No. 23-2317

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)

PLAINTIFFS-APPELLANTS' OPPOSITION TO LEGISLATIVE DEFENDANTS-APPELLEES' MOTION TO DISMISS

Edwin M. Speas, Jr.
POYNER SPRUILL LLP
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

Counsel for Plaintiffs-Appellants

R. Stanton Jones
Elisabeth S. Theodore
Samuel I. Ferenc
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001-3743
(202) 942-6000
stanton.jones@arnoldporter.com

Plaintiffs-Appellants respectfully submit this opposition to Legislative Defendants-Appellees' motion to dismiss this appeal. This Court has jurisdiction to review a district court's denial of a preliminary injunction, 28 U.S.C. § 1291(a), and the district court's unreasonable delay in deciding Plaintiffs' preliminary injunction motion here constitutes a constructive denial for multiple reasons. Alternatively, if the Court declines to hear this appeal now, Plaintiffs respectfully request that the Court ask the district court to decide Plaintiffs' preliminary injunction by January 15 and order that briefing in this Court be automatically expedited if any party appeals by January 16. This will ensure that either party has the opportunity to obtain appellate review in advance of any changes needed for the 2024 elections.

I. This Court has jurisdiction to review the district court's constructive denial of Plaintiffs' motion for a preliminary injunction

Contrary to Legislative Defendants' assertion, this appeal is proper because the district court constructively denied Plaintiffs' preliminary injunction motion. A district court's unreasonable delay in deciding a time-sensitive motion constitutes a constructive denial when it is tantamount to a denial, and that is what happened here.

A. A district court's unreasonable delay in deciding a time-sensitive motion can constitute a constructive denial

This Court has recognized that a district court's "unreasonable or inexplicable delay" in deciding a time-sensitive motion constitutes an immediately appealable constructive denial if it is "tantamount to a denial." *District of Columbia v. Trump*,

959 F.3d 126, 132 (4th Cir. 2020) (en banc). Other circuits are in accord. *See, e.g.*, *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996) ("A showing of unjustifiable delay coupled with irreparable injury if an immediate appeal is not allowed is enough to make a constructive denial appealable, if a formal denial would be."); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990) (district court delay in ruling until movant's "interest is almost non-existent" is "tantamount to denying" the motion and therefore appealable); *Liebmann v. Goden*, 629 F. Supp. 3d 314, 332-33 (D. Md. 2022) ("[A] 'deferral of consideration' is 'transformed into a constructive denial of relief' … when a 'showing of unjustifiable delay' is 'coupled with irreparable injury if an immediate appeal is not allowed.'" (quoting *Cont'l Cas. Co. v. Staffing Concepts, Inc.*, 538 F.3d 577, 580 (7th Cir. 2008)). Legislative Defendants themselves invoked this constructive denial doctrine in filing an appeal to this Court in a voting-rights lawsuit. Appellants' Opening Br. at 3-4, 42-46, *N.C. State Conf. of NAACP et al. v. Berger et al.*, No. 19-2048 (4th Cir. Oct. 2, 2019), Doc. 40-1.

B. The district court's unreasonable delay in deciding Plaintiffs' preliminary injunction motion is tantamount to a denial

Plaintiffs filed their preliminary injunction motion on November 22, two days after filing this lawsuit. After refusing to expedite proceedings on the motion and then granting Legislative Defendants an extension of time to oppose over Plaintiffs' objection, the district court set a hearing on the motion for January 10. This delay

in deciding the preliminary injunction motion was unreasonable and prejudicial—and rises to the level of a constructive denial—in three independent respects.

1. The district court's delay has already made it impossible to afford relief in time to implement remedial districts for the March 5 primaries, which was the relief Plaintiffs originally requested. *See* Pls.' Mot. for a Prelim. Inj. at 22-24, ECF 17; Pls.' Emergency Mot. For Expedited Briefing at 1-2, ECF 5. Legislative Defendants do not contend otherwise. Mot. 4. The court constructively denied that relief by refusing to expedite the proceedings, granting Legislative Defendants an opposed extension of time to oppose the motion, and setting a preliminary injunction hearing for January 10—even though Plaintiffs repeatedly requested a decision no later than the end of December. A January 10 hearing is seven weeks after Plaintiffs filed their motion, and importantly, it is *too late* to implement remedial districts in time for the March 5 primaries even if the court decided the motion at the hearing. As the State Board explained below, "to accommodate a new map without moving the dates for any elections contests, the State Board would need to receive the new map in sufficient time for candidate filing for the affected districts to begin during

the first week of January." State Board Resp. to Pls.' Mot. for Prelim. Inj. at 3 (ECF 40). The failure to decide the motion by then is a paradigmatic constructive denial.[1]

Legislative Defendants suggest that "[n]o plausible rule" could require adjudication of a preliminary injunction motion within roughly a month. Mot. 2. In fact, some federal district courts have adopted rules that require even greater alacrity. *See* Rule 65.1(f) of the Local Rules of the U.S. District Court for the District of Columbia (requiring a hearing within 21 days after the filing of a preliminary injunction motion "unless the Court earlier decides the motion on the papers or makes a finding that a later hearing date will not prejudice the parties"). The absence of a similar rule in the court below should not be taken as an invitation to delay ruling for nearly two months or longer, especially when doing so is patently prejudicial to Plaintiffs. In general, courts should decide time-sensitive motions expeditiously—certainly in time to afford effective relief if a motion is found to be meritorious.

Plaintiffs did not seek a constructive denial appeal after the court denied their motion to expedite the preliminary injunction proceedings, or even after it extended Legislative Defendants' time to respond. Plaintiffs appealed based on a constructive

[1] Although there will not be primaries in the challenged districts (because no more than one candidate from each party filed to run in those districts), there might have been March 5 primaries in remedial districts if the district court acted promptly.

denial only after the court denied Plaintiffs' request for relief in time for March primaries —by declining to decide it and scheduling a hearing for January 10.

Legislative Defendants assert that Plaintiffs' original request for relief in time for March primaries is now "moot." Mot. 4. But that only illustrates the constructive denial here: one aspect of Plaintiffs' original request for relief is no longer available precisely *because* the district court refused to rule on it promptly. Legislative Defendants' contention that this somehow supports delaying appellate review is confounding.

2. The district court's delay was also unreasonable based on the record before the court concerning the anticipated mailing of ballots for March primaries. In its December 22 submission below, the State Board indicated that it needed "7 business days" to alter UOCAVA and absent ballots for the two challenged districts in advance of sending those ballots out on January 19. ECF 41 at 5. In other words, absent injunctive relief by January 9, UOCAVA and absentee ballots listing primary candidates for the challenged districts would be mailed to voters in those districts on January 19. ECF 41 at 5. If that had occurred, it would have increased *Purcell* concerns, thereby severely prejudicing Plaintiffs' ability to obtain relief for the 2024 elections. The court's order setting a hearing for January 10 made it impossible to afford relief in time to stop such ballots from going out. After Plaintiffs filed this appeal and sought an injunction pending appeal to stop the mailing of such ballots,

the State Board advised that such an injunction is unnecessary because there will be no primaries in challenged districts (due to the fact that no more than one candidate for any party filed to run in either district). CA4 Doc. 30-2. But that does not change the record before the district court.

Legislative Defendants suggest that Plaintiffs should have known there would be no primaries in the challenged districts before filing this appeal. Mot. 3-4. But the State Board did not "learn[]" it until *after* the appeal was filed, when the State Board was "reviewing whether [it] needed to respond to Plaintiffs' motion to the Fourth Circuit" CA4 Doc. 30-2 at 3. Any suggestion that Plaintiffs should have had better information than the State Board is untenable.

3. The district court's delay is unreasonable for a third reason: it now risks making it impossible to implement remedial districts in time to hold primaries in those districts on May 14, as the State Board recommended below. While the district court has scheduled a hearing on Plaintiffs' motion for January 10, it has repeatedly declined to say, despite multiple requests from Plaintiffs, *when* it will decide the motion or whether it will do so in time to hold primaries in remedial districts on May 14. The court's refusal to decide the motion in time for March primaries, combined with its silence on when it intends to decide the motion at all, is reason for grave concern that the court will decide the motion in time for May primaries. The court has also indicated that it may rely on *Purcell* concerns to deny a preliminary

injunction, ECF 43 at 5—concerns that grow each day there is no decision. As explained in Section 2 below, if the Court declines to hear this appeal now, the Court at a minimum should take appropriate steps to safeguard its own jurisdiction to timely review a decision by the district court in advance of the May primary date.

Plaintiffs were not required to wait to appeal until it is too late to obtain new districts for May primaries, just like it is now too late to obtain new districts for March primaries as Plaintiffs originally requested. That is the point of the constructive denial doctrine.

C. Legislative Defendants' remaining arguments fail

Legislative Defendants' other scattershot arguments do not justify delaying appellate review in this case.

Legislative Defendants assert that constructive denial requires an "actual refusal to rule," but they acknowledge that, under this Court's precedent, such a refusal can be "'explicit' or 'implicit.'" Mot. 4-5 (quoting *Trump*, 959 F.3d at 130). To the extent Legislative Defendants are arguing that the constructive denial doctrine requires a refusal in the sense of an announcement that the district court will *never* rule on a motion, that is not the law. *Trump* is clear that an unreasonable delay can constitute an implicit denial. If it were otherwise, district courts could insulate unjustifiable delays in deciding time-sensitive motions from appellate review simply by remaining silent.

But even if an "actual refusal to rule" excluded implicit denials or unreasonable delays, the district court here *did* actually refuse to rule on the preliminary injunction motion in time to implement remedial districts without affecting the March 5 primaries, as Plaintiffs had originally requested. Declining to decide this case by the end of December, and instead setting a hearing for January 10, was an "actual refusal to rule" on a request for relief in time for March primaries. Nothing about the State Board's subsequent realization in this court that there will be no primaries in the two challenged districts alters the fact that a decision was required by December to enable candidate filing and potential primaries in March in the *new* districts Plaintiffs sought in their preliminary injunction motion.

In any event, even Legislative Defendants acknowledge that an "'implicit' 'refusal'" to rule constitutes a constructive denial, Mot. 2, and so too does an "unreasonabl[e] delay" in ruling. *Trump*, 959 F.3d at 131. And as Legislative Defendants previously told this Court, "'[d]enial of a pending motion may be implied from … any order inconsistent with the granting of the motion.'" Appellants' Opening Br. at 44-45, *N.C. State Conf. of NAACP et al. v. Berger et al.*, No. 19-2048 (4th Cir. Oct. 2, 2019), Doc. 40-1 (quoting *Toronto-Dominion Bank v. Cent. Nat. Bank & Tr. Co.*, 753 F.2d 66, 68 (8th Cir. 1985)). Here there is both an implicit refusal to rule and an unreasonable delay in ruling. By allowing candidate filing to occur in the challenged districts and allowing the deadline to come and go

for implementing new districts in time to hold any necessary primaries in March, the district court implicitly denied the preliminary injunction Plaintiffs requested. And the district has unreasonably delayed ruling for the reasons described.

Legislative Defendants previously noted that the Court dismissed their appeal in *Berger*, but that is irrelevant. The Court stated that its dismissal "order should not be construed to express any general view on the conditions under which a failure to act may constitute a final and appealable decision." Order, *N.C. State Conf. of NAACP*, No. 19-2048 (4th Cir. Oct. 8, 2019), Doc. 50. In *Berger*, Legislative Defendants appealed only six days after first advising the district court that they wanted a prompt ruling on their motion to intervene, and nothing was happening in the case that was prejudicing Legislative Defendants while their motion was pending. Here, by contrast, there is—it is already too late to implement new districts in time for March primaries, and absent prompt appellate review, the district court's further delay will make it impossible to afford relief for May primaries.

And as noted, Legislative Defendants' suggestion that "[n]o plausible rule" could require adjudication of a preliminary injunction motion within roughly a month, Mot. 2, is simply wrong. *See supra*. Swift decisions are especially important cases of enormous public import like this one. *See* Mot. 5. Commonsense similarly

supports that district courts should advise the parties of their intended timing for decision when important deadlines are looming.

Legislative Defendants accuse Plaintiffs of putting forward "shifting representations of deadlines." Mot. 3. This ignores the undisputed facts. Originally, a decision was needed by late December in order to implement new districts for use in March 5 primaries; this deadline came and went with no decision. Nothing about those facts—which themselves establish constructive denial—has ever changed or shifted. Then, based on the State Board's December 22 submission below, an injunction was needed by January 9 to prevent ballots from being mailed to voters listing primary candidates for the challenged districts; the district court's order setting a hearing for January 10 made this impossible as well, though the State Board subsequently advised that there will be no primaries in the challenged districts due to who filed to run in them. Plaintiffs' appropriate decision to promptly withdraw their request for an emergency injunction pending appeal the day the State Board advised them of this does not alter the need for relief in time for May.

Now, Plaintiffs seek a liability ruling by this Court by February 2 to allow an orderly remedial process and the adoption of new districts in time for primaries on May 14. Legislative Defendants have not disputed these dates and deadlines. And the State Board's counsel confirmed that they are accurate. CA4 Doc. 30-2. Specifically, the State Board's counsel stated that "if new maps are ordered, [the

State Board] would need those maps in time to complete candidate filing by March 15th in order to meet the May 14th second primary." *Id.* Plaintiffs' proposed schedule would meet that mid-March deadline, and Legislative Defendants do not contend otherwise. This is not a "change of theories," Mot. 3, but rather a consistent effort to obtain relief and implement lawful districts with the minimum impact on election administration.

Legislative Defendants assert that Plaintiffs' request for a decision by this Court by February 2 signals that the district court has not constructively denied a preliminary injunction before then. Mot. 4-5. But as Plaintiffs have explained, February 2 is the date by which a decision of *this Court* is needed to ensure an orderly remedial process and adoption of new districts for May 14 primaries. It cannot be the case that a litigant must wait to appeal until *the day* when a decision from the court of appeals would be needed, especially when the district court has already constructively denied the relief that Plaintiffs originally sought (*i.e.*, the adoption of remedial districts in time for March primaries). A decision by the district court is accordingly needed sufficiently in advance of February 2 in order to allow orderly appellate review, including a briefing schedule. In any event, there is no indication that the district court will decide Plaintiffs' motion by February 2 (or by any date

certain). And if it does and denies relief, this Court would have to scramble to decide an appeal in time to enable an orderly remedial process.

Legislative Defendants suggest that Plaintiffs unreasonably delayed by filing their preliminary injunction motion "28 days" after enactment of the challenged map. Mot. 2. They ignore that this is *less time* than Legislative Defendants themselves took to *oppose* the motion, based on the extension of time they received from the district court. What's more, the General Assembly waited *six months* to enact new maps after the North Carolina Supreme Court authorized them in *Harper III*. This was an effort to thwart judicial relief in time for the 2024 elections, it is what caused the irreparable harm that Plaintiffs now face, and it should not be rewarded by allowing one election to go forward under an illegal map that denies over 100,000 Black voters the opportunity to elect candidates of their choice.

Legislative Defendants point to a "large preliminary-injunction record" consisting of "835 pages of filings." Mot. 1, 2. But they do not deny that those 835 pages are largely items like the General Assembly's hundred-plus-page "stat pack" for the entire Senate map and briefs and expert reports from other cases that Legislative Defendants, for unclear reasons, attached to their opposition to Plaintiffs' preliminary injunction motion. Plaintiffs' preliminary injunction motion was *25 pages* and attached three expert reports totaling *54 pages*. And as the motion explained, this is as clear a violation of VRA Section 2 as you will ever see. On its

face, the 2023 enacted map crack Black voters in the Black Belt counties between two districts where their votes will be drowned out by white majorities who will vote in blocs to defeat Black-preferred candidates. Under the legal principles reiterated by the Supreme Court just months ago in *Allen v. Milligan*, 599 U.S. 1 (2023), this dilution of Black voting power is an extreme and obvious violation of Section 2.

In sum, the district court has constructively denied Plaintiffs' preliminary injunction motion and this Court has jurisdiction to hear this appeal now.

II. Alternatively, this Court should suggest that the district court decide Plaintiffs' preliminary injunction by January 15

If the Court declines to hear this appeal now, it should take appropriate steps to secure its jurisdiction to decide this matter in time for the 2024 elections. Specifically, Plaintiffs respectfully request that the Court ask the district court to decide Plaintiffs' preliminary injunction by January 15, which is three business days after the scheduled hearing. Plaintiffs also request that the Court indicate that delay beyond then would support a constructive denial appeal. To avoid unnecessary motions practice and delay in this Court, the Court should further order that if any party appeals by January 16, the appeal briefing will be automatically expedited with the opening brief due January 18, the response brief(s) due January 22, and the reply brief due January 24. This would allow the Court to hold oral argument, if it chooses to do so, on January 25 or 26 and to issue its liability ruling by February 2. As explained above, a liability ruling by this Court by February 2 would allow an

orderly remedial process and the implementation of two remedial districts in time to hold primaries in those districts, if needed, on May 14.

CONCLUSION

For the foregoing reasons, the Court should deny Legislative Defendants' motion to dismiss this appeal. Alternatively, the Court should ask the district court to decide Plaintiffs' preliminary injunction by January 15, indicate that delay beyond then would support a constructive denial appeal, and order expedited briefing in this Court if any party appeals by January 16.

Dated: January 8, 2024

Respectfully submitted,

/s/ R. Stanton Jones

R. Stanton Jones
Elisabeth S. Theodore
Samuel I. Ferenc
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001-3743
(202) 942-6000
stanton.jones@arnoldporter.com

Counsel for Plaintiff-Appellants

Edwin M. Speas, Jr.
POYNER SPRUILL LLP
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 3,315 words.

2. This motion 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 Times New Roman font.

Dated: January 8, 2024

/s/ R. Stanton Jones

R. Stanton Jones
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 942-6000
stanton.jones@arnoldporter.com

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2024, the foregoing was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on counsel of record by operation of the CM/ECF system on the same date.

/s/ R. Stanton Jones
R. Stanton Jones