule 26(a)(2)(B) and 26(a)(2)(C)	December 12, 2014
Rebuttal Expert Reports	January 9, 2015
Sur-rebuttal Expert Reports	January 16, 2015
Close of Discovery	February 2, 2015
Notice of Dispositive Motions	February 12, 2015
Dispositive Motions Due	March 4, 2015
Responses Due	April 3, 2015
Replies Due	April 17, 2015
Trial Setting	July 2015 Civil Master Calendar

The Court notes that if Plaintiffs intend to present expert testimony as part of a preliminary injunction motion, the expert reports and disclosures should be made by April 1, 2014; any rebuttal expert reports should be provided by April 14, 2014; and any sur-rebuttal reports should be provided by April 21, 2014.

With respect to any amendments to the pleadings or requests to join additional parties, any such motions should be filed by January 8, 2014. After that date, the Court will consider whether granting leave would cause a delay in the proceedings or otherwise result in undue prejudice to a party.

With respect to discovery of electronically stored information, the parties will meet on or before December 19, 2013, to determine if they can reach an agreement on those issues. The parties will similarly confer with respect to the scope of any protective order. Any agreements may be submitted for approval as a Consent Order; any disputes may be brought to the Court for resolution during the discovery process under the Rules of Civil Procedure.

This case is exempt from mediation, so no mediation deadlines will be imposed.

Written discovery response times may be adjusted by agreement between the parties or with leave of Court. The Court notes, however, that given the schedule for preliminary motions set out above, the Court anticipates that discovery will proceed on an expedited basis, as discussed during the hearing on December 12, 2013.

With respect to the scope of discovery, the Court adopts the limits agreed upon by all of the parties. Discovery will therefore include up to 60 depositions for all Plaintiffs collectively and up to 60 depositions for Defendants collectively; up to 25 interrogatories and 25 requests for admission served by Defendants as to each Plaintiff group; and up to 25 interrogatories and 25 requests for admission served by each Plaintiff group on Defendants. All of the parties agreed to these limits and agreed to their understanding and interpretation of these limits during the hearing on December 12, 2013.

IT IS THEREFORE ORDERED that the pending Motions to Consolidate [Docs. #28, #31 in 1:13CV658; Docs. #35, #37 in 1:13CV660; Docs. #17, #21 in 1:13CV861] are GRANTED to the extent that these three cases are CONSOLIDATED for discovery and scheduling purposes, but any further determination as to the structure of trial and briefing on dispositive motions will be resolved after discovery has closed.

IT IS FURTHER ORDERED that the Court adopts the deadlines and discovery limits set out above.

This, the 13th day of December, 2013.

/s/ Joi Elizabeth Peake
United States Magistrate Judge