STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION Case No. 19 CVS 12667
REBECCA HARPER, *et al.* *Plaintiffs*, v. REPRESENTATIVE DAVID R. LEWIS , *et al.* *Defendants*.	**LEGISLATIVE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW**

Legislative Defendants Representative David R. Lewis, Senator Ralph Hise, Senator Warren Daniel, Senator Paul Newton, Speaker Timothy K. Moore, and President Pro Tempore of the North Carolina Senate Philip E. Berger ("Legislative Defendants"), under N.C. R. Civ. P. 56, move the Court to enter an order dismissing this action as moot due to the enactment of House Bill 1029 ("H.B. 1029") by the North Carolina General Assembly on November 15, 2019. In support of this motion, Legislative Defendants show:

RELEVANT PROCEDURAL BACKGROUND

Plaintiffs filed this action on September 27, 2019 in Wake County Superior Court seeking a declaration that the congressional districts enacted by the General Assembly in 2016 under N.C. Sess. Law 2016-1 violated their rights under the North Carolina Constitution and sought to enjoin future use of the 2016 congressional districts ("the 2016 Congressional Plan"). Plaintiffs filed a motion for preliminary injunction on September 30, 2019, the same day Legislative Defendants were served, seeking to enjoin the defendants in this action from preparing for or administering the 2020 primary and general elections for congressional districts under the 2016 Congressional

Plan. The Court granted Plaintiffs' motion on October 28, 2019 and stated that it would enter a further order to "provide for an expedited schedule so that Plaintiffs' dispositive motion may be heard prior to the close of the filing period of the 2020 primary election." (Order on Injunctive Relief, p. 16 (Oct. 28, 2019)). On November 1, 2019, the Court entered an order setting an expedited schedule for the filing, briefing, and hearing of summary judgment motions. (Order, p.2 (Nov. 1, 2019)).

In its order granting Plaintiffs' motion, the Court stated that it did not "presume, at this early stage of this litigation, to have any authority to compel the General Assembly to commence a process of enacting new Congressional districts," but expressed concerns about potential disruptions to the 2020 elections process and noted that "these disruptions to the election process need not occur, nor may an expedited schedule for summary judgment or trial even be needed, should the General Assembly, on its own initiative, act immediately and with all due haste to enact new congressional districts." (*Id.* at p. 17).

On November 5, 2019, the General Assembly, at the Court's invitation but on its own initiative, began the process of enacting a new congressional plan for the 2020 election cycle when a Joint Committee on Redistricting made up of both Democratic and Republican members of the North Carolina House and Senate convened for the first time. To allow for full participation by the public and all interested parties in the map-drawing process, the Committee opened up rooms and public terminals for legislators to use to draw proposed maps on November 6, 7, 8, 12, 13, 14 and 15. On each of these days, legislators also used these public terminals to draw proposed maps and, if the legislator requested, legislative staff produced stat packs and related reports and documents

for any maps drawn.[1] Copies of all maps drawn and any stat packs or other documents that were requested were posted online on the General Assembly's website. Public comments were accepted online and posted on November 7, 18 and 12, and a public hearing was held on November 13, 2019. Multiple proposed maps were discussed in the House Elections and Ethics Committee and on the House floor on November 14, 2019, and in the Senate Redistricting and Elections Committee and on the Senate floor on November 15, 2019. This process ended on November 15, 2019, with the enactment of H.B. 1029 which immediately replaced the 2016 Congressional Plan enacted in N.C. Session Law 2016-1 with a new Congressional plan ("the 2020 Congressional Plan").[2] *See* H.B. 1029, 3d Ed. (stating that "G.S. 163-201(a) is rewritten" and that "[t]his act is effective when it becomes law.").

ARGUMENT

Due to the enactment of the 2020 Congressional Plan, this case is moot and should be dismissed. The effect of H.B. 1029 on this case is clear from the Court's October 28, 2019 Order on Injunctive Relief: there is no need for further proceedings in this case because the 2016 Congressional Plan challenged by Plaintiffs, N.C. Session Law 2016-1, has been replaced. This result is the right one under a line of North Carolina appellate cases holding that, in litigation, whenever "the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147-48, 250 S.E.2d 890, 912 (1978),

---

[1] No partisan data was included in the stat packs or loaded into the computer terminals used to draw proposed maps.

[2] The Court can take judicial notice of this legislation. *See Hoke Co. Bd. of Educ.*, 367 N.C. at 159, 749 S.E.2d at 454 (citing *Wikel v. Bd. of Comm'rs of Jackson Cnty.*, 120 N.C. 311, 120 N.C. 451, 27 S.E. 117 (1897)). A link to a map of the 2020 Congressional Plan, along with stat packs and other reports, may be found at: https://www.ncleg.gov/BillLookup/2019/H1029

cert. denied, 442 U.S. 929 (1979)) ("Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action.").

When the General Assembly "revises a statute in a 'material and substantial' manner with the intent 'to get rid of a law of dubious constitutionality,' the question of the act's constitutionality becomes moot." *Hoke County Bd. of Educ. v. State*, 367 N.C. 156, 159-60, 749 S.E.2d 451, 454-55 (2013) (citing *State v. McCluney*, 280 N.C. 404, 405-07, 185 S.E2d 870, 871-72 (1972)). And, where, as here, a statute is replaced, it is inappropriate for a court to "express" an "opinion of the legislation now in effect" because questions regarding the constitutionality of the new legislation (i.e. the 2020 Congressional Plan) "are not before" the Court in this case. *Id.*

In *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E. 2d 112 (2004) ("*Stephenson III*"), the North Carolina Supreme Court followed this approach in a redistricting matter when it declared, "[t]he case is over," after the General Assembly enacted a legislative redistricting plan in 2003 following successful challenges by the *Stephenson* plaintiffs to previous plans enacted earlier in the decade. *Id.* at 225-226, 595 S.E.2d at 117. While the *Stephenson* court acknowledged that it was "nevertheless aware that legislative redistricting based upon the 2000 decennial census remains an unresolved matter," it found that if the *Stephenson* plaintiffs wanted to challenge the constitutionality of the 2003 legislative plans, they had to do so in another case under the three-judge panel statute that had recently been enacted by the General Assembly. *Id.* at 226, 595 S.E.2d at 117.

The North Carolina Court of Appeals applied the mootness doctrine in *Calabria v. North Carolina State Bd. of Elections*, 198 N.C. App. 550, 680 S.E.2d 738 (2009) where the General

Assembly amended the public campaign financing statute at issue in that case before the plaintiff's appeal challenging an interpretation of the statute could be heard by the court. In dismissing the appeal as moot, the Court of Appeals relied upon the North Carolina Supreme Court's admonition in *Pearson v. Martin*, 319 N.C. 449, 355 S.E.2d 496 (1997), that the fact that an "action was brought as a declaratory judgment action does not alter this result" because "[u]nder the Declaratory Judgment Act, jurisdiction does not extend to questions that are altogether moot." 198 N.C. App. at 554-555, 680 S.E2d at 743 (citing *Pearson*, 319 N.C. at 451, 355 S.E.2d at 498).

The Court should follow this line of cases here and dismiss this case because "the questions originally in controversy between the parties"—whether the 2016 Congressional Plan violated Plaintiffs' rights under the North Carolina Constitution—are "no longer at issue" following the enactment of H.B. 1029. This law replaced the statute challenged by Plaintiffs in this lawsuit, N.C. Session Law 2016-1, with an entirely new law and new congressional plan for the 2020 election cycle. To the extent Plaintiffs seek to challenge the congressional plan enacted under H.B. 1029, they must file a new lawsuit because "[t]he case is over." *Stephenson v. Bartlett*, 358 N.C. at 226, 595 S.E. 2d at 117; *see also Hoke Co. Bd. of Educ.*, 367 N.C. at 160, 749 S.E.2d at 455 ("We express no opinion on the legislation now in effect because questions of its constitutionality are not before us."); *McCluney*, 280 N.C. at 407, 185 S.E.2d at 872 ("We express no opinion as to the constitutionality of the repealed [statute]. The constitutionality of the [sessional law repealing it] does not arise on this appeal. That question will be decided if and when it is presented.").

CONCLUSION

For the forgoing reasons, the Court should dismiss this case as moot due to the enactment of H.B. 1029 by the General Assembly creating a new congressional plan for the 2020 election cycle.

Respectfully submitted this the 15th day of November, 2019.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: _____
Phillip J. Strach
N.C. State Bar No. 29456
Thomas A. Farr
N.C. State Bar No. 10871
Michael McKnight
N.C. State Bar No. 36932
Alyssa M. Riggins
N.C. State Bar No. 52366
phil.strach@ogletreedeakins.com
tom.farr@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
alyssamriggins@ogletreedeakins.com
4208 Six Forks Road, Suite 1100
Raleigh, North Carolina 27609
Telephone: (919) 787-9700
Facsimile: (919) 783-9412
Counsel for the Legislative Defendants

BAKER & HOSTETLER, LLP

E. Mark Braden*
(DC Bar #419915)
Katherine McKnight*
(DC Bar # 99456)
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
Telephone: (202) 861-1500
Facsimile: (202) 861-1783
Counsel for Legislative Defendants
**appearing Pro Hac Vice*

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing document was served upon the parties via electronic mail:

Paul Cox
Stephanie Brennan
North Carolina Department of Justice
114 W. Edenton St
Raleigh, NC 27603
(919) 716-6932
pcox@ncdoj.gov

Counsel for the State Board of Elections

John Branch, III
Nate Pencook
Andrew Brown
Shanahan Law Group
128 E. Hargett St. Suite 300
Raleigh NC 27601
jbranch@shanahanlawgroup.com

Chris Winkelman
Jason Torchinsky
45 North Hill Drive, Suite 100
Warrenton, VA 20186.
cwinkelman@hjvt.law

Counsel for Intervenor Defendants

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
601 Massachusetts Ave., NW
Washington, DC 20001-3761
(202) 942-5000
Stanton.jones@arnoldporter.com

Marc Elias
Aria C. Branch
700 13th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com

Abha Khanna
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
akhanna@perkinscoie.com

Burton Craige
Narendra K. Ghosh
Paul E. Smith
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com

Counsel for Plaintiffs

This the 15th day of November, 2019

By: _____
Michael D. McKnight (N.C. Bar No. 36932)

40752525.1