IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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.**	**PLAINTIFFS' REPLY IN SUPPORT OF THEIR RENEWED MOTION FOR ORAL ARGUMENT AND MOTION FOR EXPEDITED CONSIDERATION OF MOTION FOR PRELIMINARY INJUNCTION AND FURTHER PROCEEDINGS**

Plaintiffs submit this Reply in Support of their Renewed Motion for Oral Argument and Motion for Expedited Consideration of Motion for Preliminary Injunction and Further Proceedings ("Motion to Expedite") (Dkt. 49).

I. INTRODUCTION

In their opening brief, Plaintiffs asked the Court to (1) hear oral argument on Plaintiffs' fully briefed motion for preliminary injunction ("PI Motion") in March 2014, and (2) as soon as possible after hearing oral argument, decide the PI Motion and order appropriate relief. *See* Mot. to Expedite at 12. Defendants now agree that oral argument

is appropriate. *See* Defs.' Response to Pls.' Renewed Mot. for Oral Argument and Mot. for Expedited Consideration of Mot. for Prelim. Injunction and Further Proceedings ("Opp'n") at 2 (Dkt. 50). Defendants continue to insist, however, that "there is no reason to expedite the hearing of plaintiffs' motion." *Id*. at 8. Defendants are wrong. In fact, Plaintiffs' opening brief identified compelling reasons to resolve the PI Motion and order a remedial map before the 2014 elections. Defendants ignore those reasons and offer a variety of unpersuasive excuses for delaying this case. Plaintiffs' Motion to Expedite should be granted.

II. ARGUMENT

A. Expedited Consideration Is Necessary to Protect the Fundamental Constitutional Rights of North Carolina's Voters.

The right to vote is "of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation marks and citation omitted). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). Thus, voters suffer an irreparable harm "of great magnitude" when their voting rights are abridged. *Dixon v. Md. State Admin. Bd. of Election Laws*, 878 F.2d 776, 782 (4th Cir. 1989).

Defendants do not deny the fundamental importance of voting rights. Nor do they deny that Plaintiffs and other North Carolinians will be irreparably harmed if they are forced to vote in elections tainted by unconstitutional racial gerrymandering. Instead, Defendants ignore the public interests implicated by this case, hoping the Court will too.

But if Plaintiffs' claims implicate fundamental rights, and if those rights may be jeopardized absent expedited relief—propositions nobody disputes—then it follows that Plaintiffs' claims should be resolved as soon as possible. Indeed, it is difficult to imagine claims more deserving of expedited consideration than claims seeking to prevent an impending unconstitutional election. *See NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 529 (M.D.N.C. 2012) (granting preliminary relief case because "a preliminary injunction during these early stages of the filing period would better serve the public than waiting until the eve of the election"); *Cannon v. N.C. St. Bd. of Educ.*, 917 F. Supp. 387, 391 (E.D.N.C. 1996) (granting preliminary relief in racial gerrymandering case because otherwise "plaintiffs' constitutional rights would be placed in great jeopardy, and the likelihood of irreparable harm would thus be quite high"); *Republican Party of N.C. v. Hunt*, 841 F. Supp. 722, 727-28 (E.D.N.C. 1994) (granting preliminary relief because if "the 1994 elections . . . take place under the present system, the likelihood of irreparable harm to plaintiffs is significant").

B. Defendants Fail to Offer Any Valid Reasons for Delaying This Case.

Notwithstanding the fundamental rights at stake, Defendants ask this Court to ignore Plaintiffs' PI Motion and defer ruling on Plaintiffs' claims until it is too late to grant effective relief before the 2014 elections. Defendants' arguments for slow-walking this case are not persuasive.

First, Defendants argue that Plaintiffs' claims are doomed to fail in light of the July 8, 2013 decision of the North Carolina state trial court in the *State Redistricting Cases*, which is currently on appeal to the North Carolina Supreme Court. *See* Opp'n at 3-4. Defendants are wrong. For one thing, this Court is not bound by the decision of a state trial court—particularly a decision, like the decision in the *State Redistricting Cases*, that involves different parties, different claims, and different evidence (including a new expert analysis). For another, even if this Court is inclined to consult the *State Redistricting Cases*, it will find little persuasive value there. The July 8, 2013 decision focuses on state legislative districts. It rarely refers to the congressional districts at issue here, and then only indirectly and collectively. *See, e.g.*, *State Redistricting Cases*, slip op. at 14 nn.9-10, 20-21 (analyzing CD 1 as one of dozens of "VRA Districts"), 23-44 (making no mention of individual congressional districts in its narrow tailoring analysis). (Dkt. 30-1).[1] Thus, the July 8, 2013 decision hardly "shows that plaintiffs are not likely to succeed on the merits of this case." Opp'n at 4.

[1] Even the little analysis devoted to CD 1 and CD 12 is not persuasive. For example, the state court upheld CD 1 despite finding that it "was predominantly determined by a racial objective" and therefore subject to strict scrutiny. *Id*. at 15. In reaching that conclusion, the court deferred to the Legislature's claim that CD 1 was racially gerrymandered no more than necessary. *See id.* at 44 (emphasizing the Legislature's "leeway" to "exercise political discretion in its reasonable efforts to address compelling governmental interests"). But strict scrutiny prohibits such deference. *See Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013). The state court also found that § 5 of the Voting Rights Act justified the race-based redistricting of CD 1. But § 5's nonretrogression standard imposed no requirement on the state to *increase* the Black Voting Age Population of CD 1. Moreover, the state court failed to grapple with *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), which eliminated § 5 as a compelling government interest justifying racial gerrymandering. The state court relied heavily on § 5, reasoning (without any authority) that *Shelby County* is irrelevant to the present inquiry. *See id*. at 21 n.16.

Second, Defendants oppose Plaintiffs' Motion to Expedite on the ground that the Court must allow the 2014 elections to go forward under Defendants' map, *even if that map is unconstitutional*, because ordering a new map at this juncture would disrupt the 2014 elections. *See id*. at 4-8.

Tellingly, however, Defendants fail to explain *how* the Court would disrupt the elections by ordering a remedial map at this time. At most, Defendants suggest that election officials might have to revise absentee ballots. *See id*. at 4-5. But minor and speculative administrative burdens cannot outweigh fundamental constitutional rights. *See Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1239-40 (M.D. Ga. 2003) (refusing to delay special election despite officials' claims of inconvenience because "[w]hile it might be more convenient, less troublesome and less expensive [to hold the election later], the citizens' right to vote neither rests on nor is subordinate to such conveniences"). In any case, Defendants do not argue that revising absentee ballots would, in fact, disrupt the elections—let alone produce evidence on that score. And Defendants forget that this Court may alter deadlines if necessary to guard against undue disruption or inconvenience. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972). Thus, even if adopting a new map at this time posed some risk of disruption—a risk Defendants have not identified—it would be well within this Court's power to eliminate that risk.

Rather than identifying any real risks to the integrity of the elections, Defendants simply assert that the Court cannot grant relief at this "late date" because "the election process has already begun." Opp'n at 5. Defendants are wrong on the facts and the law. As a factual matter, it is not "late" in the election process. Absentee voting has not yet begun and the primary election is months away. Thus, it would be far less costly and disruptive to grant relief now than it would be to grant relief soon before or soon after the elections. *See NAACP-Greensboro Branch*, 858 F. Supp. 2d at 528 (granting preliminary relief because "a preliminary injunction during these early stages of the filing period would better serve the public than waiting until the eve of the election"); *Hunt*, 841 F. Supp. at 728 (granting preliminary relief because a "victory on the merits by plaintiffs would require the court either to nullify the elections that had already taken place and thereafter order new elections at considerable cost and time to the public and to all involved").

As a legal matter, even if it were "late" in the election process—and it is not—this Court would retain the authority to order a remedial map before the 2014 elections. Time and again, courts have granted effective relief in redistricting cases notwithstanding imminent elections or election-related deadlines. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (if the appropriate legislative body will not or cannot enact a valid plan in time, as when the "imminence of . . . [an] election makes [referral to the legislative branch] impractical . . . it becomes the 'unwelcome obligation' of the federal court to

devise and impose a reapportionment plan pending later legislative action") (internal citation omitted); *Adamson v. Clayton Cnty. Elections and Registration Bd.*, 876 F. Supp. 2d 1347, 1352-53 (N. D. Ga. 2012) (utilizing independent technical advisor to aid in creating new map in time for looming qualifying deadlines and election); *Larios v. Cox*, 314 F. Supp. 2d 1357, 1359, 1363-64 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004) (finding plan invalid on February 10, 2004, appointing special master on March 1, and approving special master's plan on March 25); *In re Legislative Redistricting of State*, 805 A.2d 292, 298 (Md. 2002) (finding that redistricting plan adopted by the state legislature violated state constitution and developing and adopting court plan because "legislative elections are imminent, [and] there is simply no time to return the matter to the political branches"); *see also* Mot. to Expedite at 9-10 (citing additional cases). Thus, contrary to Defendants' arguments, Plaintiffs have not "missed their window of opportunity" for obtaining effective relief before the 2014 elections, even if the "election process has already begun." Opp'n at 6, 8.

Third, Defendants argue that "it is hard to understand how plaintiffs could be irreparably harmed should the State hold congressional elections under a plan that was used in the 2012 general elections and which has already been found to be constitutional in a well-reasoned opinion by a three-judge state court." Opp'n at 8. Plaintiffs have already explained why the *State Redistricting Cases* do not foreclose or even call into question the merits of Plaintiffs' claims. *See infra* at 4-5 & n.1. And the fact that the

State may have subjected voters to an unconstitutional election in 2012 lends more urgency to Plaintiffs' claims—not less. *See Desena v. Maine*, 793 F. Supp. 2d 456, 462 (D. Me. 2011) ("Constitutional violations, once apparent, should not be permitted to fester; they should be cured at the earliest practicable date.").

Fourth, Defendants argue that Plaintiffs do not deserve relief before the 2014 elections because Plaintiffs have been insufficiently diligent in bringing their claims. *See* Opp'n at 8-9. In fact, there is no genuine dispute that Plaintiffs acted diligently here. Plaintiffs filed this case as soon as it appeared unlikely that North Carolina's state courts would order a new map before the 2014 elections, and Plaintiffs' PI Motion was fully briefed before any major election-related deadlines. Defendants' diligence argument also conflicts with their Motion to Stay, Defer, or Abstain (Dkt. 43), in which Defendants insist that Plaintiffs' claims are premature because the *State Redistricting Cases* are still pending. Of course, Defendants cannot argue that Plaintiffs' claims are both premature and tardy—at least not without abandoning any pretense of consistency.

Putting all that aside, Defendants' diligence argument is simply beside the point. Defendants are not pursuing a laches defense, and for good reason: it would fail. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196, 202-03 (E.D. Ark. 1989) ("To the extent that electoral confusion and disruption exceed what they would have been if the case had been filed earlier, we think that fairness and equal opportunity in voting are worth it"). Thus, Defendants' complaint about the timing of this lawsuit is both wrong and irrelevant.

III. CONCLUSION

Defendants ask the Court to stay its hand until it is too late to grant effective relief before the 2014 elections. Defendants' request lacks legal support and conflicts with the "duty of federal courts to preserve constitutional rights in the electoral process." *Hutchinson v. Miller*, 797 F.2d 1279, 1283 (4th Cir. 1986). Plaintiffs' Motion to Expedite should be granted.

Respectfully submitted, this the 5th day of March, 2014.

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Local Rule 83.1
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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF THEIR RENEWED MOTION FOR ORAL ARGUMENT AND MOTION FOR EXPEDITED CONSIDERATION OF MOTION FOR PRELIMINARY INJUNCTION AND FURTHER PROCEEDINGS** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 5th day of March, 2014.

/s/ Edwin M. Speas, Jr.
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