STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO TRANSFER

Plaintiffs respectfully submit this opposition to Legislative Defendants' "Motion to Transfer," which responds to Plaintiffs' motion for leave under Rule 15(d) to file a supplemental complaint challenging the recently enacted 2021 congressional map (the "2021 Plan") on precisely the same constitutional grounds as the 2016 map (the "2016 Plan").

In their "Motion to Transfer," Legislative Defendants do not dispute that Plaintiffs have met the standards for filing a supplemental complaint under Rule 15(d), or that this panel as currently assembled can grant Plaintiffs' motion for leave to do so. *See* Pls.' Mot. for Leave at 11-16. Instead, Legislative Defendants ask that this Court "transfer" some (but not all) of this case, apparently on the theory that Rule 15(d) somehow does not apply in redistricting litigation. Specifically, Legislative Defendants request that this Court notify the Chief Justice of Plaintiffs' challenge to the 2021 Plan in their supplemental complaint—apparently so the Chief Justice can appoint a new panel—while this panel retains jurisdiction over Plaintiffs' challenge in this case to the 2016 Plan. Legislative Defendants' motion to transfer is baseless and should be denied.

1. On November 5, 2021, the day after the General Assembly enacted a new congressional map, Plaintiffs filed a motion for leave to file a supplemental complaint under Rule 15(d). As explained in that pending motion, Rule 15(d) permits "a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented." N.C.G.S. 1A-1, Rule 15(d). Under Rule 15(d), supplemental pleadings are filed within the existing action, not as a new one: they "facilitate the litigation of related issues *in a single action*." *Foy v. Foy*, 57 N.C. App. 128, 132–33, 290 S.E.2d 748, 750–51 (1982) (emphasis added). The Rule "avoid[s] the cost, delay and waste of separate actions which must be separately tried and prosecuted." *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 28–29 (4th Cir. 1963). A quintessentially appropriate use of Rule 15(d) is to allow a

supplemental complaint when defendants are "thwart[ing]" the same constitutional rights of the same plaintiffs but have altered their method. *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 226–27 (1964).

2. Legislative Defendants have filed no opposition to Plaintiffs' motion under Rule 15(d). They do not dispute that the issues in Plaintiffs' original and supplemental complaints are "related," that courts allow supplemental complaints under Rule 15(d) "with great liberality and almost as a matter of course," 1 N.C. Civil Prac. & Proc. § 15:6 (6th ed.), or more broadly that Plaintiffs' motion fits squarely within the contours of Rule 15(d) and caselaw interpreting it. Legislative Defendants also do not suggest that the filing of a supplemental complaint as opposed to a new action would cause them any prejudice, much less "substantial injustice." *vanDooren v. vanDooren*, 37 N.C. App. 333, 337–38, 246 S.E.2d 20, 23–24 (1978). Nor could they, as all Defendants will have an opportunity to respond to a supplemental complaint, just as they would in a newly filed case. *See* Pls.' Mot. for Leave at 14.

3. Instead of responding directly to Plaintiffs' arguments under Rule 15(d), Legislative Defendants have filed what they style a "Motion to Transfer." Notably, the motion does not actually ask for anything to be "transferred," but instead asks this Court to "notify the Chief Justice of the challenge to the 2021 Plan so that a new panel can be appointed by the Chief Justice." Leg. Defs.' Mot. at 5. Legislative Defendants do not identify any source of authority supporting their unusual motion. They invoke N.C.G.S. § 1-267.1, which provides for the "transfer" of certain cases, but not redistricting cases—and even then, Section 1-267.1's transfer provision requires transfer "to the Superior Court of Wake County," where this action already resides. N.C.G.S. § 1-267.1(a1). Parties also can seek the transfer of civil actions filed in an "improper" venue, *see* N.C.G.S. § 7A-258(a), but, again, this case already *is* in the proper venue,

as Legislative Defendants concede. Thus, Legislative Defendants' request to "transfer" this case is not just unauthorized, but inherently nonsensical: they seek "transfer" of a piece of this case to the same Court, just with different judges. The only apparent explanation for Legislative Defendants' motion is that they believe Rule 15(d) somehow does not apply in redistricting cases—that supplemental pleadings are categorically forbidden here, unlike in every other type of civil action in North Carolina. Legislative Defendants cite no authority for that implausible notion. Proceedings under Section 1-267.1 are "civil proceedings," N.C.G.S. § 1-267.1(d), to which the North Carolina Rules of Civil Procedure, including Rule 15(d), apply.

4. Regardless, even on its own unauthorized terms, Legislative Defendants' motion to transfer fails. The premise of their motion is that Plaintiffs' motion for leave to file a supplemental complaint under Rule 15(d) is somehow a new "action" triggering new procedures under Section 1-267.1. That premise is wrong, and Legislative Defendants' arguments only confirm that leave to file the supplemental complaint should be granted.

5. Section 1-267.1(a) provides: "Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) of this section." Subsection (b) then prescribes how a three-judge panel should be assembled "to hear and determine the action."

6. This case is such an "action," which is what triggered the appointment of this panel in 2019. A supplemental complaint, however, is not a new "action." The very point of Rule 15 is to permit the filing of amended or supplemental pleadings in "a single action," *Foy v. Foy*, 57 N.C. App. at 132–33, 290 S.E.2d at 750–51, without requiring "the cost, delay and waste

of separate actions," *New Amsterdam*, 323 F.2d at 28–29. Requiring plaintiffs "to go through the needless formality and expense of instituting *a new action* when events occurring after the original filing indicated he had a right to relief [is] inconsistent with the philosophy of the … rules." *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002); *see Griffin*, 377 U.S. at 226–27 ("The amended complaint thus was not a new cause of action but merely *part of the same old cause of action* arising out of the continued desire of colored students in Prince Edward County to have the same opportunity for state-supported education afforded to white people, a desire thwarted before 1959 by segregation in the public schools and after 1959 by a combination of closed public schools and state and county grants to white children at the Foundation's private schools." (emphasis added)); Action, *Black's Law Dictionary* ("A civil or criminal judicial proceeding."). Legislative Defendants cite no authority supporting the notion that a supplemental pleading is a new action, and there is none.

7. Though Legislative Defendants provide no substantive response concerning the standards for supplemental complaints under Rule 15(d), they highlight purported differences between the 2016 and 2021 Plans, ostensibly to suggest that Plaintiffs should be required to file a new case. Leg. Defs.' Mot. ¶ 3. But whatever differences Legislative Defendants perceive between the two maps and the processes that led to their creation do not somehow render Plaintiffs' supplemental complaint a new "action." N.C.G.S. § 1-267.1(a), (b). And Legislative Defendants accept that that is the sole relevant question under Section 1-267.1. Legislative Defendants puzzlingly assert that the 2021 Plan "has nothing to do with the 2016 Plan," Leg. Defs.' Mot. ¶ 4, apparently because it involves different census data. But what Plaintiffs have asserted all along is that they are being denied their constitutional rights because they are forced to vote in gerrymandered congressional districts. The whole point of a supplemental complaint

is to supplement the original complaint with new, related conduct by the defendants post-dating the complaint but bearing on the same legal violation. Legislative Defendants do not argue (nor could they) that that standard isn't met or that anything about the replacement of the 2016 Plan with the 2021 Plan changes the basic nature of this lawsuit or Plaintiffs' constitutional claims.

8. Nor do Defendants dispute that this panel has been "organized as provided by subsection (b)," N.C.G.S. § 1-267.1(a), and is authorized to rule on Plaintiffs' motion for leave under Rule 15(d). *See* Pls.' Mot at 15-16. And even were there doubt about the Court's ability to enter final judgment in this case, the issue is unlikely to arise. Section 1-267.1, the very statute under which Legislative Defendants purport to be acting, provides: "Should any other member of the three-judge panel be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice *shall* appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced." N.C.G.S. § 1-267.1(b) (emphasis added). Legislative Defendants' motion seems to rest on the inappropriate assumption that the Chief Justice will fail to appoint new judges to this panel as the statute expressly requires. Legislative Defendants' argument in their motion to expedite that allowing the supplemental complaint will cause delay by requiring the Court to unnecessarily decide whether it can issue a preliminary injunction without three judges thus makes little sense.

9. Allowing a supplemental complaint in this case in no way endorses "gamesmanship" or the continuation of cases "decade after decade" in perpetuity. Leg. Defs.' Mot. ¶ 4. For starters, this is a paradigmatic situation for a supplemental complaint—a point Legislative Defendants do not dispute—so it is difficult to see how there could be "gamesmanship" in seeking leave under Rule 15(d). Beyond that, in a typical redistricting case, a challenge will proceed promptly to final judgment. That was true, for example, in the 2018

challenge to the state's legislative districts, where the Court held a trial, entered final judgment, and closed the case when the defendants there did not appeal. *See Common Cause v. Lewis*, No. 18-CVS-014001. In cases where full relief has been granted and final judgment entered, supplemental pleadings are disfavored. *See* Pls.' Mot. at 15 (citing *Biosafe-One, Inc. v. Hawks*, 639 F. Supp. 2d 358, 370 (S.D.N.Y. 2009)). This case, by contrast, is still in a preliminary posture—with no discovery taken, no trial held, and no judgment entered. *Id.* And there was a manifest danger that the extreme gerrymandering that produced the 2016 Plan would be repeated, which this Court warned against when declining to dismiss the case as moot. *See* 12/2/19 Tr. at 9 (Exhibit 1 to Proposed Suppl. Compl.) (Court expressing "fervent hope" that "future maps are crafted through a process worthy of public confidence and a process that yields elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people").

10. Legislative Defendants continue to assert that this case "is moot because the 2016 congressional map will no longer be used in North Carolina." Leg. Defs.' Mot. ¶ 1. But that argument only reinforces that a supplemental complaint is warranted. It is black-letter law that "[e]ven when the District Court lacks jurisdiction over a claim at the time of its original filing, a supplemental complaint may cure the defect by alleging the subsequent fact which eliminates the jurisdictional bar." *Feldman v. L. Enf't Assocs. Corp.*, 752 F.3d 339, 347 (4th Cir. 2014) (quoting *Wilson v. Westinghouse Elec. Corp*, 838 F.2d 286, 290 (8th Cir.1988)). Thus, though Plaintiffs' challenge to the 2016 Plan is *not* moot, the supplemental complaint obviates any need to resolve that question—further cementing that judicial economy favors supplementation.

11. Legislative Defendants had ample opportunity to oppose Plaintiffs' motion for leave under Rule 15(d) to file a supplemental complaint, but they instead chose to file a baseless

"motion to transfer" seeking to circumvent the established procedures under Rule 15. Their motion should be deemed a response to Plaintiffs' motion, and for the reasons stated in Plaintiffs' motion, leave to file the supplemental complaint should be granted.

12. This case should remain in this Court notwithstanding Judge Ridgeway's recusal and request to the Chief Justice that he be replaced as the presiding judge.[1] For the reasons explained above, Section 1-267.1's procedures for assembling an entirely new three-judge panel are triggered only upon the commencement of a new "action." This action remains pending. And again, under Section 1-267.1(b), the Chief Justice is required to appoint judges to replace those "disqualified or otherwise unable to serve on the three-judge panel."

13. Finally, for the reasons explained in Plaintiffs' motion for leave, even a single judge has the power to grant motions under Rule 15(d), which are purely procedural and rest "within the trial judge's discretion." *vanDooren*, 37 N.C. App. at 337, 246 S.E.2d at 23; *see* Pls.' Mot. at 16. Legislative Defendants do not dispute this point. This Court should therefore grant Plaintiffs' motion for leave without delay to ensure the Court's ability to promptly resolve Plaintiffs' challenge to the 2021 Plan.

CONCLUSION

For the foregoing reasons, Defendants' motion to transfer should be denied, and Plaintiffs' motion for leave to file the proposed supplemental complaint should be granted.

[1] *See* Ltr. from Hon. Paul C. Ridgeway to Chief Justice Paul Newby (Nov. 12, 2021).

Dated: November 16, 2021 By: /s/ Burton Craige

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This the 16th day of November, 2021.

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