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' RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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") file this response in opposition to Plaintiffs' Motion for Summary Judgment and show the Court:

RELEVANT PROCEDURAL BACKGROUND

The relevant procedural background is provided in Legislative Defendants' Motion for Summary Judgment and Supporting Memorandum of Law and is hereby incorporated by reference.

ARGUMENT

Plaintiffs' Motion for Summary Judgment should be denied because the relief Plaintiffs seek through their motion—and the underlying lawsuit—has been mooted by the General Assembly's enactment of a new congressional plan for the 2020 elections (the "2019 Congressional Plan"). *See* N.C. Session Law 2019-249 (known as H.B. 1029 during consideration in the General Assembly). Under the authorities cited in Legislative Defendants' Motion for

Summary Judgment filed with the Court on November 15, 2019, this action is moot and should be dismissed because it is well-settled that North Carolina 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), *cert. denied*, 442 U.S. 929 (1979).

Because the 2019 Congressional Plan was enacted after Plaintiffs filed their Motion for Summary Judgment, it is not addressed in that motion. Plaintiffs, clearly cognizant of the fact that mootness was an impediment to their continued pursuit of this action, addressed the issue in their Motion to Set Schedule for Review of Remedial Plan filed November 15, 2019. In that filing, Plaintiffs cite four authorities in support of their contention that this case is not moot and that the Court has the authority to review the 2019 Congressional Plan in this action. All of the authorities cited by Plaintiffs are inapposite and distinguishable. To begin with, none of the cases cited by Plaintiffs involved an order like the one issued by this Court on October 28, 2019 stating that "disruptions to the elections process need not occur" and that expedited proceedings and trial would not be needed in those cases "should the General Assembly, on its own initiative, act immediately and with all due haste to enact new congressional districts." (Order on Injunctive Relief, p. 17 (Oct. 28, 2019)).

Additionally, all of the redistricting cases Plaintiffs rely upon involved circumstances in which the General Assembly replaced a redistricting plan with a new one *after* a final judgment by a court finding the existing plan that was replaced unconstitutional. As this Court already acknowledged in its October 28, 2019 order, that hasn't happened here. (Order on Injunctive Relief, p. 17 (Oct. 28, 2019)) (stating that the Court 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").

In their November 15, 2019 filing, Plaintiffs contend that this panel's February 11, 2018 order in *Dickson v. Rucho* supports their position that this case is not moot and that the Court retains the authority to review the 2019 Congressional Plan. But this panel's February 2018 ruling in *Dickson* does nothing to support Plaintiffs' arguments here. To the contrary, despite entering a judgment in favor of the *Dickson* and *NAACP* plaintiffs on both the state and federal constitutional claims asserted in their complaints (Order and Judgment on Remand from the North Carolina Supreme Court, p. 5 (Feb. 11, 2018)), this panel rejected the *Dickson* and *NAACP* plaintiffs' request to hold the case in abeyance "so as to be available to aid in the fashioning and enforcement of an appropriate remedy should federal court remedies prove incomplete." The *Dickson* and *NAACP* plaintiffs contended that holding the case in abeyance was necessary because "despite their successes before federal court forums, there may still be sate constitutional issues that require resolution in the remedial legislative and congressional plans because the federal courts are only considering federal constitutional challenges." (*Id.* at pp. 5-6). In rejecting this request, this panel wrote:

> Therefore, as to the Plaintiffs' request to continue to hold this matter in abeyance, this three-judge panel concludes that the doctrine of mootness and judicial economy dictate that this litigation be declared to be concluded. The legislative and congressional maps now under consideration in federal courts are not the product of the 2011 redistricting legislation considered by this trial court, but rather the product of later acts of the General Assembly (see, See N.C. Sess. Law, 2016-1 (Congressional Plan) and N.C. Sess. Laws 2017-207, 2017-208 (Legislative Plan)) and the scrutiny of the federal courts. The 2011 Redistricting Plans no longer exist. There is no further remedy that the Court can offer with respect to the 2011 Plans. While Plaintiffs are certainly not foreclosed from seeking redress in the General Court of Justice of North Carolina for state constitutional claims that may become apparent in the 2016 and 2017 redistricting plans, those claims ought best be asserted in new litigation.

(*Id*. at pp. 6-7).

Plaintiffs' position that this case is not moot and that this Court has the authority to review the 2019 Congressional Plan enacted *before* any judgment or finding of liability by this Court or any other is untenable in light of this panel's Feb. 11, 2018 order in *Dickson*. Plaintiffs' position fares no better when considered in light of the U.S. Supreme Court's actions in *North Carolina v. Covington*, 138 S.Ct. 2548 (2018). The question before the U.S. Supreme Court in *Covington* was whether the District Court had the authority to enter a remedial order where a new legislative map had been enacted *after* a finding of liability and judgment entered. 138 S.Ct. at 2550 (noting that "[t]he District Court granted judgment to the plaintiffs, and we summarily affirmed that judgment."). The U.S. Supreme Court found that, following entry of a judgment finding the previous districts unconstitutional racial gerrymanders, the District Court "properly retained jurisdiction" of the case to review the narrow issue of whether under the newly enacted districts the plaintiffs "remained segregated on the basis of race." *Id.* at 2553-2354 (finding the District Court's "remedial authority was accordingly limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts" and that, by reviewing other issues beyond this scope, "the District Court proceeded from a mistaken view of its adjudicative role and its relationship to the North Carolina General Assembly.").

In their Nov. 15, 2019 filing, Plaintiffs argue that "[i]t makes no difference that Legislative Defendants enacted the [2019 Congressional Plan] voluntarily, prior to final judgment" but cite no case where a court has done what they are asking the Court to do here: (1) declare a districting plan enacted *before* a final judgment to be a "remedial plan" and (2) review the new districting plan for constitutional compliance even though the new plan replaced the old one. Such an action would be contrary to this panel's actions in *Dickson* and unprecedented under North Carolina law.

A review of the additional cases on which Plaintiffs rely outside the redistricting context further shows this to be true.

Plaintiffs cite the North Carolina Court of Appeals' decision in *Wilson v. N.C. Dep't of Commerce*, 239 N.C. App. 456, 768 S.E.2d 360 (2015), for the proposition that "actions by defendants subsequent to the filing of a lawsuit do not moot a case unless they 'provide plaintiffs the relief they sought' in the complaint." In *Wilson*, the plaintiffs contended they were entitled to daily hearing notices under the North Carolina Public Records Act and attorneys' fees incurred in enforcing their right to receive the notices. *Id*. at 460-61, 768 S.E.2d at 364. After the defendants appealed an order granting the plaintiffs a preliminary injunctive granting them access to the notices, the General Assembly amended the law to classify the hearing notices as confidential and exempting them from the disclosure requirements of the Public Records Act. *Id.* at 460, 768 S.E.2d at 363. The plaintiffs then argued that the appeal was moot because of the statutory amendment. *Id*. at 460, 768 S.E.2d at 364.

The Court of Appeals found the statutory amendment did not moot the appeal because it did not apply retroactively and there remained an open question as to whether the plaintiffs were entitled to hearing notices before the statute was amended. *Id.* at 461, 768 S.E.2d at 364. The *Wilson* decision has no bearing here because there is no issue of whether Plaintiffs were entitled to any relief between October 28, 2019, when the Court granted their motion for a preliminary injunction, and November 15, 2019, when the 2019 Congressional Plan was enacted because no election or anything else involving the challenged congressional districts occurred between those dates. Accordingly, nothing in *Wilson* prohibits this Court from declaring this case moot.

Plaintiffs cite a decision by the Court of Appeals in *Bailey & Assocs., Inc. v. Wilmington Bd. of Adjustment*, 202 N.C. App. 177, 689 S.E.2d 576 (2010) for the related proposition that a

case is not moot where "repeal of the challenged statute does not provide the injured party with adequate relief or the injured party's claim remains viable." (Pls' Motion at 7) (citing *Bailey*, 202 N.C. App. at 182, 689 S.E.2d at 582). But the Court of Appeals in *Bailey & Assocs., Inc.* found that the repeal of an ordinance governing the development of property in a conservation district did not moot a pending lawsuit because the new ordinance contained a "savings provision" which made "the new ordinance applicable on a prospective basis" only. *Bailey*, 202 N.C. App. at 181-82, 689 S.E.2d at 581-82. As a result of the "savings provision," the ordinance could still be applied to the property in question and, for that reason, the repeal of the ordinance did not moot the appeal. *Id.* The Court of Appeals' decision in *Bailey & Assocs., Inc.* is inapplicable here because the 2016 Congressional Plan has been completely replaced by the 2019 Congressional Plan and, as a result, the Plaintiffs in this case will not have to vote again under the 2016 Congressional Plan.

Finally, Plaintiffs argue that "[f]inding this case moot would allow the General Assembly 'to avoid meaningful review' in this case and future redistricting cases." (Pls' Motion at 12) (citing *Thomas v. N.C. Dep't of Human Res*., 124 N.C. App. 698, 706, 478 S.E.2d 816, 821 (1996)). Plaintiffs claim that "it would mean that the General Assembly could pass any unlawful congressional plan, and then, when voters sue, replace it with another unlawful plan before the Court rules" resulting "in a game of legal whack-a-mole, until the next election is near and Legislative Defendants claim it is too late to change their most recent plan." (*Id*.) But neither this hypothetical nor the case Plaintiffs cite in support of it are applicable here.

In *Thomas*, while an appeal was pending, the N.C. Department of Human Resources ("NCDHR") voluntarily ended a practice for determining food stamp eligibility that the United States Department of Agriculture had rescinded and that had been previously invalidated by a prior

decision the North Carolina Court of Appeals. 124 N.C. App. at 703, 478 S.E.2d at 819. In finding that the plaintiff's appeal was not moot, the *Thomas* court stated that "[i]f we were to decide that we must dismiss this or any substantially similar case as moot, defendants like the NCDHR here could virtually always manage to cease their offending practices in time to avoid meaningful review." *Id.* at 706, 478 S.E.2d at 821.

A review of the litigation involving the legislative and congressional districts that has unfolded over the past decade disproves Plaintiffs' theory here. The enactment of the 2019 Congressional Plan is the first instance in which the General Assembly adopted a new districting plan without a finding of liability by any court. More importantly, it did so after an invitation, but not direction, from this Court. This case was the first among the multiple cases filed involving redistricting this decade in which a court invited the General Assembly to "act immediately and with all due haste to enact" new districts before entering a final judgment in the case. Given the complexities and realities of the legislative process, it would not be possible for the General Assembly to pass a new districting plan whenever a legal challenge to an existing plan is filed for purposes of avoiding litigation.

CONCLUSION

For the forgoing reasons, Plaintiffs' Motion for Summary Judgment should be denied and, for the reasons stated above and in Legislative Defendants' Motion for Summary Judgment and Supporting Memorandum of Law, the Court should dismiss this case as moot.

Respectfully submitted this the 22nd day of November, 2019.

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

By: /s/Phillip J. Strach
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 22nd day of November, 2019

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

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