STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2017 DEC 11 A 10:02
WAKE CO., C.S.C.
BY

MARGARET DICKSON, *et al.*,

Plaintiffs

v.

ROBERT RUCHO, *et al.*,

Defendants.

Civil Action No. 11 CVS 16896

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al.*,

Defendants.

Civil Action No. 11 CVS 16940

(*Consolidated*)

JOINT PLAINTIFFS' REPLY BRIEF

I. Contrary to Legislative Defendants' Circular Logic, the Cases are Not Moot

a. Legislative Defendants' simplistic portrayal of North Carolina mootness doctrine ignores not only important case law, but the facts at hand

Legislative Defendants' explanation of North Carolina mootness doctrine is grossly over-simplified: the proper inquiry to determine mootness is not simply whether a statute has been "repealed and replaced," Leg-Defs' Br. at 7, but rather, whether Plaintiffs have been afforded all of the relief sought that may be within the court's power to provide. *See Lange v. Lange*, 357 N.C. 645, 647, 558 S.E.2d 877, 879 (2003) ("when a court's determination can have a practical

effect on a controversy, the court may not dismiss the case as moot"); *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 401, 474 S.E.2d 783, 788 (1996) (plaintiff's claim is not moot where trial court has not yet determined whether there is an appropriate equitable remedy); *see also Bailey & Assocs. v. Wilmington Bd. of Adjustment,* 202 N.C. App. 177, 182; 689 S.E.2d 576, 582 (2010) ("the repeal of a challenged statute does not have the effect of mooting a claim arising under that statute . . . if the repeal of the challenged statute does not provide the injured party with adequate relief or the injured party's claim remains viable"). Legislative Defendants' persistence in asserting that the *Harris* and *Covington* courts have provided Plaintiffs with all of the relief that they have requested does not make the assertion true. *See* Pls' Br. at 9-14. Among other relief sought and not yet obtained, Plaintiffs requested as part of their relief the implementation of remedial redistricting plans that adequately comply with federal and state law. *Id.* The fact no maps that have been decidedly ruled as constitutional are yet in place necessarily prevents this case from being moot. *See Lange,* 357 N.C. at 647, 558 S.E.2d at 879.

b. This Court is empowered to revisit Plaintiffs' state law claims that were contingent on the mistaken interpretation of federal law

Further, neither court that has ruled on the constitutionality of the districts at issue has, to date, adjudicated their adequacy under state law. Legislative Defendants contend that "[n]othing in the United States Supreme Court's decision to vacate the *Dickson II* judgment on the federal claims . . . changes the North Carolina Supreme Court's final resolution of separate and distinct state law claims." Leg-Defs' Br. at 9. That conclusion defies logic. The North Carolina Supreme Court in *Dickson II* premised its holding that defendants did not violate the North Carolina Constitution on its erroneous conclusion that the challenged districts were valid and necessary under the VRA. *Dickson v. Rucho,* 368 N.C. 481, 533, 781 S.E.2d 404, 440 (2015) (noting that the creation of VRA districts is the first step in complying with the Whole County Provision, and

that where VRA districts are assessed incorrectly, "maps are distorted *ab initio* and the distortion is compounded at each subsequent step"). Because Plaintiffs' state law claims have never been resolved utilizing the proper determinations under federal law, these claims are still live, and Plaintiffs' state law claims must be a part of the calculus in fashioning appropriate remedial maps.

Moreover, Plaintiffs are not simply seeking a declaratory judgment from this court that the statutes at issue violate state law, but even if Plaintiffs were requesting only that relief, this court would be within its discretion to grant it. In citing *N.C. Ass'n of Educators v. North Carolina,* 368 N.C. 777, 792, 786 S.E.2d 255, 266 (2016), for the proposition that "when a statute is found to be unconstitutional under the United States Constitution, North Carolina courts *will not* address alternative claims under the North Carolina Constitution," Legislative Defendants mistake the court's exercise of its discretion for a mandate to avoid ruling on both federal and state law claims. Leg-Defs' Br. at 10 (emphasis added). It is not at all uncommon for North Carolina courts to invalidate a statute on both state and federal constitutional grounds. *See, e.g., In re Appeal of Springmoor, Inc.,* 348 N.C. 1, 12, 498 S.E.2d 177, 184 (1998) (affirming the Court of Appeals' finding that a statute giving preferential tax treatment to religious nursing homes violated both the First Amendment to the United States Constitution and Article I, Section 13 of the North Carolina Constitution); *Treants Enterprises, Inc. v. Onslow Cty.,* 94 N.C. App. 453, 463, 380 S.E.2d 602, 608 (1989) (holding that an ordinance requiring an escort bureau to maintain clients' names and addresses for county inspection violated the First and Fourteenth Amendments of the United States Constitution as well as Article I, Section 19 of the North Carolina Constitution). This court is not prohibited from deciding these live state law issues that, in addition to Plaintiffs' outstanding request for an adequate remedy, prevent this case from

being "altogether moot." Leg-Defs' Br. at 13 (quoting *Pearson v. Martin,* 319 N.C. 449, 451-52, 355 S.E.2d 496, 498 (1997)).

c. Courts retain jurisdiction over the implementation of such remedial plans

While it is appropriate for state legislatures to make the first attempt at enacting new plans that comply with the law, *see Wise v. Lipscomb,* 437 U.S. 535, 540 (1978) (noting that "whenever practicable" courts should "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure"), that does not mean that invalidities in the remedial redistricting legislation require aggrieved plaintiffs to file a new lawsuit. Indeed, it is routinely necessary for courts to retain the authority to review whether the plan has remedied the identified defects without creating new ones, and to reject plans that fail to do so. *See Stephenson v. Bartlett,* 355 N.C. 354, 376, 562 S.E.2d 377, 392 (2002) ("both reason and experience argue that courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief") (internal quotations omitted); *Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003) ("*Stephenson II*") (upholding the trial court's rejection of the General Assembly's enacted remedial maps as "constitutionally deficient"). Because the 2016 and 2017 plans are subject to review for their adequacy, *see Knox. v. SEIU, Local 1000*, 567 U.S. 298, 308 (2012), the argument that these plans "repealed and replaced" the 2011 plans at issue is unavailing and does not render this case moot.

II. *Stephenson II*, not *Stephenson III*, Is Instructive and Controlling Here

Legislative Defendants argue that the decision in *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) ("*Stephenson III*") should control here, but *Stephenson II* is actually the case directly on point here. 357 N.C. at 307, 582 S.E.2d at 251. In *Stephenson II*, the Supreme

Court affirmed the trial court's determination that the legislature's revised remedial redistricting plans did not comply with state constitutional requirements—that is, the state supreme court confirmed that the plaintiffs in *Stephenson II,* like the plaintiffs here, were entitled to an opportunity to be heard on the issue of whether the remedial districts were themselves constitutional. *Id.* In contrast, *Stephenson III* was decided on a complex procedural posture following the enactment of a new venue statute requiring a three-judge panel instead of a single judge to review state redistricting plans. *Stephenson III*, 359 N.C. at 222-23, 595 S.E.2d at 115. In light of the new statute regarding venue, and the fact that the *Stephenson* plaintiffs had already been heard on the adequacy of the remedy for the 2001 unconstitutional redistricting plans, new litigation was appropriate rather than continuing the *Stephenson* case. *Id.* at 225-26, 595 S.E.2d at 117. Those facts are not present here. *Stephenson II* requires that plaintiffs here be allowed to argue the adequacy of the remedial plan, not be forced to file a new lawsuit. Only once this determination of adequacy has been made will this case be over

III. Conclusion

For all the foregoing reasons, and those presented in Joint Plaintiffs' opening brief on remand, Joint Plaintiffs respectfully request that this Court grant them the relief requested.

Respectfully submitted, this the 11th day of December, 2017.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing JOINT PLAINTIFFS' REPLY BRIEF in the above-titled action upon all other parties in this consolidated cause by:

[ ] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal;

[x] By email transmittal to the email addresses indicated below;

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This the 11th day of December, 2017.

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