

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

THE CHRISTIAN MINISTERIAL ALLIANCE, *et al.*,

PLAINTIFFS,

v.

Case No. 4:19-cv-00402-JM

ASA HUTCHINSON,
the Governor of the State of Arkansas, *et al.*,

DEFENDANTS.

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR RECONSIDERATION OF SCHEDULED TRIAL DATE

Defendants, for the response in opposition to Plaintiffs' motion for reconsideration of scheduled trial date pursuant to Local Rule 7.2 and this Court's scheduling order (Doc. No. 144), state:

1. On January 6, 2022, the parties herein filed a *Joint Report Pursuant to Administrative Order Nineteen* setting forth the parties' respective positions on the two-week bench trial that was scheduled to commence on January 18, 2022. (Doc. No. 138). Due to various complications caused by the COVID-19 pandemic and pursuant to Order 19, Defendants requested a continuance of the trial date until it is safe to hold the trial in person. *Id.* ¶¶ 10-18. Plaintiffs, by contrast, said they would be prejudiced by any delay of the trial date due to "elections for both the Arkansas Supreme Court and Court of Appeals in the coming months." *Id.* ¶ 8. Plaintiffs urged the Court to move forward with the trial as scheduled and asked the Court to order the Defendants to "work with Plaintiffs to find a commensurate accommodation" and to "discuss a variety of alternatives" to a continuance. *Id.* ¶ 8. Plaintiffs also suggested the Court should "consider a remote trial in order to avoid further delay[.]" *Id.* ¶ 9.

2. The next day, on Friday, January 7, 2022, the Court's law clerk emailed all counsel of record and advised that the Court had decided to move the trial off its current setting after considering the parties' positions as represented in the Joint Status Report and Administrative Order No. 19 in the hopes of letting this wave of the pandemic pass so the Court could more sure of completing the trial without complications caused by the pandemic.

3. The Court initially re-set the trial for March 14, 2022, but later that same day had to bump it to April 25, 2022, due to a conflict on the Court's trial calendar. (Doc. Nos. 140-141).

4. Plaintiffs now seek reconsideration of this Court's order rescheduling the trial date, asserting that the April 25 trial date irreparably harms them due to upcoming judicial elections. (Doc. No. 143). But Plaintiffs' motion does little more than regurgitate arguments they already made to the Court in their section of the Joint Status Report and via various e-mails, and Plaintiffs certainly do not establish irreparable harm as a result of an April 25, 2022 trial date.

5. Plaintiffs' motion ignores the fact that, as they concede in their complaint, legislative action would be required to effectuate any judgment entered in their favor regarding the Court of Appeals. (*See* Doc. No. 9 at 20) (requesting an order "[s]etting an immediate and reasonable deadline for the State of Arkansas to enact and adopt new methods of election for the Arkansas Supreme Court and Court of Appeals"). Plaintiffs have no basis for assuming that an earlier trial date—even if the Court had such a setting available—would guarantee that any such legislative action would be completed in time for the upcoming judicial election cycle. Nor do Plaintiffs have any factual basis for assuming that any such legislative action could *not* be timely completed before the May 24, 2022, elections, should they prevail on the merits.

6. Any changes to the method of electing justices to the Supreme Court would likely require a constitutional amendment. Under Section 22 of Article 19, while either house of the Arkansas General Assembly may propose amendments, the amendment of the state constitution requires majority approval of both houses in a recorded vote, publication in at least one newspaper in each county for six (6) months prior to the next election of the Assembly, and majority approval of the voters. Ark. Const. art. 19, § 22. As a matter of law, the Arkansas Constitution simply cannot be amended prior to the May 24, 2022, judicial elections, regardless of when the Court conducts the trial in this matter.

7. Plaintiffs threaten that if this Court does not reschedule the trial in this case, they “will likely need to seek emergency relief before March 1, 2022,” because they would otherwise suffer irreparable harm. (Doc. No. 143 at 2; *see id.* at 4-7). But Plaintiffs’ conduct in this litigation is inconsistent with any sort of preliminary relief. They filed this lawsuit in June of 2019, over two-and-a-half years ago. (*See* Doc. No. 1). Since then, the 2020 elections for the Arkansas Supreme Court and Court of Appeals have come and gone. Yet Plaintiffs filed no motion seeking any kind of emergency relief. Notwithstanding that Plaintiffs are unlikely to succeed on the merits of their claims, their “delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief.” *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); *see Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057, 1063 (7th Cir. 2016) (affirming denial of preliminary injunction where “the [district] court emphasized the significance of the plaintiffs’ delay, more than two months after receiving notice, as a deciding factor in the case”); *Quince Orchard Valley Citizens Ass’n, Inc. v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (affirming denial of preliminary injunction for six-month delay). Because of Plaintiffs’ delay, which is much longer than the delays in the cases just cited, “considerable

harm would [be] visited on the electoral system if the requested relief [were] granted” on an emergency basis prior to the May 2022 elections. *Jones*, 842 F.3d at 1063. Plaintiffs’ delay makes any last-minute relief even less appropriate than in typical election cases. *See Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (“This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.”); *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 609 (8th Cir. 2020) (applying *RNC v. DNC* to stay injunction of election law pending appeal).

8. Because Plaintiffs’ request is speculative and does not establish irreparable harm, the Court should deny their request to reconsider the order re-setting the trial in this case to commence on April 25, 2022.

9. Plaintiffs’ proposed alternatives to the April trial date are untenable. Non-consecutive trial dates would be inefficient for the Court, the parties, counsel, and witnesses. If the Court is to decide this case on a piecemeal record, then Defendants submit that judicial economy and efficiency would be far better served if the Court would reconsider the Defendants’ still-pending motion for summary judgment and enter judgment as a matter of law. There are no genuine disputes of material fact in this case. Instead, this case presents a battle of the experts who have a fundamental disagreement about whether the Court should consider *all* judicial elections or only the handful involving black candidates when deciding whether racially-polarized voting exists. But that issue presents a pure question of law that the Court can and should decide on the papers. Respectfully, there is no need whatsoever for a costly two-week long dog-and-pony show that will do nothing more than present live what is outlined in detail in the expert reports and summary-judgment papers.

10. Because there are no genuine issues for trial, this case should be decided on summary judgment and *no* trial should be held. But in the alternative, if the Court believes that genuine issues of material fact preclude summary judgment, then the Court should hold the April 25, 2022, trial date as all counsel and witnesses have already confirmed their availability for trial on those dates, and judicial economy and efficiency for the parties and witnesses would be best served by keeping the current schedule.

11. Counsel for the Defendants have extremely full trial calendars and have numerous conflicts throughout the remainder of January and the entire month of February. March 2022 is already nearly fully booked, as well. Many of those dates and deadlines have already been delayed due to the COVID-19 pandemic and cannot be rescheduled again. Nevertheless, Defendants are willing to confer with Plaintiffs regarding alternatives to the April 25, 2022, trial date should the Court direct them to do so.

WHEREFORE, Defendants pray that the Court deny Plaintiffs' motion for reconsideration and for all other relief to which they may be entitled.

Dated: January 25, 2022

Respectfully submitted,

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