

STATE OF NORTH CAROLINA

FILED

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

SUPERIOR COURT DIVISION

No. 19 CVS 012667

2021 NOV -5 P 4: 28

REBECCA HARPER, *et al.*,

WAKE CO., C.S.C.

Plaintiffs,

BY

v.

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL
CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE
SELECT COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

**MOTION FOR EXPEDITED
BRIEFING AND
RESOLUTION OF
PLAINTIFF'S MOTION FOR
LEAVE TO FILE
SUPPLEMENTAL
COMPLAINT**

Plaintiffs, a group of individual North Carolina voters, respectfully request that the Court expedite briefing and resolution of their Motion for Leave Under Rule 15(d) to File a Supplemental Complaint, which is being filed simultaneously with this motion, as well as Plaintiffs' forthcoming motion for a preliminary injunction. In support of this motion to expedite, Plaintiffs state as follows.

1. Plaintiffs filed this action on September 27, 2019, asserting that North Carolina's congressional map enacted in 2016 (the "2016 Plan") was an extreme partisan gerrymander in violation of multiple provisions of the North Carolina Constitution. On October 28, 2019, this Court granted a preliminary injunction barring further use of the 2016 Plan. The Court held that "there is a substantial likelihood that Plaintiffs will prevail on the merits of this action by showing beyond a reasonable doubt that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution[]." Order on Inj. Relief at 14.

2. On October 30, 2019, Speaker Moore announced that Legislative Defendants would create a joint House and Senate Select Committee to draw a remedial plan (the "2019 Plan"), which the full House and Senate then passed on straight party-line votes on November 14

and 15. Legislative Defendants subsequently moved for summary judgment, arguing that the case was moot in light of the 2019 Plan. The Court on its own motion stayed the filing period for the 2020 congressional primary elections and set a hearing for December 2, 2019 to hear the parties' cross-motions for summary judgment. At the conclusion of that hearing, the Court lifted its stay of the filing period.

3. In May 2020, following the March primary elections, Legislative Defendants renewed their motion for summary judgment on mootness grounds. Plaintiffs' opposition reiterated that the case was not moot, stressing the importance of a declaratory ruling that the 2016 Plan violated the North Carolina Constitution because "finding this case wholly moot would allow Legislative Defendants to escape judicial review of the 2016 Plan and create a roadmap for how to escape review of future plans that are challenged in court," including those produced during "the next round of redistricting in 2021." Pls.' Opp. to Renewed Mot. for Summ. J. at 2-3. The Court did not rule on Legislative Defendants' summary judgment motion and the 2020 general elections were held under the 2019 Plan.

4. On November 4, 2021, the North Carolina General Assembly enacted a new congressional map (the "2021 Plan"). As explained more fully in the accompanying motion for leave to file a supplemental complaint and proposed supplemental complaint, the map is an extreme partisan gerrymander—as extreme, if not more so, than the one this Court enjoined in 2019. Just like the 2016 Plan, the 2021 Plan guarantees that Republicans will win 10 seats and Democrats will win 3 seats, merely adding one competitive district because the state gained a seat in apportionment. This extreme result was the product of an opaque and hurried process that openly flouted the redistricting Committees' nominal prohibition on partisan considerations.

5. Today, Plaintiffs have moved under Rule 15(d) for permission to file a supplemental complaint challenging the 2021 Plan as an unconstitutional partisan gerrymander. As explained in that motion, North Carolina courts allow supplemental pleadings “with great liberality and almost as a matter of course.” 1 N.C. Civil Prac. & Proc. § 15:6 (6th ed.). Here there is ample reason to permit the proposed supplemental complaint given that it asserts identical legal claims on behalf of identical plaintiffs, seeks identical forms of relief, and makes substantially overlapping factual allegations about the extreme partisan gerrymandering of North Carolina’s congressional districts. Permitting a supplemental complaint will cause no prejudice to Defendants, whereas denying leave threatens profound irreparable harm to Plaintiffs and millions of other North Carolina voters due to the quickly impending candidate filing period for the 2022 election, which is set to open on December 6.

6. Plaintiffs and the public have a strong interest in resolving Plaintiffs’ motion for leave to file a supplemental complaint as expeditiously as possible to ensure that new, lawful districts can be established for the 2022 primary and general elections. In nearly every state and federal legislative election held in North Carolina since 2010, voters have been forced to cast their ballots in districts that the courts ruled unconstitutional. The 2011 state House and Senate plans were unconstitutional racial gerrymanders, and the 2017 replacements were unconstitutional partisan gerrymanders, as a three-judge panel of this Court held in *Common Cause v. Lewis*, 18-CVS-14001 (N.C. Super. Ct. Sept. 3, 2019). Likewise, the 2011 congressional plan was an unconstitutional racial gerrymander. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 604 (M.D.N.C. 2016), *aff’d sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017). And if not for this Court’s timely intervention in 2019, North Carolinians would have been forced to cast their votes under a 2016 congressional plan that was potentially the most extreme

and brazen partisan gerrymander in American history. As Plaintiffs explain in their proposed supplemental complaint, the 2021 Plan is no better. North Carolinians should not be forced again to vote in unconstitutional districts.

7. While this Court has the authority to delay the congressional primaries now scheduled for March 8, 2022, to provide more time to adjudicate the constitutionality of the 2021 Plan, the Court can eliminate or substantially mitigate the potential for delay by resolving Plaintiffs' motion for leave expeditiously.

8. If Plaintiffs are permitted to file their supplemental complaint, they will promptly move for a preliminary injunction. That motion will be straightforward both factually and legally. Just like the 2016 Plan, the 2021 Plan systematically packs and cracks Democratic voters to entrench an overwhelming Republican advantage. Expert analysis materially identical to what Plaintiffs presented with respect to the 2016 Plan will show that the 2021 Plan is likewise an extreme partisan outlier that cannot be explained but for an intent to dilute the electoral strength of Democratic voters.

9. Although Legislative Defendants enacted the 2021 Plan as late as possible to frustrate attempts at judicial review, sufficient time remains to establish and implement a remedial plan on the current election schedule. During the remedial phase in *Common Cause*, the General Assembly adopted two separate remedial plans revising a total of 77 state House and state Senate districts over a mere 8-day period. If Plaintiffs' motion under Rule 15(d) and their forthcoming motion for preliminary injunction are briefed expeditiously, there will be time for the Court to hear and resolve those motions, allow the General Assembly to redraw the map, and review and revise the remedial map as necessary to ensure compliance with the North Carolina Constitution.

10. Candidate filing is currently set to begin on December 6, 2021, and the congressional primaries are set for March 8, 2022.

11. To promote a timely resolution that will allow for the establishment of a remedial plan to be used in the 2022 elections, Plaintiffs propose the following schedule:

- a. Defendants shall file any response to Plaintiffs' Rule 15(d) motion by Wednesday, November 10, 2021.
- b. Plaintiffs shall file their reply in support of the Rule 15(d) motion by Friday, November 12.
- c. Plaintiffs will file their motion for a preliminary injunction promptly upon the Court's ruling on Plaintiffs' Rule 15(d) motion.
- d. Defendants shall file their responses to Plaintiffs' motion for a preliminary injunction within 7 days of the filing of that motion.
- e. Plaintiffs shall file their reply in support of their motion for a preliminary injunction within 3 days of Defendants' response.

12. While sufficient time remains to resolve Plaintiffs' preliminary injunction motion and implement a remedial plan on the current election schedule, the schedule can be adjusted to provide effective relief. The State Board of Elections has authority "to make reasonable interim rules and regulations" to move administrative deadlines in the event that any North Carolina election law "is held unconstitutional or invalid by a State or federal court." N.C. Gen. Stat. § 163A-742. And this Court has remedial authority to move the 2022 congressional primary elections, if necessary. *See Common Cause v. Lewis*, 18-CVS-014001, slip op. at 352 ¶¶ 181-82. The Court could move the primaries under one of two approaches. First, the Court could move all of the State's 2022 primaries, including for offices other than the U.S. House, to a later date in

2022. Alternatively, the Court could move the primaries for only the U.S. House to a later date, while keeping the primaries for other offices on the currently scheduled date in March. One possibility would be to move the congressional primaries to the “Second Primary” date that has taken place in recent election cycles for primary run-offs.

13. As this Court is aware, there is precedent for both approaches. In 2002, the North Carolina Supreme Court in *Stephenson v. Bartlett* enjoined the primaries for the state House and state Senate from occurring on the originally scheduled date, 355 N.C. 281, 282, 561 S.E.2d 288 (2002), causing all of the State’s primaries to be moved to a different date, 357 N.C. 301, 303, 582 S.E.2d 247, 249 (2003). And in 2016, after the federal court in *Harris* enjoined the State’s congressional plan as an unconstitutional racial gerrymander, the General Assembly moved *only* the congressional primaries, while leaving other primaries (including the presidential primary) on the originally scheduled date. *See* Session Law 2016-2 § 1(b). Such changes are not necessary at this stage, however, as the Court has sufficient time to receive briefing and argument, issue a preliminary injunction, and oversee a remedial process under the current election schedule.

WHEREFORE, Plaintiffs request that the Court enter an order expediting briefing and decision on Plaintiffs’ motion for leave to file a supplemental complaint, and their forthcoming motion for a preliminary injunction, on the schedule set out above.

Dated: November 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

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This the 5th day of November, 2021.



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