

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2021 DEC -3 PM 3:35 FILE NO. 21 CVS 015426

NORTH CAROLINA LEAGUE, OF
CONSERVATION VOTERS, INC.;
HENRY M. MICHAUX, JR.;
DANDRIELLE LEWIS; TIMOTHY
CHARTER; TALIA FERNOS;
KATHERINE NEWHALL; R. JASON
PARSLEY; EDNA SCOTT; ROBERTA
SCOTT; YVETTE ROBERTS;
JEREANN KING JOHNSON;
REVEREND REGINALD WELLS;
YARBROUGH WILLIAMS, JR.;
REVEREND DELORIS L. JERMAN;
VIOLA RYALS FIGUEROA; and
COSMOS GEORGE,

Plaintiffs,

v.

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 E. HISE,
JR., 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; REPRESENTATIVE
TIMOTHY K. MOORE, in his official
capacity as Speaker of the North
Carolina House of Representatives;
SENATOR PHILIP E. BERGER, in his
official capacity as President
Pro Tempore of the North Carolina
Senate; THE STATE

WAKE CO., C.S.C.

BY _____

**ORDER ON PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Defendants

STATE OF NORTH CAROLINA
COUNTY OF WAKE

REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL,
IN HIS OFFICIAL CAPACITY AS

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

**ORDER ON PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

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; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STELLA ANDERSON, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON III, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; STACY EGGERS IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; TOMMY TUCKER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH

CAROLINA STATE BOARD OF
ELECTIONS,

Defendants

THESE MATTERS came on to be heard before the undersigned three-judge panel on December 3, 2021. Upon considering the pleadings, parties' briefs and submitted materials, arguments, pertinent case law, and the record established thus far, the Court finds and concludes, for the purposes of this Order, as follows:

As an initial matter, in order to promote judicial efficiency and expediency, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rule of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

In this litigation, the North Carolina League of Conservation Voters, Inc. and individual Plaintiffs in Civil Action 21 CVS 015426 (hereinafter "NCLCV Plaintiffs") have asserted the following causes of action against Defendants:

1. That Defendants' enacted redistricting maps for state legislative and congressional districts (hereinafter referred to as "Enacted Plans") constitute extreme partisan gerrymanders in violation of the Free Elections Clause under Article I, Section 10 of the North Carolina Constitution; the Equal Protection

- Clause under Article I, Section 19 of the North Carolina Constitution; the Free Speech and Free Assembly Clauses under Article I, Sections 12 and 14 of the North Carolina Constitution; and
2. That the Enacted Plans cause unlawful racial vote dilution in violation of the Free Elections Clause under Article I, Section 10 of the North Carolina Constitution and the Equal Protection Clause under Article I, Section 19 of the North Carolina Constitution; and
 3. That the Enacted Plans were drawn in violation of the Whole County Provisions of Article II, Sections 3(3) and 5(3) of the North Carolina Constitution, and *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

NCLCV Plaintiffs have moved for a preliminary injunction solely on their partisan gerrymandering-based claims.

NCLCV Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from preparing for, administering, or conducting the March 8, 2022 primary elections and any subsequent elections for Congress, the North Carolina Senate, or the North Carolina House of Representatives using the Enacted Plans. Plaintiffs further request that to the extent the General Assembly fails to adopt redistricting plans—within two weeks from the date of this Court’s entry of a preliminary injunction—that adequately remedy the Enacted Plans, then the 2022 primary elections and 2022 general elections for Congress, North Carolina Senate, and the North Carolina House of Representatives shall be conducted under Plaintiffs’ Optimized Maps, as outlined in their Verified Complaint.

The individual Plaintiffs in Civil Action 21 CVS 500085 (hereinafter “Harper Plaintiffs”) have asserted the following causes of action against Defendants, claiming that the Enacted Plans for congressional districts are unlawful partisan gerrymanders in violation of: the Free Elections Clause of Article I, Section 10 of the North Carolina

Constitution; the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution; and the Freedom of Speech and Freedom of Assembly Clauses of Article I, Sections 12 and 14 of the North Carolina Constitution.

Harper Plaintiffs seek to enjoin Defendants, their agents, officers, and employees from preparing for, administering, or conducting the March 8, 2022, primary elections and any subsequent elections for the United State House of Representatives using the Enacted Plans. Harper Plaintiffs further prays this Court set forth a remedial process to create a new plan that complies with the North Carolina Constitution, to include a court-ordered remedial plan if the General Assembly fails to timely enact an adequate remedial plan.

Legislative Defendants (the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the Senate, and the redistricting committees of each respective chamber) have responded to plaintiffs' motions by asserting that Plaintiffs' lack standing, present a political question, and that the Free Elections, Equal Protection, Freedom of Speech and Freedom of Assembly claims have been misapprehended by Plaintiffs.

State Defendants (the State of North Carolina, State Board of Elections, members of the State Board of Elections in their official capacity, and the Director of the State Board of Elections) have taken no position on the merits of Plaintiffs' motions for preliminary injunction but have provided information as to election administration concerns and deadlines.

PROCEDURAL HISTORY

On August 12, 2021, the United States Census Bureau released new census data. North Carolina gained a congressional seat due to population growth pursuant to Article I,

Section 2, Clause 3 of the United States Constitution, and Title 13 of the United States Code. On November 4, 2021, the General Assembly enacted S.L. 2021-173 (North Carolina Senate districts); S.L. 2021-174 (United States House of Representatives districts); S.L. 2021-175 (North Carolina House of Representatives districts). NCLCV Plaintiffs filed their Complaint in this matter on November 16, 2021, contemporaneously with the present Motion for Preliminary Injunction. Harper Plaintiffs filed their Complaint in this matter on November 18, 2021, and the present Motion for Preliminary Injunction on November 30, 2021. The undersigned three-judge panel was assigned to preside over the NCLCV and Harper matters pursuant to N.C.G.S. § 1-267.1 on November 19, 2021, and November 22, 2021, respectively.

POLITICAL QUESTION DOCTRINE

Plaintiffs' claims are not likely to succeed because they are not justiciable. North Carolina courts lack jurisdiction over political questions. *See, e.g., Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001). The State Constitution delegates to the General Assembly the power to create congressional districts. Because a constitution cannot be in violation of itself, a delegation of a political task to a political branch of government implies a delegation of political discretion. Because Plaintiffs' claims are not justiciable, they have not shown a likelihood of success on the merits.

STANDING OF PLAINTIFFS

Plaintiffs are unlikely to establish standing. It is clear that a voter is only directly injured by specific concerns with that voter's districts. *Gill v. Whitford*, 138 S. Ct. 1916,

1932 (2018). A plaintiff has standing to challenge the district in which that plaintiff lives, but cannot raise generalized grievances about redistricting plans. Additionally, a “hope of achieving a Democratic [or Republican] majority in the legislature” is not a particularized harm. *Id.* Additionally, a district’s partisan composition is not a cognizable injury is a similar composition would result “under any plausible circumstance.” *Id.* at 1824, 1932.

None of the Harper Plaintiffs reside in six of the challenged congressional districts (CD2, CD3, CD5, CD8, CD12, and CD13). Additionally, though the Harper Plaintiffs claim that Democratic voters are “packed” in CD9 and CD6, they admit that these districts would be “packed” with Democratic voters in any event. This is also true for the “cracking” claimed in CD1, CD7, and CD10. For the remaining districts (CD4 and CD14), the Harper Plaintiffs are presumed to be represented by their designated representatives and it is therefore not self-evident that these individual plaintiffs are harmed.

The NCLCV Plaintiffs reside in only 6 of the congressional districts, 8 of the Senate districts, and 9 of the House districts. The individual plaintiffs do not establish that their own districts would shift from Republican-leaning to Democratic-leaning under a different configuration or that they are prevented from electing their candidates of choice. The organizational plaintiffs have not shown how the redistricting legislation has negatively impacted their ability to complete their organizational mission.

The Plaintiffs are unlikely to prove standing and therefore have not shown a likelihood of success on the merits.

INJUNCTIVE RELIEF

“It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be

plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.” *City of Asheville v. State*, 369 N.C. 80, 87-88, 794 S.E.2d 759, 766 (2016) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). “An act of the General Assembly will be declared unconstitutional only when ‘it [is] plainly and clearly the case,’ . . . and its unconstitutionality must be demonstrated beyond a reasonable doubt.” *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016).

Plaintiffs have moved for a preliminary injunction pending a resolution of this action on the merits. “The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.” *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an “extraordinary remedy” and will issue “only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.” *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Injunctive relief “may be classified as ‘prohibitory’ and ‘mandatory.’ The former are preventive in character, and forbid the continuance of a wrongful act or the doing of some threatened or anticipated injury; the latter are affirmative in character, and require positive action involving a change of existing conditions—the doing or undoing of an act.” *Roberts v. Madison Cty. Realtors Ass’n*, 344 N.C. 394, 399-400, 474 S.E.2d 783, 787 (1996) (citations and quotation omitted).

Status Quo

Plaintiffs have asked that this Court enjoin the 2021 congressional and state legislative district legislation and to move the March 2022 primary schedule. However, this requested relief alters the status quo. Plaintiffs are not asking this Court to restore what has been unlawfully changed, but to create a new condition that has not existed to this point. *See Seaboard Air Line R. Co. v. A. Coast Line R. Co.*, 287 N.C. 88, 96, 74 S.E.2d 430, 436 (1953). Plaintiffs here have never voted under a redistricting plan like the one they request and so are asserting rights that have never existed. *Id.*

Likelihood of Success on the Merits

Plaintiffs burden on a motion for preliminary injunction is to show a likelihood of success in proving beyond a reasonable doubt that the enacted congressional and state legislative districts are unconstitutional. This Court finds on these facts that Plaintiffs have failed to carry this burden.

The Supreme Court of North Carolina has ruled that “[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions.” *Stephenson v. Bartlett*, 355 N.C. 534, 371, 562 S.E.2d 377, 390 (2002). The North Carolina Constitution “clearly contemplates districting by

political entities” and redistricting is “root-and-branch a matter of politics.” *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.).

Plaintiff have not shown a likelihood of success on their Free Elections Clause claims. The decision in *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584 relied heavily on the evidence of intentionally partisan gerrymandering, stating that they were “designed specifically to ensure that Democrats would not win a majority.”

While the decision in *Common Cause v. Lewis* is not binding on this Court, it seems clear that some evidence of intent is required to prove of claim of extreme partisan gerrymandering. Plaintiffs have not claimed intent. In fact, the evidence presented shows that the General Assembly did not use any partisan data in the creation of these congressional and state legislative districts, suggesting a lack of intent.

Plaintiffs have also not shown a likelihood of success on the merits on their Equal Protection Clause claims. Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 51-53, 707 S.E.2d 199, 206 (2011). Additionally, political considerations in redistricting do not impinge on the fundamental right to vote. These considerations do not deny the opportunity to vote nor do they result in the unequal weighing of votes.

Plaintiffs likewise have not shown a likelihood of success on the merits of their Freedom of Speech and Assembly claims. Political considerations in redistricting do not place any restraints on speech and do not discourage those who wish to speak. Additionally, associational rights do not guarantee a favorable outcome, only the ability to participate in the political process. These rights are not infringed by political considerations in redistricting.

Additionally, Plaintiffs assert claims regarding the congressional district legislation only under the North Carolina Constitution. However, it is the federal Constitution which

provides the North Carolina General Assembly with the power to establish such districts. In order to address these claims, this Court must derive authority from the federal Constitution. Since claims under the federal Constitution have not been alleged, Plaintiffs have not shown a likelihood of success on the merits.

Irreparable Harm

As discussed above, Plaintiffs have challenged districts in which they do not live, districts that would not likely be meaningfully different under any reasonable maps, and have asserted only abstract harms. They have not alleged that they are unable to obtain representation in Congress or the General Assembly by whomever is ultimately elected. As such, they have not shown that they will suffer irreparable harm should their request be denied.

Weighing of the Equities

Though Plaintiffs have not shown that they will suffer harm should their request be denied, the State and the public will suffer irreparable harm should the request be granted. It is obvious that any time a statute is enjoined, the State suffers irreparable harm. *See Maryland v. King*, 567 U.S. 1301, 133 (2012). This is particularly true in the area of elections due to the State's indisputably compelling interest in preserving the integrity of the election process. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). Additionally, an injunction will cause significant disruption, confusion, and uncertainty in the election process. As such, the equities weigh in favor of denial.

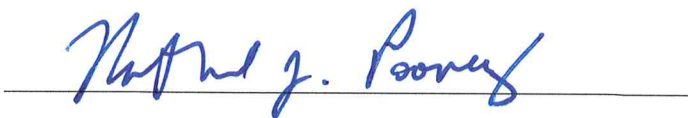
CONCLUSION

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall not issue in regard to the 2021 Enacted Plans. To the extent necessary, this Court determines that there is no just reason for delay and certifies this order for immediate appeal pursuant to Rule 54 of the North Carolina Rules of Civil Procedure.

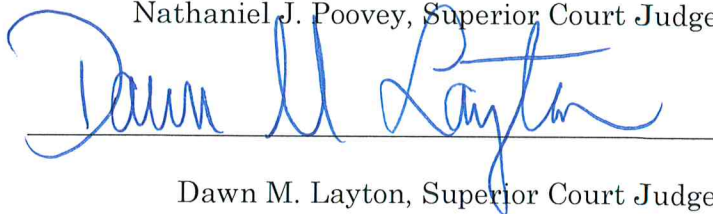
This the 3 day of December, 2021.

A handwritten signature in blue ink, appearing to read "A. Shirley", written over a horizontal line.

A. Graham Shirley, Superior Court Judge

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Nathaniel J. Poovey, Superior Court Judge

A handwritten signature in blue ink, appearing to read "Dawn M. Layton", written over a horizontal line.

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 3rd day of December 2021.



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