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.

On Appeal 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)

OPPOSITION OF LEGISLATIVE DEFENDANTS-APPELLEES TO EMERGENCY MOTION TO EXPEDITE

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STATEMENT

This is an appeal from an order setting a hearing on a preliminary-injunction motion for January 10, 2024, nine days before the date Plaintiffs originally identified as the drop-dead date for relief. The district court's scheduling order observes that Plaintiffs' entitlement to relief "is not as clear as plaintiffs suggest" and that it needs "to hear from the advocates and to have advocates answer the court's questions." D.Ct.Doc.43 at 3, 5. Rather than attempt to prove their claim in the proper forum and answer questions, Plaintiffs have declared that they already lost in the district court and brought this meritless appeal. Now they move this Court for expedited review, even as they have withdrawn their position that a January 19 ruling is essential. Their motion should be denied.

The Court lacks jurisdiction because a scheduling order is not appealable, and there is no "constructive denial" of a motion the district court was actively considering before the notice of appeal deprived it of jurisdiction. Plaintiffs call it "clear that [the district court] will not decide the motion in time" to prevent ballots from being mailed on January 19, 2024, for the 2024 primary election. Mot. 3. But Plaintiffs have since abandoned the assertion of a January 19 deadline, and, besides, the scheduled hearing is nine days before that date, and just one date after the date by which Plaintiffs originally demand an injunction from this Court (and now have withdrawn). More importantly, the district court did not refuse to rule on Plaintiffs' motion, as Circuit precedent requires as a precondition to jurisdiction by constructive denial. The district court said it had

questions for both sides and needs a hearing to adjudicate what it regards as questions that are not clear. That is the opposite of a refusal to rule. Plaintiffs, in sum, are complaining that they might have to *persuade* a neutral tribunal that the relief they demanded on a highly expedited time frame—after waiting 28 days to file suit—is justified. That is called due process, not irreparable harm.

Even if appellate jurisdiction were somehow proper, Plaintiffs' demand for expedited consideration would be unwarranted and prejudicial. It would be futile to impose the extreme schedule Plaintiffs propose when, under the *Purcell* principle, Plaintiffs' suit was too late to impact the 2024 elections when it was filed. Moreover, the motion demands this Court schedule a hyper-expedited remedial phase that affords the General Assembly insufficient time—a mere week—to pass a remedial plan, and virtually no time for appropriate review of the plan. This demand, like Plaintiffs' others, is untenable.

ARGUMENT

I. This Court Lacks Appellate Jurisdiction

Plaintiffs' motion should be denied, and this appeal dismissed for lack of jurisdiction. Plaintiffs' appeal is taken from the district court's December 29, 2023, scheduling order, D.Ct.Doc.43, setting a hearing on Plaintiffs' motion for a preliminary injunction, in which they seek an additional majority-minority

State Senate District in northeast North Carolina. *See* D.Ct.Doc.44 at 1.[1] That motion is not yet resolved.

1. Contrary to Plaintiffs' assertions (in their now-withdrawn Emergency Motion for Limited Injunction Pending Appeal ("Injunction Mot."), at 9–11; *see* C.A.4.Doc.30-1), this Court lacks jurisdiction and can neither issue an injunction nor proceed to the merits. "With few exceptions, courts of appeals are vested with jurisdiction only over appeals from 'final decisions of the district courts,'" *District of Columbia v. Trump*, 959 F.3d 126, 130 (4th Cir. 2020) (quoting 28 U.S.C. § 1291), and orders granting or denying injunctions, 28 U.S.C. § 1292(a)(1). Plaintiffs' motion for a preliminary injunction remains pending before the district court, and no appealable order has issued.

Plaintiffs erroneously allege that their appeal is from "the district court's constructive denial of their preliminary injunction motion." Mot. 3; *see also* Injunction Mot. 9 (same). The Circuit precedent they cite treats as appealable "[a] district court's actual refusal to rule on immunity." *District of Columbia*, 959 F.3d at 130. Even assuming that doctrine applies in the interlocutory-injunction context, it is not satisfied here because there is no refusal to rule. The district court scheduled a hearing on January 10 to facilitate its forthcoming resolution of Plaintiffs' motion and has signaled that it *will* rule. D.Ct.Doc.43 at 6. This

[1] The notice of appeal also references two other scheduling orders, D.Ct.Doc.27 (Dec. 8, 2023), and D.Ct.Doc.23 (Nov. 27, 2023). Neither is appealable.

Court in *District of Columbia* held that only a "refusal," "implicit" or "explicit," that is "clear" in "establishing that the ruling is the court's final determination in the matter" creates the type of constructive denial Plaintiffs invoke. 959 F.3d at 130. That standard is not met where the district court has actively adjudicated the motion and will rule in the near future.

Plaintiffs cite (Injunction Mot. 10) a case in which Legislative Defendants asserted this type of basis of appellate jurisdiction, but Plaintiffs fail to mention that this Court rejected that assertion and dismissed the appeal. *See* Order, *N.C. State Conf. of NAACP et al. v. Berger et al.*, No. 19-2048 (4th Cir. Oct. 2, 2019), Doc. 50. That was no oversight. Plaintiffs' counsel's law firm represented the appellees in *N.C. State Conf. of NAACP* and advocated dismissal of that appeal, contending that "the motion [to intervene at issue in that case] has only been briefed for just over one month" and "the mere fact that the district court has not abided by Appellants' preferred schedule does not amount to a *de facto* denial...." Appellees' Mot. to Dismiss Interlocutory Appeal, No. 19-2048, Doc. 17 at 5 (4th Cir. Sept. 27, 2019). That view prevailed and applies equally here: briefing on Plaintiffs' motion for preliminary injunction closed on December 26, 2023, with a hearing scheduled for just a few weeks later, on January 10, 2024. The Court's decision to employ a "judicious deliberative process" and to hold a hearing to "hear from the advocates and to have the advocates answer the court's questions," D.Ct.Doc.43 at 5, is not a constructive denial of Plaintiffs' motion.

2. Even assuming Plaintiffs could establish jurisdiction in this Circuit based on the out-of-circuit standard they cite, requiring "[a] showing of unjustifiable delay coupled with irreparable injury," *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996), Plaintiffs fall well short of that mark. To begin, their papers refute any plausible contention of irreparable injury, for two reasons.

First, Plaintiffs' contention is that the district court's December 29, 2023, scheduling order setting a hearing on their preliminary-injunction motion for January 10, 2024, somehow made it "clear that [the district court] will not decide the motion in time" to prevent ballots from being mailed on January 19, 2024, to voters for the 2024 primary election. Mot. 2–3. But there are no 2024 contested primaries in SD1 and SD2, which means that there is no primary election and no ballots for State Senate being circulated to SD1 and SD2 voters on January 19. *See* G.S. 163-110 (where only one candidate files in a primary, that candidate becomes a general election candidate by default without a primary); NCSBE General Election Candidate List, Federal and State Office Only (2024), at 4 (showing general election candidates for SD1 and SD2).[2]

Plaintiffs have since conceded this and withdrawn their Emergency Motion for Temporary Injunction Pending Appeal. C.A.4.Doc.30-1. In so

[2] https://s3.amazonaws.com/dl.ncsbe.gov/Elections/2024/Candidate%20Filing/2024_General_Election_Candidate_PDFs/2024_general_candidate_list_by_contest_federal_and_state.pdf (visited Jan. 3, 2024).

doing, Plaintiffs now maintain this appeal and request to expedite with no foundation: their theory of appellate jurisdiction is that the January 19 "deadline" provides the deadline for relief, which the district court's hearing date "constructively" denies by coming too late. *See* Injunction Mot. 1, 3, 8, 9–11. Having withdrawn that position, Plaintiffs lack any argument that the January 10 hearing date constructively denies them anything; their motion to expedite looks to a February 2 deadline. *See* Mot. 4; *see also* C.A.4.Doc.30-1, at 2 ¶ 7. Plaintiffs do not explain how the district court's scheduling order prevents it from ruling before February 2, and it is a mystery how Plaintiffs have a good-faith basis to proceed with this appeal.

Besides, even under Plaintiffs' original, erroneous view that the January 19 date set the deadline, there remained nine days after the hearing in which the district court could issue the relief Plaintiffs demand.[3] Plaintiffs have not and cannot show why the district court cannot grant relief in time—except, of course, if the district court disagrees with their view of the merits. But that eventual outcome would not create jurisdiction in this Court before it occurs.

Second, Plaintiffs vigorously assert that there is ample time for a federal injunction, as (in their view) state deadlines can be moved and primaries "for only two Senate districts" may be held "in May," which they say has "happened

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[3] Indeed, Plaintiffs shot their own motion in the foot by filing this appeal, which deprives the district court of jurisdiction to conduct the January 10 hearing or issue a ruling before January 19. *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 741 (2023). But unforced errors also do not create appellate jurisdiction.

in 12 of the last 17 cycles." Injunction Mot. 22. Obviously, Plaintiffs do not believe there is a January 9 deadline for a ruling, as they say there is time for a remedial state senate plan to be adopted "by March 4," Mot. 4, and they cannot show irreparable harm when they adamantly insist there is none.

Plaintiffs say appellate jurisdiction arises because "Legislative Defendants surely will say that," if ballots are sent out, "it conclusively forecloses relief." Injunction Mot. 2. But a party's argument does not create appellate jurisdiction. Notably, Legislative Defendants' position is that the *Purcell* principle foreclosed relief as of the date Plaintiffs' filed this case, *see* Opp. to Injunction Mot. 18–19, so Plaintiffs' now-withdrawn January 9 deadline carries, at most, marginal significance as far as Legislative Defendants' argument is concerned (and apparently none is far as Plaintiffs are concerned). More fundamentally, Plaintiffs disagree with Legislative Defendants' *Purcell* argument, Injunction Mot. 21–23, and, however that dispute might ultimately turn out, the point for jurisdictional purposes is that the *district court* is currently entertaining these competing views. Plaintiffs have their opportunity to convince *it* that relief can be effectuated, and (if they do not succeed) Plaintiffs may renew their position in this Court by appealing from the denial of their preliminary-injunction motion. Plaintiffs' apparent belief that they will lose this argument in the district court—and in this Court in a later appeal—does not create appellate jurisdiction now. It just demonstrates that this appeal is meritless.

3. Assuming the point is relevant to jurisdiction, the district court has not unreasonably delayed in processing Plaintiffs' preliminary-injunction

motion. "It is axiomatic that a district court has wide discretion to prioritize matters among its docket." *District of Columbia*, 959 F.3d at 132. It has not abused its discretion here. The court explained its rationale for conducting a hearing, observing that Plaintiffs' showing on the merits "is not as clear as plaintiffs suggest," that the court needs "sufficient time to review the 835 pages of filings concerning" Plaintiffs' motion, and that the district court "is the busiest … in the Fourth Circuit" as each judge has "over 1,000 cases." D.Ct.Doc.43 at 2, 5–6. It was eminently reasonable for the Court to set an argument "to hear from the advocates and to have the advocates answer the court's questions." *Id.* at 5–6. That is what courts typically do and should typically do.

The district court also did not abuse its discretion in denying Plaintiffs' "meritless" emergency motion to expedite. *Id.* at 5. Plaintiffs afforded themselves weeks to prepare their complaint and motion, announced they would file their motion the day before Thanksgiving, and demanded that opposition briefs be filed the following Monday. In rejecting that absurd request, the district court correctly recognized that redistricting litigation "is not a game of ambush." D.Ct.Doc.23 at 3 (quoting *In re Landry*, 83 F.4th 300, 303 (5th Cir. 2023)). Voting Rights Act litigation is uniquely complex, calling for "a flexible, fact-intensive" inquiry and "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 46, 78 (1986) (quotation marks omitted). VRA §2 rejects any "single-minded" rule in favor of "a more refined approach." *Allen v. Milligan*, 599 U.S. 1, 26 (2023). The district court correctly concluded that this type of case takes time to develop,

prepare, and present. In recent §2 litigation resolved in the Supreme Court, the preliminary-injunction motion entailed a seven-day hearing about two months after the challenged plan was enacted, involving 17 witnesses, and more than 1,000 pages of briefing and 350 exhibits. *See Landry*, 83 F.4th at 306 (describing *Allen v. Milligan* preliminary-injunction hearing). The district court had the best of reasons to conclude that a similar inquiry here could not occur over Thanksgiving weekend and that Legislative Defendants were entitled to a modest, nine-day briefing extension to afford them time to retain experts and obtain their opinions. *See* D.Ct.Doc.28.

The district court also did not clearly err in finding that Plaintiffs' "slothfulness" has contributed to any inability on their part to obtain relief, as they waited "26 days" after the challenged plan was enacted to sue and "28 days" to file their preliminary injunction motion. D.Ct.Doc.43 at 2. Plaintiffs insist that this case is extraordinary and that the "VRA violation in this case is egregious and entirely clear-cut." Mot. 3. But they did not act like it when it counted, even though they insist the information showing liability was available before the challenged plan was adopted. *See* Injunction Mot. 5. Litigants who sit on their hands for weeks cannot demand that the federal courts overhaul their schedules and impose unreasonable deadlines on the parties they sue. And they certainly cannot manufacture appellate jurisdiction *before* district-court resolution of the motions they tender. If Plaintiffs' claims have merit, that should become apparent in the ordinary course of litigation in the proper forum. This Court, at least for now, is not it.

4. Plaintiffs' strategy of throwing in the towel in the district court before it rules, claiming "constructive" denial, and invoking a manufactured original jurisdiction in the court of appeals would—if ratified—set a dangerous precedent. It would invite—indeed, practically compel—every future election-law litigant to bring suit to appellate tribunals in the first instance. In an era where scores of election cases proceed on very tight time frames every cycle, the massive increase in case load would overwhelm this and every other appellate court.

Now is no time to open that door. Plaintiffs brought a Voting Rights Act §2 claim, and "the ultimate finding of vote dilution" under §2 is "a question of fact." *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986). This Court's "function is not authoritatively to find the 'facts' in the first instance," but to review the district court's findings for clear error. *Moore v. City of Charlotte, N.C.*, 754 F.2d 1100, 1104 (4th Cir. 1985); *see Gingles*, 478 U.S. at 78-79. The Court cannot review findings yet to be issued and is not postured to examine the "835 pages of filings" where Legislative Defendants "hotly dispute" Plaintiffs' assertions. D.Ct.Doc.43 at 4, 6. Plaintiffs again do not explain how this Court can act as a tribunal of first review in a case like this and fall well short of justifying their unprecedented request.

II. Expedition Would Be Futile and Plaintiffs' Proposed Schedule Would Be Prejudicial To Legislative Defendants

Even if this Court had jurisdiction over this interlocutory appeal—it does not—it should not entertain the hyper-expedited schedule Plaintiffs seek in their motion for two reasons.

1. Expedition would be futile. As explained in Legislative Defendants' accompanying opposition to plaintiffs' emergency motion for temporary injunction pending appeal (at 18–21), it is already too late for the district court—or this Court—to issue the demanded relief in time for the 2024 elections. Under the *Purcell* principle, "federal district courts ordinarily should not enjoin state election laws in the period close to an election, and … federal appellate courts should stay injunctions when … lower federal courts contravene that principle." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)); *see Wise v. Circosta*, 978 F.3d 93, 98-99 (4th Cir. 2020).

The *Purcell* principle applies here because the "State's election machinery is already in progress." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The candidate filing period has both begun and ended (running from December 4 to December 15). Ballots will be sent to voters in North Carolina's no-excuse absentee system beginning January 19, 2024.[4] North Carolina State Board of Elections, *Upcoming*

[4] Although SD1 and SD2 may not be impacted, Plaintiffs' demanded relief may require reconfiguring much of the Senate plan and hence impact other districts. *See* Opposition to Injunction Mot. 20.

Election, Overview of 2024 Elections.[5] In-person early voting runs from February 15 to March 2, with the primary on March 5. *Id.* In *Allen*, the Supreme Court intervened to stay a three-judge panel's redistricting injunction, which was issued "seven weeks" before delivery of ballots for absentee voting in "the primary elections." 142 S. Ct. at 879 (Kavanaugh, J., concurring). According to the two Justices whose votes were decisive, the *Purcell* principle alone compelled that result. *Id.* at 879-82. Here, absentee balloting commences January 19, just 16 days from the date of this Opposition, making this a far more compelling *Purcell* case than *Allen.*

A stay was required in *Allen*, even though the Supreme Court later affirmed on the merits, concluding that the court "faithfully applied our precedents." *Allen*, 599 U.S. at 23. The stay was issued on February 7, 2022—approximately a week after Alabama's candidate filing deadline of January 28, 2022. *See Allen*, 142 S. Ct. at 879; *id.* at 880 (Kavanaugh, J., concurring); Alabama Code §17-13-5. Around the same time, the Fifth Circuit declined to stay a June 2022 district-court injunction under §2 in Louisiana, notwithstanding that ballots were set to be mailed in September, calling *Allen* "an outlier." *Robinson v. Ardoin*, 37 F.4th 208, 228-29 (5th Cir. 2022). That was erroneous. The Supreme Court promptly entered the stay the Fifth Circuit refused to enter. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022).

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[5] https://www.ncsbe.gov/voting/upcoming-election (visited Jan. 3, 2024).

Here, like in *Allen*, the candidate filing deadline has come and gone. Because the *Purcell* principle is a bar to Plaintiffs' preliminary-injunction motion as it relates to the 2024 elections, no purpose would be served by expediting this appeal. Complex appeals such as this one are best briefed, argued, and decided in the ordinary course, to allow the litigants and the Court sufficient time to carefully consider the issues. Any relief ultimately granted in this lawsuit—Legislative Defendants dispute that any relief is warranted or will be granted—would not take effect until the 2026 elections, affording ample time for the timely disposition of this appeal and any subsequent appeal to the Supreme Court in time for the 2026 elections.

2. Separately, Plaintiffs' proposed schedule affords inadequate time for the North Carolina General Assembly to consider and enact a remedial plan in the event that the enacted Senate Plan is enjoined. Under Plaintiffs' proposed schedule, "if the Court issues a decision finding a VRA violation by February 2, it could give the General Assembly until February 9 to enact" a remedial plan. Mot. 4. The schedule would then afford other parties four days, until February 13, to propose "alternative" plans, and would require this Court to "direct the district court to adopt remedial districts by February 15." *Id.*

The framework governing the remedial process in this Court is settled. The Supreme Court has "said on many occasions" that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *see also Growe v. Emison*, 507 U.S. 25, 34 (1993). "Absent evidence that these state

branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34.

As applied where federal courts find a redistricting plan unconstitutional, this principle requires courts "to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). "[A] legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands' of federal law." *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (citation omitted); *see also, e.g.*, *United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009) ("[A]t least in redistricting cases, district courts must offer governing bodies the first pass at devising a remedy[.]"). This remedial opportunity was afforded in the most recent redistricting case resolved in the Supreme Court. *See Caster v. Allen*, No. 2:21-cv-1536-AMM, 2023 WL 6005545, at *3 (N.D. Ala. Sept. 5, 2023) ("Because federal law dictates that the Alabama Legislature should have the first opportunity to draw a remedial plan, we gave the Legislature that opportunity."). And just a few months ago, when a district court afforded a state legislature an unreasonably short time to remedy a likely violation of the Voting Rights Act, the Fifth Circuit issued a writ of mandamus commanding that court to afford additional time. *See Landry*, 83 F.4th at 306–07, *stay denied*, 144 S. Ct. 6 (2023); *see also Robinson v. Ardoin*, 86 F.4th 574, 586 (5th Cir. 2023) ("[W]e

agree with the ruling that the Louisiana Legislature has time to create its own remedial plan. Our decision will give the Legislature an opportunity to act or to inform the district court that it will not.").

Affording the General Assembly only a week to implement a remedial plan is patently unreasonable, and affords insufficient time for two legislative chambers to craft a plan, debate it, and pass it. Furthermore, state law directs that the General Assembly be afforded fourteen days to remedy any defects in the first instance. N.C.G.S. § 120-2.4. State and federal courts have recognized this statutory two-week minimum for legislative remedy. *See, e.g., Covington v. State*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017); *Pender County v. Bartlett*, 361 N.C. 491, 509-10, 649 S.E.2d 364 (2007).[6] Like in *Pender County*, the court should also consider that the General Assembly is now in recess and is not scheduled to reconvene until January 17, 2024. Because the General Assembly is scheduled to convene within 45 days, the period of time under N.C.G.S. § 120-2.4., may not be less than 2 weeks from the opening of that session, which in this instance would be January 31, 2023. Affording such a brief remedial period would serve no purpose but to set the General Assembly up to fail, which contravenes the principle that "even after a federal court has found a districting plan unconstitutional, 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to

[6] *See* Senate Joint Resolution 760, https://www.ncleg.gov/Sessions/2023/Bills/Senate/PDF/S760v3.pdf.

preempt.'" *Robinson*, 86 F. 4th at 601 (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981)).

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to expedite appeal should be denied.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 3,913 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 Calisto MT font.

Dated: January 3, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2024, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 3, 2024

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