

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION NO. 1:16-CV-1164

**LEAGUE OF WOMEN VOTERS OF  
NORTH CAROLINA, WILLIAM  
COLLINS, ELLIOTT FELDMAN,  
CAROL FAULKNER FOX, ANNETTE  
LOVE, MARIA PALMER, GUNTHER  
PECK, ERSLA PHELPS, JOHN  
QUINN, III, AARON SARVER, JANIE  
SMITH SUMPTER, ELIZABETH  
TORRES EVANS, and WILLIS  
WILLIAMS,**

Plaintiffs,

v.

**ROBERT A. RUCHO**, *in his official  
capacity as Chairman of the North  
Carolina Senate Redistricting Committee  
for the 2016 Extra Session and Co-  
Chairman of the 2016 Joint Select  
Committee on Congressional Redistricting,*

**DAVID R. LEWIS**, *in his official capacity  
as Chairman of the North Carolina House  
of Representatives Redistricting Committee  
for the 2016 Extra Session and Co-  
Chairman of the 2016 Joint Select  
Committee on Congressional Redistricting,*

**TIMOTHY K. MOORE**, *in his official  
capacity as Speaker of the North Carolina  
House of Representatives,*

**PHILIP E. BERGER**, *in his official  
capacity as President Pro Tempore of the  
North Carolina Senate,*

**A. GRANT WHITNEY, JR.**, *in his*

**RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION FOR  
EXTENSION OF TIME**

*official capacity as Chairman and acting  
on behalf of the North Carolina State  
Board of Elections,*

**THE NORTH CAROLINA STATE  
BOARD OF ELECTIONS, and**

**THE STATE OF NORTH CAROLINA,**

Defendants.

Plaintiffs submit this Response in opposition to Defendants' Motion for Extension of Time. Plaintiffs do not oppose an extension of time until October 31, 2016, but do oppose an extension beyond that date because, under the unique circumstances of this case, Plaintiffs will be prejudiced by a six-week extension of time. It is important that Defendants answer by October 31, 2016 so that this case can remain on a similar timeline as *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C. Aug. 5, 2016), a related case likely to be consolidated with this one. It will be challenging for this Court to consolidate the cases if they proceed on different timelines due to Defendants' delay in answering. In addition, extending the deadline until November 28, 2016 will delay this case in a way that would potentially cause irreparable harm to Plaintiffs to the extent that it prevents an expedited remedy if Plaintiffs' claims are successful. Finally, Defendants have not actually shown good cause for needing a six-week extension of time. Defendants' displeasure with Plaintiff's choice to personally serve each defendant does not suffice as good cause to extend time to answer. Therefore, this Court should deny Defendants' motion to extend their deadline to answer to November 28, 2016, and instead extend the

deadline to October 31, 2016, which is the same as the deadline for defendants to answer the complaint in *Common Cause*.

### **STATEMENT OF FACTS**

On September 22, 2016, Plaintiffs filed this complaint alleging that the 2016 Congressional Redistricting Plan (“the 2016 plan”) enacted by the General Assembly is an unconstitutional partisan gerrymander and seeking a preliminary and permanent injunction prohibiting Defendants from conducting any elections of North Carolina congressional members using the 2016 plan. *See* Dkt. 1. As indicated on the Civil Cover Sheet included in the initial filing documents, this action is related to *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C. Aug. 5, 2016). Importantly, Defendants and counsel for Defendants in this action are the same as those in *Common Cause*, and both cases have been assigned to Hon. William Osteen, Jr. *See* Sept. 23, 2016 Docket Entry; *see also* *Common Cause*, Aug. 5, 2016 Docket Entry.

The facts and claims in this case are very similar to those in *Common Cause*. Both cases were filed because of the same 2016 plan; and both complaints contain allegations that the 2016 plan is an unconstitutional partisan gerrymander that was used to ensure that Republicans win 10 of North Carolina’s 13 congressional seats. *See* Dkt. 1; *see also* *Common Cause*, Dkt. 1. Additionally, both cases arise out of, allege, and rely upon the actions and statements of defendants Senator Robert Rucho and Representative David Lewis that were made throughout the 2016 redistricting process to support the claims against Defendants. *Id.* Significantly, in both cases, it is alleged that the 2016 plan

violates the Fourteenth Amendment's Equal Protection Clause and the First Amendment's right to freedom of speech and association. *Id.*

After filing the complaint in this case, but prior to serving Defendants, counsel for Plaintiffs contacted counsel for Defendants to discuss service. In the course of email correspondence, Plaintiffs' counsel explained the necessity of this case moving forward as quickly as possible for purposes of staying on the same timeline as the *Common Cause* case, and avoiding unnecessary delays in the litigation overall. Counsel for Defendants were aware of this concern and were informed in a September 27, 2016 email of Plaintiffs' decision to personally serve all Defendants. *See* Ex. A ("September 27, 2016 Emails"). Three of the seven defendants were served on September 26, 2016, and their answers were due on October 17, 2016. *See* Dkts. 8-14. One defendant was served on September 27, 2016, and his answer is due on October 18, 2016. *Id.* The last three defendants were served on September 28, 2016, and their answers are due on October 19, 2016. *Id.* The defendants' answer to the Amended Complaint in *Common Cause* is due by October 31, 2016. *See Common Cause*, Sept. 15, 2016 Docket Entry.

On September 27, 2016, counsel for Plaintiffs received an email from counsel for Defendants regarding Plaintiffs' process server's attempts to serve Defendants. *See* Ex. A. In that email, one of Defendants' counsel indicated that he would accept service on behalf of all Defendants with a waiver of service. *Id.* Counsel for Plaintiffs responded to that email explaining that "given the kinds of arguments we have seen in other cases regarding the time needed to implement a remedy in redistricting cases, we feel under the obligation to take every step possible to expedite this litigation and we will continue to do

so to the best of our abilities.” *Id.* At that point, it was clear that Defendants’ counsel could accept service on Defendants’ behalf only if service was waived. After Representative Lewis was served at his home on the evening of September 27, 2016, on the following day counsel for Defendants eventually received authorization to accept service on behalf of the remaining individual defendants. *See* Ex. A.

As of September 27, 2016, Defendants’ counsel was aware that the complaint had been filed and that Plaintiffs would personally serve each defendant. *See* Ex. A. They were also aware that in the absence of a waiver of service they had 21 days from the date of service to answer the complaint. *Id.* Nevertheless, Defendants filed their motion on October 12, 2016, less than a week before the first three answers were due, on Monday, October 17, 2016.

### **ARGUMENT**

Defendants’ motion to extend time to answer to November 28, 2016 should be denied because (1) Plaintiffs have now commenced this action and have the right to choose the best method to serve Defendants; (2) in light of defense counsel’s resources- which include private counsel who have submitted notices of appearance in this case (*see* Dkts. 15-16, 22-24)- involvement in other litigation and the November 2016 General Election are not good cause to extend their time to answer by nearly six weeks; and (3) Defendants unreasonably delayed filing this motion until three business days prior to the first answer being due. Plaintiffs consent to extending the time for all Defendants to answer to October 31, 2016, the same day the defendants’ answers are due in the related *Common Cause* case.

Local Rule 6.1 requires that “all motions for an extension of time to perform an act required or allowed to be done within a specified time must comply with Fed.R.Civ.P. 6(b).” Fed. R. Civ. P. Rule 6(b)(1) provides that:

When an act may or must be done within a specified time, the court may, for good cause, extend the time:

- (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
- (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

*See* Fed. R. Civ. P. 6(b)(1).

While the applicable standard is not typically a demanding one, that does not mean extensions are automatic and can be granted without a proper showing of good cause. *See U.S. Home Corp. v. Settlers Crossing, LLC*, No. 8-1863, 2012 U.S. Dist. LEXIS 114444, \*54-\*56 (D. Md. Aug. 14, 2012) (“Although [movant] filed its motion before the original time for filing objections expired, it must nonetheless show ‘good cause’ for extending the deadline”). Here, where Plaintiffs will be unduly prejudiced by the delay extending the time to answer to November 28, 2016 would cause, this Court has the discretion to prevent such harm by extending the answer deadline to October 31, 2016 to coincide with the deadline to answer in *Common Cause*. *See Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. Md. 2003) (a Rule 6(b)(1) motion is reviewed for abuse of discretion); *see also Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 795 (9th Cir. 1996) (district court did not abuse its discretion when making a decision regarding an enlargement of the time to answer). Importantly, Plaintiffs do not

object to *any* extension. Plaintiffs are merely objecting to a longer extension to November 28, 2016 that could cause significant delays in adjudicating this case and obtaining remedies if Plaintiffs' claims are successful.

a. Defendants' Dissatisfaction With Being Personally Served is not Good Cause to Extend Their Time to Answer

Defendants' motion to extend mainly describes the process by which they were served and their disagreement with being personally served instead of being given the opportunity to waive service pursuant to Rule 4(d) of the Federal Rules of Civil Procedure, so they would have 60 days to answer instead of 21 days. *See* Mot. ¶¶ 1-11. Defendants fail to provide any precedent that supports their argument that a plaintiff's decision to personally serve a defendant instead of requesting a waiver of service establishes good cause to extend their time to answer. Indeed, pursuant to Fed.R.Civ.P. 4(e), a plaintiff has the option to serve a defendant by either (1) deliver[ing] "a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode" or (2) following the state law rules for effecting service. Fed. R. Civ. P. 4(e);<sup>1</sup>*see also Moore v. Cox*, 341 F. Supp. 2d 570 (M.D.N.C. 2004) (recognizing that a plaintiff can serve a defendant in any manner that "is within the rule.")

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<sup>1</sup> The North Carolina Rules of Civil Procedure provide that individuals may be served by "mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. R. Civ. P. 4(j)(1)(c).

A plaintiff does not have a duty to request a waiver of service. Instead, if a plaintiff chooses to request a waiver of service, then a defendant, in certain circumstances, has a duty to avoid unnecessary expenses of serving the summons. Fed. R. Civ. P. 4(d); *see also Justice v. White*, No. 5:13-CV-548, 2014 U.S. Dist. LEXIS 16345, \*17 (E.D.N.C. Feb. 10, 2014) (“Rule 4 imposes a duty of reimbursement only on certain types of defendants who must avoid unnecessary expenses by return of a waiver.”) In other words, requesting a waiver of service pursuant to Rule 4(d) is an option for plaintiffs, not a requirement. Therefore, the fact that Plaintiffs chose to personally serve Defendants does not automatically entitle Defendants to an extension of time to answer especially when, as discussed below, Defendants fail to establish good cause for such an extension.

Defendants noted that this action was filed over seven months after the 2016 plan was enacted. However, even though the 2016 plan was enacted by the North Carolina General Assembly on February 19, 2016, the 2016 plan did not receive the required approval of the Court until June 2, 2016. See Ex. B (“June 2, 2016 Order in *Harris v. McCrory*, No. 1:13-cv-949”). Moreover, the amount of time it takes a plaintiff to file an action is irrelevant to the form of service chosen and the corresponding deadlines to answer that follow.

It is important that this case proceed on a timeline similar to that in *Common Cause* to avoid unreasonable delays. The cases will likely be consolidated and should move forward with similar discovery and trial dates. If Defendants were allowed to extend their time to answer until November 28, 2016, it is possible that discovery and

trial deadlines in this case will be set at dates later than those in the *Common Cause* case, which will make it difficult for this Court to consolidate the two cases. When, as in this instance, there are two cases with similar questions of law and fact, it is in the best interests of judicial economy and efficiency to keep the cases on the same timeline for ultimate consolidation. *See, e.g., Walter E. Heller & Co. v. Tuscarora Cotton Mill*, 1974 U.S. Dist. LEXIS 13035, \*5 (M.D.N.C. Mar. 29, 1974) (refusing to try an issue regarding ownership at separate trials because it “would unduly protract th[e] litigation” and denying the motion to separate was in “the interests of judicial economy and efficiency”). Moreover, extending the deadline to November 28, 2016 would irreparably prejudice Plaintiffs because, if Plaintiffs’ claims are successful on the merits, a delay in answering could cause a delay in implementing a remedy. This could result in a delay in drawing new maps prior to the 2018 midterm elections, which would unnecessarily continue to violate Plaintiffs’ rights.

b. Defendants’ Involvement in Other Litigation and Election Related Matters is Not Good Cause to Extend Their Time to Answer

Defendants’ argue that they need an additional six weeks to answer because they are “currently involved in numerous matters related to the 2016 General Election” and “are engaged in other election-related litigation, including another action that challenges the 2016 congressional redistricting plan on grounds of partisan gerrymandering.” *See* Mot. ¶ 12. In fact, their involvement in the *Common Cause* case actually facilitates filing an answer in this case.

Defendants fail to provide any precedent or procedural rule that would support granting an extension of time to answer because Defendants and defense counsel are busy with other matters. Importantly, this is not a case where Defendants have to engage in extensive research or conduct an investigation to answer the allegations in the complaint. The factual allegations are indeed very similar to those in the *Common Cause* complaint, and any allegations they may not have information about at this time can be denied upon information and belief. Responding to the allegations does not require interviewing witnesses for additional information. Instead, the factual allegations are primarily about the legislative process and statements made during that process, which Defendants themselves directed and made. For instance, the complaints in this case and in *Common Cause* both cite to the “Partisan Advantage” criteria used to create the 2016 plan (*see* Dkt. 1; *see also Common Cause*, Dkt. 1), and both complaints also cite various statements made by Representative Lewis, such as “I acknowledge freely that this would be a political gerrymander, which is not against the law.” *Id.* Other allegations are based on the data the General Assembly provided to support the 2016 plan.

Additionally, in light of defense counsel’s resources, which include private counsel who have submitted notices of appearance in this case, *see* Dkts. 15-16, 22-24—Defendants and their counsel’s involvement in other litigation and election matters does not establish good cause to extend their time to answer. *See Stonkus v. Brockton Sch. Dep’t*, 322 F.2d 97, 101 (1st Cir. 2003) (recognizing that “most attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences”); *see also*

*Symbionics Inc. v. Ortlieb*, 432 F. App'x 216, 219 (4th Cir. 2011) (finding “nothing extraordinary or unusual about counsel’s calendaring error that should relieve [the party] of its duty to comply with the time limit”). Counsel being busy does not meet the excusable neglect standard under Rule 6(b)(2). See *McLaughlin v. LaGrange*, 662 F.2d 1385, 1387 (11th Cir. 1981) (“Appellants’ motion for additional time to respond [to a summary judgment motion] was filed four days late. It asserts as ‘excusable neglect’ only that appellants’ counsel is a solo practitioner and was engaged in the preparation of other cases. The fact that counsel has a busy practice does not establish ‘excusable neglect’ under Rule 6(b)(2).”)

Although Rule 6(b)(1) is at issue in this case, the rationale applied to Rule 6(b)(2) sheds light on how the good cause standard should be interpreted under Rule 6(b)(1). Here, Defendants’ vague assertions of involvement in other litigation and election related matters does not meet the good cause standard to warrant extending Defendants’ time to answer by an additional six weeks. Moreover, based on Defendants’ argument, if there was good cause to extend the time to answer, Defendants would have filed this motion sooner to ensure that that the court would have time to in fact issue an order granting an extension prior to the October 17, 2016 deadline to file three of the seven defendants’ answers. Therefore, Defendants have failed to demonstrate that being busy establishes good cause to extend their time to answer to November 28, 2016.

- c. Defendants’ Motion Should be Denied Because, Under the Circumstances, Defendants Unreasonably Delayed Filing the Motion

This Court has denied motions for extension of time to act when a movant unreasonably delays filing the motion. *See United States ex rel. Rodgers Excavating v. Swamp*, No. 1:15-CV-482, 2016 U.S. Dist. LEXIS 131275, \*12 (M.D.N.C. Sept. 26, 2016) (holding that “unreasonable delay in presenting the extension motion [to extend expert and supplemental disclosure deadlines] further counsels against finding that [the movant] acted with diligence regarding the proposed belated disclosures. Put simply, [the movant] has not established ‘good cause’”). This Court’s rules also require, in the discovery context, that a party requesting an extension “must set forth good cause justifying the additional time and [the extension] will be granted or approved only upon a showing that the parties have diligently pursued discovery.” LR 26.1(d).

The diligent pursuit requirement in the discovery context provides guidance in this context where Defendants’ delay in filing their motion, under the circumstances, is unreasonable and Defendants’ September 27, 2016 email noting that “if plaintiffs insist on attempting to serve defendants personally, then we will move for an extension of time to answer or otherwise respond” demonstrates that Defendants never intended to diligently pursue, or make a good faith effort, to answer within the 21-day time frame, and in fact have not made any efforts to do so. *See Ex. A*. Assuming that Defendants first became aware of service on September 27, 2016, they waited 16 days, out of the 21 days they have to answer, to file this motion. Under these circumstances, if there was good cause to extend Defendants’ time to answer, Defendants should have filed their motion sooner- not five days before three of the answers are due. Defendants’ lack of diligence

and good faith effort requires this Court to deny Defendants' delayed motion to extend their time to answer to November 28, 2016.

### CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion for Extension of Time to extend the time for Defendants to answer to November 28, 2016. In the alternative, Plaintiffs consent to extending the deadline for all Defendants' answer to October 31, 2016.

This the 18th day of October 2016.

/s/ Anita S. Earls

Anita S. Earls (State Bar # 15597)  
Allison J. Riggs (State Bar # 40028)  
Emily Seawell (State Bar # 50207)  
Southern Coalition for Social Justice  
[anitaearls@southerncoalition.org](mailto:anitaearls@southerncoalition.org)  
[allisonriggs@southerncoalition.org](mailto:allisonriggs@southerncoalition.org)  
[emilyseawell@southerncoalition.org](mailto:emilyseawell@southerncoalition.org)  
1415 Highway 54, Suite 101  
Durham, NC 27707  
Telephone: 919-323-3380 ext. 115  
Facsimile: 919-323-3942  
Counsel for All Plaintiffs

/s/ J. Gerald Hebert

J. Gerald Hebert\*<sup>2</sup>  
Ruth Greenwood\*  
Annabelle Harless\*  
Danielle Lang\*  
Campaign Legal Center  
1411 K Street NW, Suite 1400  
Washington, DC 20005  
(202) 736-2200  
[ghebert@campaignlegalcenter.org](mailto:ghebert@campaignlegalcenter.org)

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\* Appearing pursuant to Local Rule 83.1(d).

[rgreenwood@campaignlegalcenter.org](mailto:rgreenwood@campaignlegalcenter.org)  
[aharless@campaignlegalcenter.org](mailto:aharless@campaignlegalcenter.org)  
[dlang@campaignlegalcenter.org](mailto:dlang@campaignlegalcenter.org)

/s/ Nicholas O. Stephanopoulos  
Nicholas O. Stephanopoulos\*  
University of Chicago Law School  
1111 E 60th St.  
Chicago, IL 60637  
(773) 702-4226  
[nsteph@uchicago.edu](mailto:nsteph@uchicago.edu)

**CERTIFICATE OF SERVICE**

I CERTIFY that on October 18, 2016, I served the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF TIME** with the Clerk of Court using the CM/ECF system in case No. 1:16-cv-1164, which on the same day sent notification of the filing to the following:

Alexander McC. Peters  
Special Deputy Attorney General  
James Bernier, Jr.  
Office of the Attorney General  
P.O. Box 629  
Raleigh, NC 27602  
apeters@ncdoj.gov  
jbernier@ncdoj.gov

*Counsel for Defendants*

Thomas A. Farr  
Phillip J. Strach  
Michael D. McKnight  
Ogletree Deakins Nash  
Smoak & Stewart, P.C.  
4208 Six Forks Road, Suite 1100  
Raleigh, NC 27602  
thomas.farr@ogletreedeakins.com  
phillip.strach@ogletreedeakins.com  
michael.mcknight@ogletreedeakins.com

*Counsel for Defendants*

This the 18th day of October, 2016.

Respectfully submitted,

/s/ Anita S. Earls

Anita S. Earls

*Counsel for All Plaintiffs*