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 Plain ("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 Pregnacy 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);[1]*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.")

[1] 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, s*ee* 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. <u>Defendants' Motion Should be Denied Because, Under the Circumstances, Defendants Unreasonably Delayed Filing the Motion</u>

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
allisonriggs@southerncoalition.org
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*[2]
Ruth Greenwood*
Annabelle Harless*
Danielle Lang*
Campaign Legal Center
1411 K Street NW, Suite 1400
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org

* Appearing pursuant to Local Rule 83.1(d).

rgreenwood@campaignlegalcenter.org
aharless@campaignlegalcenter.org
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

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

EXHIBIT A

("September 27-28, 2016 Emails")

RE: New Congressional Redistricting Lawsuit

Peters, Alec <apeters@ncdoj.gov>
Wed 9/28, 8:38 AM
Anita Earls; Alesha Brown; Bernier, James <jbernier@ncdoj.gov>

Reply all

Inbox

You forwarded this message on 9/28/2016 9:07 AM

Anita, this morning I received authorization to accept service for Speaker Moore. So, I can accept for the three remaining defendants who haven't been served.

Thanks.

— Alec

From: Anita Earls [mailto:AnitaEarls@southerncoalition.org]
Sent: Tuesday, September 27, 2016 10:05 PM
To: Alesha Brown; Peters, Alec
Cc: Bernier, James
Subject: RE: New Congressional Redistricting Lawsuit

Alec,
Also, just to confirm, the process server left the papers with Representative Lewis' wife. Alesha also instructed him to hold off on attempting service on any other legislative defendants.
Thank you,
Anita

From: Alesha Brown
Sent: Tuesday, September 27, 2016 10:01 PM
To: Anita Earls; Peters, Alec
Cc: Bernier, James
Subject: Re: New Congressional Redistricting Lawsuit

Reply all | Delete Junk | ••• ×

I just spoke with our process server and he indicated that Rep. Lewis was served tonight as well.

Alesha

From: Anita Earls
Sent: Tuesday, September 27, 2016 9:56:17 PM
To: Peters, Alec
Cc: Bernier, James; Alesha Brown
Subject: RE: New Congressional Redistricting Lawsuit

Dear Alec,
Thank you for this clarification. We are again constrained by the Federal Rules of Civil Procedure which do not authorize us to serve a party by leaving the documents at their offices or place of business. Given your efforts to be authorized to accept personal service, rather than simply to waive service, I will instruct our process server to not serve the remaining three defendants at home and will await further communication from you regarding Representative Moore and Representative Lewis. It may be that a second legislative defendant was also served this evening, before I received this email. I just don't know for certain. I will call and email our process server now to relay this information.
We did not know how long it might take to achieve personal service and, as I said before, we considered it important to move forward as expeditiously as possible to preserve our clients' rights. I did not realize you were seeking authorization for personal service, had you asked for a period of time to do that, I certainly would have accommodated that request. We meant no disrespect to you or your clients.
Sincerely,
Anita

From: Peters, Alec [mailto:apeters@ncdoj.gov]
Sent: Tuesday, September 27, 2016 9:45 PM
To: Anita Earls
Cc: Bernier, James; Alesha Brown
Subject: Re: New Congressional Redistricting Lawsuit

Anita,

Late this afternoon, I received authorization to accept service on behalf of Sen. Berger and Sen. Rucho. I'm awaiting word on Rep. Moore and Rep. Lewis. Unfortunately, I was tied up late this afternoon and earlier this evening and wasn't able to get word to you, and I've learned that Sen. Berger was served at home about a half hour ago. Given that he and the other legislators were sued in their official capacity, I must pass along our feeling that it is unnecessary and inappropriate to serve them at home rather than at their offices.

I understand your desire not to delay matters in a way that you believe is unnecessary or not in your clients' best interest, but I would point out that this lawsuit, which challenges districts enacted seven months ago, was filed last week. You did not contact me about the lawsuit until yesterday, and your message gave no indication that you intended to serve immediately. As soon as I got your message, I set about inquiring from my clients whether I had authorization to waive service, and I contacted you first thing this morning, only to learn that you had already sent a process server to our office and to the State Board of Elections yesterday, and that a process server was at the General Assembly this morning. After your email below, I again set about up find out if I had authority to accept service on behalf of the remaining defendants. I do not think it was unreasonable for me to expect that since you offered the option of me accepting service on their behalf, I would have an opportunity of at least 24 hours to arrange that.

I would ask that you not serve any of the remaining three defendants at home. As I said above, I'm authorized to

Reply all | Delete Junk | ... ×

Thank you, and please let me know if you have any questions.

— Alec

On Sep 27, 2016, at 11:27 AM, Anita Earls <AnitaEarls@southerncoalition.org> wrote:

Dear Alec,
Thank you for your email. We are obviously concerned about moving as quickly as possible so that this case, which has been assigned to the same Judge as the Common Cause, et al. v. Rucho lawsuit filed earlier, remains on the same track time-wise and does not occasion any delay in the litigation overall. It

is my understanding that there is an October 31st deadline for answering the amended complaint in that case. 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. I realize the court may grant you an extension of time to answer the complaint, but that is beyond our control. At this point, we can seek to expedite the case by obtaining personal service and we have no alternative but to pursue that course. I do not read Rule 4(d) to require plaintiffs to request a waiver of service of a summons and complaint.

I assure you we would prefer not to have to obtain personal service of the individual legislators, but we have no choice unless they authorize you or other counsel to accept personal service on their behalf. Please let me know if you have any questions.
Thank you,
Anita

Anita S. Earls
Executive Director
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, N.C. 27707
919-794-4198 (direct dial)
919-323-3942 (fax)
www.southerncoalition.org

From: Peters, Alec [mailto:apeters@ncdoj.gov]
Sent: Tuesday, September 27, 2016 10:31 AM
To: Anita Earls
Cc: Bernier, James
Subject: New Congressional Redistricting Lawsuit

Anita,

I have been told that a process server was at the legislature this morning attempting to serve one or more of the defendants in the new LWV lawsuit, so I wanted to confirm in writing what stated in the voicemail I left earlier this morning. I am authorized to waive service for all of the defendants pursuant to Rule 4(d). If you'll forward the waiver papers to me, I'll be glad to sign and return them.

If plaintiffs insist on attempting to serve the defendants personally, then we will move for an extension of time to answer or otherwise respond, and we will note in that motion that the defendants promptly

Reply all | ⌄ Delete Junk | ⌄ ••• ✕

Thanks, and please let me know if you have any questions.

Best regards,
Alec

<image001.jpg>

Alexander McC. Peters
Senior Deputy Attorney General

North Carolina Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629
Telephone: 919.716.6900
Fax: 919.716.6763
apeters@ncdoj.gov

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential or privileged material. Any review, retransmission, dissemination of or reliance upon this information by any person or entity other than an intended recipient is prohibited. If you have received this in error, please contact the sender and delete the material.

Reply all | Delete Junk | ••• ✕

EXHIBIT B

("June 2, 2016 Order")

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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.	Case No. 1:13-cv-949

MEMORANDUM OPINION

PER CURIAM.

Pending before the Court are plaintiffs' objections to the North Carolina General Assembly's 2016 Contingent Congressional Plan ("Contingent Congressional Plan"). Upon careful consideration of the plaintiffs' objections, the responses and replies thereto, the applicable law, and the entire record, the Court **DENIES** the plaintiffs' objections as presented to this Court. The Court's denial of the plaintiffs' objections does not constitute or imply an endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan.

I.

The relevant facts are fully set forth in this Court's previous decision, Harris v. McCrory, 13-cv-949, 2016 WL 482052 (M.D.N.C. Feb. 5, 2016). There, the Court held that the congressional map adopted by the North Carolina General Assembly in 2011 violated the Fourteenth Amendment: race was the predominant consideration with respect to Congressional Districts 1 and 12, and the General Assembly did not narrowly tailor the districts to serve a compelling interest. Having found that the 2011 Congressional Redistricting Plan violated the Fourteenth Amendment, the Court ordered that new congressional districts be drawn forthwith to remedy the unconstitutional districts. See Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978).

Before enacting the Contingent Congressional Plan, the defendants filed a motion to stay this Court's order, which this Court denied. See ECF No. 148. The defendants then filed an emergency motion to stay this Court's order with the U.S. Supreme Court, which the Supreme Court denied. McCrory v. Harris, 136 S. Ct. 1001 (2016).

On February 18, 2016, the General Assembly enacted the Contingent Congressional Plan. On February 22, 2016, the plaintiffs filed a motion to establish a briefing schedule concerning the Contingent Congressional Plan. On February 23,

2016, the Court issued a scheduling order, directing, among other things, that the plaintiffs "state with specificity the factual and legal basis for [any] objection" to the Contingent Congressional Plan. ECF No. 153. On March 3, 2016, the plaintiffs filed their objections. On March 7, 2016, the defendants filed their response. On March 9, 2016, the plaintiffs filed their reply. The plaintiffs' objections are now ripe for the Court's review.

II.

As an initial matter, the Court must address two jurisdictional issues. On February 8, 2016, the defendants appealed this Court's decision on the merits to the U.S. Supreme Court. Thus, we must address the preliminary issue of whether jurisdiction in this Court was stripped by the filing of a notice of direct appeal. "The filing of a notice of appeal is an event of jurisdictional significance - it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam) (emphasis added). Because the remedial phase of this case is not an "aspect[ ] of the case involved in the appeal," the Court retains jurisdiction over it.

Relatedly, although the defendants contend that this Court's review is limited to whether the new Congressional Districts 1 and 12 pass constitutional muster, precedent suggests that we have a responsibility to review the plan as a whole. McGhee v. Granville Cty., N.C., 860 F.2d 110, 115 (4th Cir. 1988). Nonetheless, while the Court reviews the Contingent Congressional Plan as a whole, that review is limited. If "the legislative body . . . respond[s] with a proposed remedy, a court may not thereupon simply substitute its judgment of a more equitable remedy for that of the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable because it violates anew constitutional or statutory voting rights - that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." Id. (citing Upham v. Seamon, 456 U.S. 37, 42 (1982)). In other words, while a court must not overreach when fashioning a remedy of its own, it must determine whether the legislative remedy enacted at its behest is in fact a lawful substitute for the original unconstitutional plan. Accordingly, the Court can, and will, consider the plaintiffs' objections to the entire Contingent Congressional Plan.

III.

The plaintiffs appear to raise two separate objections. The first objection is remarkably vague, suggesting that the Court should be "skeptical" of the Contingent Congressional Plan and the defendants' "warped conception of the original violation." Pls.' Reply, ECF No. 163 at 5, 7. While the Court may share the plaintiffs' skepticism about the General Assembly's process in drafting the Contingent Congressional Plan, including the exact criteria actually evaluated by the map drawer, Dr. Hofeller, the plaintiffs have not sufficiently proffered a theory on why this plan "violates anew constitutional or statutory voting rights." McGhee, 860 F.2d at 115. Therefore, the Court rejects the plaintiffs' first objection on the grounds that they failed to state with specificity the factual and legal basis for the objection.

The plaintiffs' second objection is that the Contingent Congressional Plan should be rejected as an unconstitutional partisan gerrymander. As Representative Lewis stated, "I acknowledge freely that this would be a political gerrymander." Hamilton Decl., ECF No. 155 at Ex. 3 (Tr. 46:5-11); see also id. (Tr. 51:12-52:5) ("[W]e want to make clear that we . . . are going to use political data in drawing this map. It is to gain partisan advantage on the map. I want that criteria to be clearly stated and understood. . . . I'm making clear that our

intent is to use – is to use the political data we have to our partisan advantage."). The Court is very troubled by these representations. Nevertheless, it is unclear whether a partisan-gerrymander claim is justiciable given existing precedent.

The Supreme Court has recognized that partisan gerrymanders "[are incompatible] with democratic principles." Vieth v. Jubelirer, 541 U.S. 267, 292 (2004) (plurality opinion); id. at 316 (Kennedy, J., concurring in judgment) (concluding that "partisan gerrymandering that disfavors one party is [not] permissible" as such "legislative classifications reflect no policy, but simply arbitrary and capricious action"); see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2658 (2015). "Even so, the Court in Vieth did not grant relief on the plaintiffs' partisan-gerrymander claim. The plurality held the matter nonjusticiable." Id. at 281. "Justice Kennedy found no standard workable in [Veith], but left open the possibility that a suitable standard might be identified in later litigation." Ariz. State Legislature, 135 S. Ct. at 2658.

In light of the plurality holding in Vieth, the Court's hands appear to be tied. 541 U.S. at 281 ("As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering

claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable. . . ."). While we find our hands tied, we note that it may be possible to challenge redistricting plans when partisan considerations go "too far." See Cox v. Larios, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) ("In the recent decision in Vieth v. Jubelirer, 541 U.S. 267 (2004), all but one of the Justices agreed that [politics] is a traditional criterion, and a constitutional one, so long as it does not go too far."). But it is presently obscure what "too far" means. Moreover, the plaintiffs have not provided the Court with a "suitable standard," see Ariz. State Legislature, 135 S. Ct. at 2658 - that is, one that is clear and manageable - to evaluate the partisan-gerrymander claim. Therefore, it does not seem, at this stage, that the Court can resolve this question based on the record before it. For these reasons, the Court rejects the plaintiffs' second objection as presented.

IV.

For the foregoing reasons, the Court denies the plaintiffs' objections as presented. The Court reiterates that the denial of the plaintiffs' objections does not constitute or imply an

endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan.

SO ORDERED.

6/2/16

Roger L. Gregory
United States Circuit Judge