

FILED

STATE OF NORTH CAROLINA 2021 NOV 10 P.M. IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

WAKE CO., C.S.C.

No. 19- CVS-012667

BY _____

REBECCA HARPER, *et al.*,)
Plaintiffs,)

v.)

REPRESENTATIVE DAVID R.)
LEWIS¹, in his official capacity as Senior)
Chairman of the House Select Committee)
on Redistricting, *et al.*,)
Defendants.)

MOTION TO TRANSFER

COME NOW Defendants Representative Destin Hall, in his official capacity as Chair of the House Standing Committee on Redistricting; Senator Warren Daniel, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; Senator Ralph Hise, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; Senator Paul Newton, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; Speaker of the North Carolina House of Representatives Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives; and President Pro Tempore of the North Carolina Senate Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate (“Legislative Defendants”), by and through undersigned counsel, and move, pursuant to N.C. Gen. Stat. § 1-267.1, that this Court notify the Chief Justice of Plaintiffs’ challenge to the 2021 Congressional

¹ As discussed in further detail below, Plaintiffs filed this suit over two years ago challenging a different North Carolina Congressional district plan. In the significant intervening time between the filing of the suit and today, North Carolina has gained a Congressional district, passed new plans according to new census data, and Destin Hall is now the Chair of the House Select Committee on Redistricting. These changes are just some of the reasons Plaintiffs’ suit is moot, and Plaintiffs should have to file a new suit, naming the appropriate parties, with the proper facts.

Redistricting Plan (“2021 Plan”) so that the Chief Justice can comply with his obligation to “appoint two additional resident superior court judges to the three-judge panel of the Superior Court of Wake County to hear and determine the action.” In support of this motion, Legislative Defendants state the following:

1. According to Plaintiffs, “[t]his case concerns North Carolina’s 2016 congressional map.” Compl. ¶ 1. The case, however, is moot because the 2016 congressional map will no longer be used in North Carolina by operation of the one-person, one-vote principle, and the reapportionment of congressional seats, under which North Carolina gained a seat from the prior decade. That this case presents no live controversy is self-evident from the fact that no action has taken place since this Court permitted the 2020 elections to proceed under a plan enacted in 2019—which act already mooted this case *as of December 2019*.

2. The North Carolina General Assembly, last week, enacted a new congressional redistricting plan in light of the 2020 census results. If Plaintiffs believe the 2021 Plan violates the law, their recourse is to file a new complaint establishing a new lawsuit. Instead, Plaintiffs moved for leave to file a so-called “Supplemental Complaint” in this matter on November 5, 2021. The motion is nothing more than a ruse to interfere with the obligation of the Chief Justice of the North Carolina Supreme Court to appoint a three-judge panel to hear this challenge to the 2021 Plan.

3. This gamesmanship is improper. The Supplemental Complaint contains a challenge to 2021 Plan. Under N.C. Gen. Stat. § 1-267.1, that challenge must be heard and determined by a three-judge panel “organized as provided by subsection (b2)” of that statute. Section 1-267.1 establishes a carefully calibrated scheme for selecting the judges to hear and decide redistricting challenges. Under subsection (b2), a plaintiff who files a challenge to a redistricting act must serve

the action on the senior resident superior court judge of Wake County. *Id.* § 1-267.1(b)(2). Next, the senior resident superior court judge is obligated to “notify the Chief Justice” of the challenge. *Id.* The Chief Justice is obligated to appoint the remaining two members of the panel. *Id.* The statute “ensure[s] that members of each three-judge panel are drawn from different regions of the State” by requiring the Chief Justice “appoint to each three-judge panel one resident superior court judge from the First or Second Judicial Division, one resident superior court judge from the Third or Fourth Judicial Division, and one resident superior court judge from the Fifth Judicial Division.” *Id.* In case there was any doubt that this process is mandatory, the statute goes on to state that “[n]o order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, or finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel” established by the above-described means. *Id.* § 1-267.1(c). That is the process that must be followed here.

4. Plaintiffs’ apparent view that a new redistricting challenge to a new plan can be challenged within the confines of a prior case—that has been effectively closed for years—contravenes Section 1-267.1, which plainly contemplates that the judicial-selection process shall begin anew each cycle with each new plan and each new challenge. The General Assembly would not have crafted such a detailed scheme of choosing judges if prior panels could serve *in perpetuum* through clever motions practice. Plaintiffs, in short, are trying to game this system. The 2021 Plan has nothing to do with the 2016 Plan. The 2016 Plan was based on census data from 2011 and can never be used again in light of new census data obtained this year. The 2021 Plan is based on 2021 census data, has one additional district than the 2016 Plan because of that data, and was enacted by a new legislative body in 2021. Under Plaintiffs’ apparent view, litigants could obtain

the same panel decade after decade by moving to supplement their complaint each decade to add completely new facts with no connection to prior challenges or redistricting plans and thereby frustrate the carefully crafted scheme of Section 1-267.1. This Court is obligated to respect that scheme, and the duties of the State's Chief Justice, and to transfer this case to a properly constituted panel. And, as subsection (c) of 1-267.1 clarifies, this Court's ability even to issue a valid judgment depends on following the clear judicial-selection dictates of that statute.

5. To be sure, a fully constituted *Harper* panel can and should determine the motion filed by Legislative Defendants on May 19, 2020 requesting the Court to dismiss the *Harper* case as moot. Once the 2020 elections occurred under the congressional redistricting plan approved by this Court in 2019 ("2019 Plan"), the *Harper* case became moot because there are no further elections under which the 2016 or 2019 Plans may be used. *Stephenson v. Bartlett*, 358 N.C. 219, 595, S.E.2d 112 (2004). This is true not only because new census data exists as of 2021, but also because those Plans contain only thirteen congressional districts, not the fourteen districts reflected in the 2021 Plan which occurred as a result of North Carolina's population growth throughout the prior decade.

6. Plaintiffs' procedural game is an affront to the North Carolina judiciary, it would (if permitted) deprive this Court of power to issue a judgment, and it should be rejected. The Court should notify the Chief Justice of this new challenge to the 2021 Plan so that the Chief Justice can comply with his obligation to appoint the panel. Failure to do so would interfere with the ability of the Chief Justice to exercise his statutory authority and obligation in this matter.

WHEREFORE, Legislative Defendants request that this Court grant this motion and notify the Chief Justice of the challenge to the 2021 Plan so that a new panel can be appointed by the Chief Justice.

Respectfully submitted this the 10th day of November, 2021.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served on the parties via email at:

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