STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE 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.

Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Motion to Set Schedule for Review of Remedial Plan

NOW COME Intervenor-Defendants Reps. Virginia Foxx, Richard Hudson, and Ted Budd (collectively "Intervenor Defendants") and submit this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Motion to Set Schedule for Review of Remedial Plan ("Motion for Review") (collectively "Plaintiffs' Motions"). In response to Plaintiffs' Motions, Intervenor Defendants show the Court as follows:

INTRODUCTION

On October 28, 2019, this Court entered a preliminary injunction which both enjoined the Legislative Defendants and State Defendants from using the North Carolina congressional district map enacted by the General Assembly in 2016 (the "2016 Plan"), and invited the General Assembly to draw a new congressional district map "to achieve the constitutional objective of allowing for elections to be conducted more freely and honestly to ascertain, fairly and truthfully, the will of the people," through a transparent process, which

allowed for bipartisan participation. (Preliminary Injunction Order p.17). The General Assembly accepted this invitation and, on November 15, 2019, enacted N.C. Sess. Law 2019-249 (formerly HB 1029) (the "2019 Plan"), replacing the 2016 Plan with a new congressional district map.

The 2019 Plan addressed specific issues about the districts raised by Plaintiffs in their Complaint. In addition, the process used by the Legislative Defendants comported substantially with the process used by the General Assembly (and approved by the Court) to draw the new state legislative district maps in *Common Cause v. Lewis*. Plaintiffs' claims that the districts in the 2019 Plan are substantially the same as those in the 2016 Plan fail even basic scrutiny at this early stage, as each district appears to have been materially changed in an effort to address the concerns raised by Plaintiffs in their Complaint. Plaintiffs' remaining concerns are political, not legal, and even assuming Plaintiffs' political contentions about the 2019 Plan are true, **Plaintiffs' own experts** believe that the purported political makeup of the 2019 Plan is reflective of North Carolina. *See* Mattingly et al., Quantifying Gerrymandering in North Carolina (October 15, 2109) p.8, 33-34 (available at https://www.ncleg.gov/documentsites/committees/BCCI-6740/11-05-19/Quantifying-Gerrymandering.pdf) ("In contrast, the Judges plan gradually shifts from electing four to six Democrats as the statewide Democratic vote fraction changes from 44% to 52% of the vote; when situated within the ensemble of redistricting plans, the results are nearly always one of the two most expected outcomes."). As such, the Plaintiffs' concerns over the 2019 Plan are not valid, as it is not impervious to the will of the people.

It is within this context that Plaintiffs' Motions should be considered. The claims for which Plaintiffs seek summary judgment are now moot, since the congressional district map over which the Complaint was filed has been redrawn and will not be used to administer the 2020 election. Additionally, the record before the Court simply does not provide a basis for

the extraordinary relief of moving the congressional primary date to conduct the review Plaintiffs seek, and for which this Court has no jurisdictional basis, as the concerns raised in the Complaint were addressed through a process similar to that used in *Common Cause v. Lewis*. Finally, the power to determine the time, manner, and place of congressional elections has not been delegated to North Carolina state courts, and thus this Court is without the power to move the congressional primary date. As such, both of Plaintiffs' Motions should be denied.

PROCEDURAL BACKGROUND

Plaintiffs filed this lawsuit on September 27, 2019 seeking a declaration that the then-existing North Carolina congressional district map, formerly passed by the North Carolina General Assembly ("General Assembly") as the 2016 Plan was unconstitutional and that the Legislative Defendants and State Defendants should be enjoined from using the 2016 Plan in administering the 2020 elections. (Compl. ¶ 5 & Prayer for Relief). Plaintiffs thereafter filed their Motion for Preliminary Injunction on September 27, 2019, asking the Court not just to enjoin the Defendants from using the 2016 Plan to administer the 2020 elections, but also to affirmatively require the General Assembly to draw a new congressional district map under detailed requirements from the Court. (*See* Plaintiffs' Proposed Order on Motion for Preliminary Injunction).

On October 28, 2019, the Court granted Plaintiffs' Motion for Preliminary Injunction, but only allowed part of the relief requested by Plaintiffs. After concluding that Plaintiffs were likely to succeed on the merits of their claims by applying the tests announced in *Common Cause v. Lewis*, Case No. 18-CVS-14001, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019), the Court enjoined the State Defendants and Legislative Defendants from

using the 2016 Plan to administer the 2020 elections, but refused to affirmatively require the General Assembly to redraw the map:

> This Court does 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, and this Court recognizes that such a decision is wholly within the discretion of a co-equal branch of government. . . . The Court respectfully urges the General Assembly to adopt an expeditious process, as it did in response to this Court's mandate in the September 3, 2019 Judgment in *Common Cause v. Lewis*, that ensures full transparency and allows for bipartisan participation and consensus to create new congressional districts that likewise seek to achieve this fundamental constitutional objective.

(Order on Injunctive Relief ("Preliminary Injunction Order") pp.17–18). The Court also "retain[ed] jurisdiction to move the primary date for the congressional elections, or all of the State's 2020 primaries, including for offices other than Congressional Representatives, should doing so become necessary to provide effective relief in this case." (*Id.* p.18). Shortly after entry of the Preliminary Injunction Order, the Court set a schedule for expedited briefing on summary judgment by the parties, requiring Motions for Summary Judgment to be filed by November 15, 2019 and responses thereto by November 22, 2019.

After entry of the Preliminary Injunction Order, on November 5, 2019, the General Assembly started the process of drawing a new congressional district map for North Carolina. The process included drawing the maps in a public office on public computers viewable both in person and over the internet, uploading documents related to the process at least daily to a section of the General Assembly's website maintained specifically for this, and public comments being accepted online, and conducting a public hearing on November 13, 2019. (*See generally* https://www.ncleg.gov/Committees/CommitteeInfo/NonStanding/6740 (website for Joint Select Committee on Congressional Redistricting (2019) containing documents and records related to enactment of the 2019 Plan) and

https://www.ncleg.gov/Video/Redistricting2019 (containing archived videotaped footage of the redistricting process for the 2019 Plan)). The process concluded on November 15, 2019 when the General Assembly enacted N.C. Sess. Law 2019-249 (formerly HB 1029) (the "2019 Plan"), whereby a new congressional district map replaced the 2016 Plan.

Later that same day, on November 15, 2019, the Legislative Defendants filed their Motion for Summary Judgments and Motion to Expedite related to the same, generally contending that the enactment of the 2019 Plan rendered Plaintiffs' claims in this case moot and requesting expedited briefing and hearing on that issue alone. In addition, Plaintiffs filed a Motion to Set Schedule for Review of Remedial Plan ("Plaintiffs' Motion for Review"), contending that the Court has the authority to review the 2019 Plan, which Plaintiffs characterize as a "Remedial Plan," and suggesting an expedited schedule on which the Court should review the 2019 Plan. Thereafter, on November 20, 2019, the Court entered an order requiring that any response to the Motions for Summary Judgment and Plaintiffs' Motion for Review be filed on November 22, 2019, that any Reply by Plaintiffs to a Response to the Motion for Review be filed by November 26, 2019, that the Court would hear both summary judgment motions and Plaintiffs' Motion for Review on December 2, 2019, and that the filing period for the 2020 congressional primary elections was enjoined until further notice of the Court.

ARGUMENT

Plaintiffs' Motion for Summary Judgment should be denied because the relief sought therein—namely a finding that the 2016 Plan was unconstitutional and an order setting parameters for the drawing of a new congressional district map—was rendered moot upon the enactment of new legislation embodying a substantially different congressional district map.

Plaintiffs' Motion for Review should be denied for several reasons. First, the relief requested is dependent on Plaintiffs' inaccurate contention that the districts contained in the 2019 Plan are substantially the same as those in the 2016 Plan; in reality, each district in the 2019 Plan is materially different, and the 2019 Plan appears to be a good-faith, voluntary effort by the General Assembly to address the issues Plaintiffs raised in their Complaint with the 2016 Plan. Second, granting the relief requested by Plaintiffs would require this Court to move the 2020 congressional primary election date, an act for which the Court lacks constitutional authority or jurisdiction. Finally, the principles of *Purcell v. Gonzalez*, 549 U.S. 1 (2006), weigh in favor of denying Plaintiffs' Motion for Review considering that the filing period for the congressional elections was originally scheduled to occur on the date that the Motion for Review will be heard by the Court.

I. Plaintiffs' Claims in this Lawsuit Are Moot Due to the Enactment of the 2019 Plan.

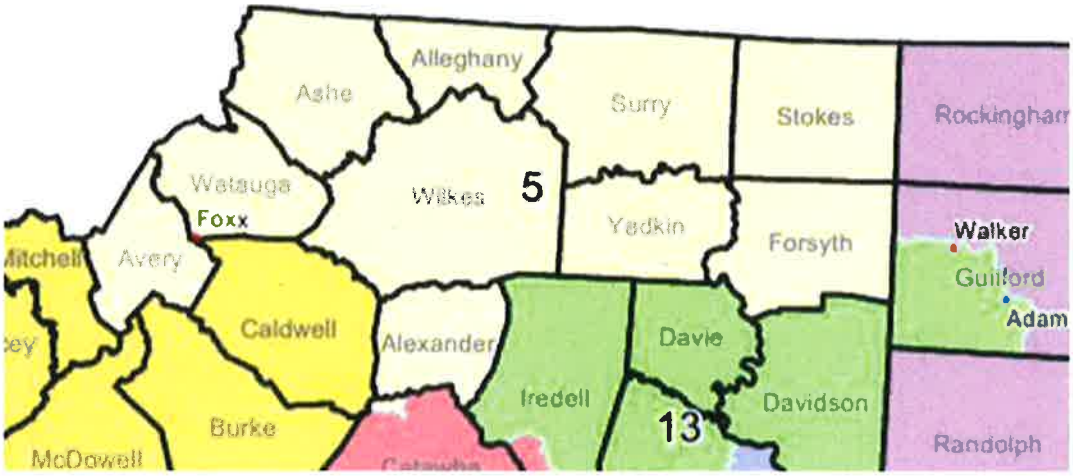
Intervenor Defendants adopt by reference the arguments made in Legislative Defendants' Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, specifically that the enactment of the 2019 Plan renders the claims raised by Plaintiffs in their Complaint moot. (*See* Legislative Defendants' Motion for Summary Judgment at pp.3–5; Legislative Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment).

II. Plaintiffs' Claim that the 2019 Plan is Substantially the Same as the 2016 Plan Fails Any Level of Scrutiny.

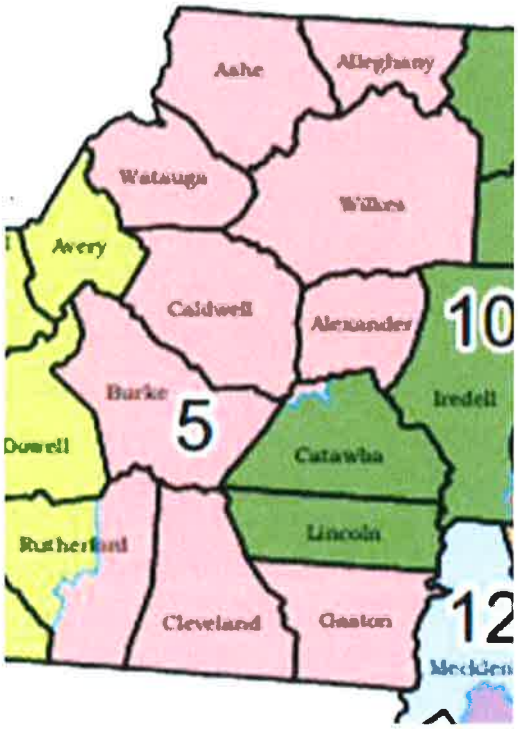
In their Motion to Set Schedule for Review of the Remedial Plan, Plaintiffs mischaracterize the 2019 Plan by contending that it is substantially similar to the 2016 Plan. (Motion to Review at 10–11). Plaintiffs argue that much of the 2019 Plan is a "mere continuation[]" of the 2016 Plan because it "substantially overlap[s]" with the 2016 Plan. *Id.* at 10. In making their argument, Plaintiffs ignore that the 2019 Plan materially differs from

the 2016 Plan in that there have been significant changes to each and every Congressional District in North Carolina, changes which quite clearly address the alleged constitutional infirmities of which the Plaintiffs complain in this lawsuit. The 5th, 8th, and 13th Districts—districts which the Intervenor Defendants represented under the 2016 Plan, and in which they reside under the 2019 Plan—provide illustrative examples.

5th Congressional District: 2016 Plan



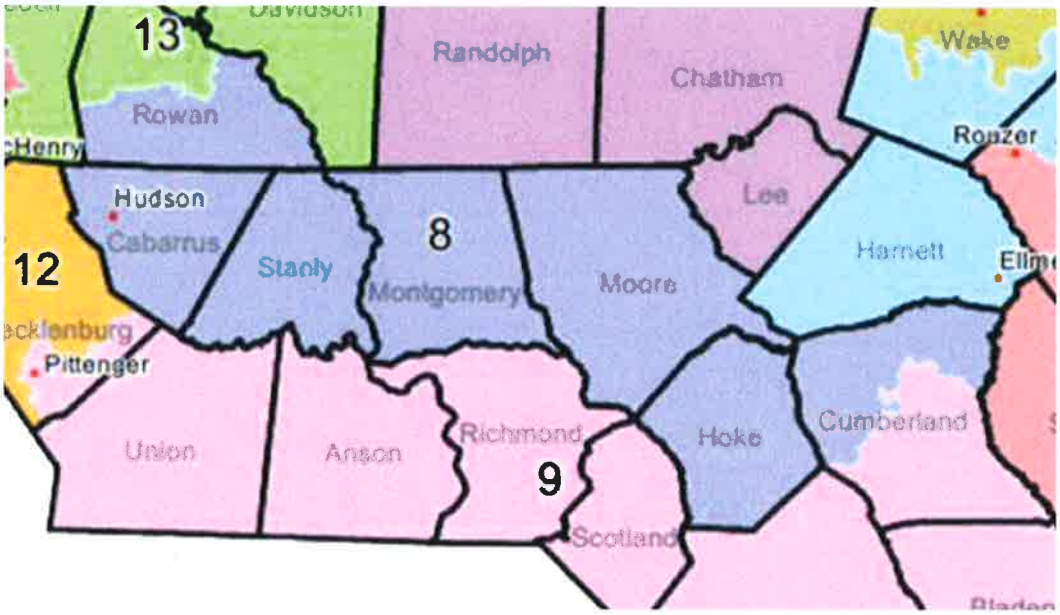
5th Congressional District: 2019 Plan



In their Complaint, Plaintiffs raised concerns that the General Assembly "wast[ed] the votes of the Democratic voters of Forsyth County" by "connect[ing] Winston-Salem's predominantly Democratic voters with far-flung rural communities to the west." (Compl. ¶¶ 89–90). That configuration no longer exists in the 2019 Plan. Instead, the 5th

Congressional District incorporates parts of former Congressional Districts 10 and 11 to create a district that now runs North-South from the Northern boundary to the Southern Boundary of North Carolina, rather than running East-West at the Northern boundary of the state. Instead of containing Winston-Salem, the 2019 5th District contains Shelby, Morganton, Lenoir, and parts of suburbs of Charlotte. Specifically, out of the 11 counties making up the 2019 version of the 5th District, five are entirely new from the 2016 version. These include Caldwell, Burke, Cleveland, Gaston, and a large portion of Rutherford Counties. Notably, these counties were in Districts 10 and 11 under the 2016 Plan, and the only defect Plaintiffs argued existed in those districts was the "egregious[] crack[ing]" of Asheville, including "the campus of UNC Asheville." (Compl. ¶¶ 101–02). The addition of these five counties to District 5 does not replicate that alleged harm; in fact, Buncombe County is now wholly contained in District 11. The 2019 5th District also removes the counties of Avery, Surry, Yadkin, Stokes, and Forsyth, which were included in the 2016 Plan's 5th District. The result is a district that looks unlike District 5 under the 2016 Plan, and a district that does not replicate the harm alleged by Plaintiffs.

8th Congressional District: 2016 Plan



8th Congressional District: 2019 Plan

In their Complaint, Plaintiffs argue that Congressional District 8 under the 2016 Plan "cracks Fayetteville's Democratic voters nearly down the middle," and "stop[s] halfway through Rowan County, right before the district would hit the Democratic voters of Salisbury . . . ." (Compl. ¶ 97). The 8th Congressional District as drawn in the 2019 Plan has also been materially altered from the 2016 Plan, addressing each of the constitutional issues listed in Plaintiffs' Complaint. The 2019 8th District now extends further East, encompassing

all of Cumberland County, thereby placing all of Fayetteville in the district. The 2019 8th District also entirely retreats from Rowan County, Hoke County, and the southern part of Moore County. Pinehurst, located in Southern Moore County, is now excluded from the 8th District, whereas it was included in the 8th District under the 2016 Plan. Thus, significant changes were in fact made to the 8th District, given the population centers contained within those changes, which address each of the constitutional issues raised by Plaintiffs within the boundaries of the district in their Complaint.

13th Congressional District: 2016 Plan

13th Congressional District: 2019 Plan

The Plaintiffs' Complaint raises the same concern regarding Congressional Districts 6 and 13 in the 2016 Plan: principally, that those districts "crack" Greensboro, "caus[ing] both districts to be safe Republican seats," and "separat[ing] the Democratic voters in both of these districts from Forsyth County's Democratic voters in District 5." (Compl. ¶¶ 91–93, 106). The

2019 Plan completely addresses this point by combining the entirety of Guilford County with parts of Forsyth County containing Winston-Salem in the 6th District.

Likewise, the 13th Congressional District changed significantly in the 2019 Plan from the 2016 Plan. The 2019 13th District no longer includes Iredell County and Guilford County, but instead runs East through Randolph County and parts of Chatham and Lee Counties, then north through Alamance County to the northern boundary of the state in Caswell and Person Counties. Moreover, Rowan County is kept whole, addressing yet another alleged constitutional issue from Plaintiffs' Complaint. (*See* Compl. ¶ 97). The 13th District is now made up of nine rather than five counties, only three of which carry over from the 2016 Plan's 13th District. The 2019 13th District now contains the parts or all of six new counties including Randolph, Alamance, Caswell, Person, Chatham, and Lee Counties. The 2019 13th District is not substantially the same, at all, as the 2016 13th District, and the constitutional issues raised by Plaintiffs regarding it have been addressed through the enactment of the 2019 Plan.

The changes to these three districts demonstrate that the 2019 Plan is materially different from the 2016 Plan. But these districts are more than just different for the sake of being different; the 2019 Plan voluntarily addressed the alleged specific constitutional infirmities of the 2016 Plan in each of these three districts. Plaintiffs' arguments to the contrary lack any basis in fact and are simply an effort to get yet another bite at the apple, further disrupt the 2020 Elections, and seek to improperly use the judiciary to their political advantage. This Court should not countenance such efforts and should deny Plaintiffs' Motion for Review and Motion for Summary Judgment.

III. This Court Lacks Constitutional Authority to Move the Congressional Primary Date and Grant the Other Relief Requested by Plaintiffs.

The United States Constitution specifically delegates the "Time, Place and Manner" of congressional redistricting to state legislatures, which are political bodies. U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ."[1]). Accordingly, the Framers enshrined the political nature of redistricting in the Constitution. *Rucho v. Common Cause*, 139 S.Ct. 2484, 2497 (2019) ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities."). Notably, the Framers did not vest the power to set the time, manner, and place of congressional elections with the states, with oversight from the state courts. Rather, the Framers delegated the power over the time, manner, and place of congressional elections to state legislatures—themselves political bodies—with oversight by Congress, which is likewise a political body. The Framers viewed Congress, not state courts, as the exclusive check on the authority granted to the state legislature. *See* THE FEDERALIST No. 59 (Alexander Hamilton). Thus, in North Carolina the power to determine the time, manner, and place of elections is exclusively vested by the Constitution of the United States in the General Assembly.

The Constitution vests Congress, not state courts, with the authority to curb a state legislature's ability to set the time, place, and manner of elections, absent some delegation of

[1] The term "Legislature" in the Elections Clause has been found by the Supreme Court of the United States to be "a limitation upon the State in respect of any attempt to circumscribe the legislative power" over federal elections. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (interpreting the substantially similar delegation of authority to the State legislatures in the Electors Clause in U.S. Const. art. II, § 1, cl. 2).

that power. *See* U.S. Const. art. I, § 4, cl. 1 (vesting authority in state legislatures to establish time, place, and manner of elections, but also vesting authority in Congress to "make or alter" such laws). Congress uses this authority to address various election related issues, including partisan gerrymandering. *See also* 2 U.S.C. § 2a (setting procedures regarding reapportionment of representatives and the time and manner of elections); 2 U.S.C. § 2b (setting number of representatives from each state); 2 U.S.C. § 2c (setting number of congressional districts and number of representatives from each district); 2 U.S.C. § 5 (describing the method of electing Representatives from a state at large); 2 U.S.C. § 6 (setting penalties for states who abridge the right of voters to vote in certain contexts); 2 U.S.C. § 7 (setting the time of, *inter alia*, Congressional elections); 2 U.S.C. § 8 (setting procedures for when vacancies occur in Congressional seats); 2 U.S.C. § 9 (setting method by which votes for members of Congress are cast). Furthermore, it is unquestioned that Congress has the authority to further act to regulate congressional redistricting by state legislatures, but it has simply declined to so do. *See, e.g., Rucho*, 139 S.Ct. at 2508 (describing proposed legislation in Congress which would, e.g., require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering or which would require states to follow standards of compactness, contiguity, and respect for political subdivisions). Notably here, there is no allegation that either the 2016 Plan or the 2019 Plan violates any statute or standard set by Congress for the election of Representatives.

The Elections Clause requires that state courts avoid encroaching on the legislature's role by inappropriately inserting their judgment on inherently political matters properly left to the Legislature. This is particularly true with respect to redistricting, a task that is explicitly and exclusively assigned to the Legislature in the United States Constitution,

checked by Congress, and is likewise allocated only to the Legislature in North Carolina's state constitution. North Carolina's Constitution recognizes that North Carolina Courts, are not lawmaking bodies.[2] *See In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 332–33 (1963); *see also* N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). Changes to the time, manner, and place of North Carolina congressional elections must be made via exercise of legislative power, not judicial power.

Though the Framers appreciated that state legislatures may abuse their delegated power to regulate congressional districts, the Constitution still denies that power to other state actors (such as state courts) unless those state actors have a separate and explicit grant of authority. Fundamentally, "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking . . . ." *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015). In North Carolina, state courts have no separate grant of authority—or prescription—to participate in the congressional redistricting process. *See Hawke v. Smith*, 253 U.S. 221, 229 (1920) (holding that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word."); *cf. Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) (referendum was part of the legislative authority of the State where it involved the *enactment* of legislation). Indeed, the North Carolina Constitution recognizes that congressional redistricting is the responsibility of the legislative branch. *See* N.C. Const. art. II, § 22(5)(d) (excepting congressional redistricting legislation from the executive veto process). Accordingly, any attempt by a state court to intrude upon the authority of the North Carolina General Assembly to fulfill its role

[2] Indeed, the North Carolina Constitution specifically excepts congressional redistricting from the executive veto power. *See* N.C. Const. art. II § 22(5)(d). In North Carolina, the congressional redistricting power is uniquely reserved to the General Assembly.

in redistricting would unlawfully usurp the General Assembly's federally prescribed role by mandating the substance of a remedial plan, and potentially redistricting North Carolina's congressional districts itself.

Allowing Plaintiffs' Motion for Review and Motion for Summary Judgment would necessarily require this Court to encroach upon the General Assembly's exclusive power to set the time of the 2020 congressional elections by it moving the date of North Carolina's 2020 congressional primary elections.[3] Here the General Assembly has not delegated its authority over congressional elections to any other branch of North Carolina state government. Thus, this Court may not unilaterally decree a change in when a congressional election occurs absent some delegation of power from the General Assembly. Indeed, undersigned counsel have been unable to locate any case where a state court order delayed a federal primary election, especially where such a delay is based on a state, not federal law violation. *Cf. Wilson v. Eu*, 1 Cal. 4th 707 (Cal. 1992) (modifying some qualifying dates and ballot qualifying requirements, but otherwise maintaining the date of Election Day); *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) (ordering use of state court-drawn congressional district map where legislature failed to enact new map after 1990 census and resetting filing deadlines for the April 28, 1992 primary election, but refusing to move the actual date of the primary election). Indeed, where the legal challenge is to a duly enacted plan, rather than where a state legislature has failed to enact a new congressional districting plan after a

[3] Plaintiffs argue that the Court should adopt a procedure to review the 2019 Plan similar to the one used in *Common Cause v. Lewis*. (Plaintiffs' Motion for Review p.14). However, it took nearly two months, from September 17, 2019 (the date of the enactment of the remedial plan) until November 15, 2019 (the date of the withdrawal of Plaintiffs' appeal) for the remedial maps at issue in *Common Cause v. Lewis* to be reviewed and finalized, and this was without any appellate review other than the denial of Plaintiffs' Bypass Petition by the Supreme Court of North Carolina. Thus, to allow for full objections briefing, an order by this Court on the same, and appeals by any party, the Court would have to move the congressional primary election date in order to grant Plaintiffs' relief.

decennial census, state courts have no authority unless it has been granted by the Legislature.

Since Plaintiffs' requested relief is unconstitutional, Plaintiffs are not entitled to judgment as a matter of law and their Motion for Summary Judgment must be denied.

IV. The Principles of *Purcell v. Gonzalez* Weigh in Favor of Denying Plaintiffs' Motion for Review.

North Carolina and federal law recognize that there are times, even when a Plaintiff's election law claim may have some merit, that it is too close in time to an election to afford the Plaintiff the relief she or he requests. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *Pender Cty. v. Bartlett,* 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007) *aff'd sub nom., Bartlett v. Strickland*, 556 U.S. 1 (2009). Here, granting Plaintiffs' Motion for Review and the relief they are seeking through their Motion for Summary Judgment and moving the primary date would disrupt the orderly administration of the 2020 Elections and harm North Carolina voters since it would require the congressional primary date to be changed by the Court, this time during the statutory filing period. The courts of this state and the United States Supreme Court have repeatedly refused to accede to such harmful, belated, and eleventh hour disruptions to elections. Plaintiffs' Motion should, thus, be denied.

The statutory filing period during which congressional candidates were required to file their Notice of Candidacy was set to begin on December 2, 2019, and end on December 20, 2019. N.C. Gen. Stat. § 163-106.2. *See also* North Carolina State Board of Elections, *Factsheet: Candidates for U.S. Congress 2020*, https://www.ncsbe.gov/Portals/0/Forms/2020/Filing_factsheet_2020_USCongress_190502.pdf. *But see Harper et al. v. Lewis et al.*, November 20, 2019 Order (enjoining the filing period

for the North Carolina 2020 congressional primary elections).[4] Within this short period of time congressional candidates must undertake numerous steps: completing Notices of Candidacy, submitting Notices of Candidacy, visiting their county boards of election, and receiving affirmations of party affiliation. N.C. Gen. Stat. § 163-106.1. *See also* North Carolina State Board of Elections, *Factsheet: Candidates for U.S. Congress 2020*, https://www.ncsbe.gov/Portals/0/Forms/2020/Filing_factsheet_2020_USCongress_190502.pdf (last visited on November 21, 2019). In addition, because the election districts at issue in the present case are for federal office, the Federal Election Campaign Act and Ethics in Government Act apply, requiring that candidates and potential candidates observe certain compliance and disclosure requirements. Prior to filing their Notices of Candidacy with the state, congressional candidates must also make the delicate decision to run for office. This decision, both personal and professional, requires candidates to weigh the factors affecting their decisions to run, including those involving their suitability for a particular district, election chances, finance, and other considerations—**all of which are dependent on knowing the geographic boundaries of the district for which the potential candidates are considering running for election**.

Furthermore, state and county election officials require time prior to elections in order to properly administer those elections. This includes time for the allocation of voting systems, organization of ballots, distribution of pollbooks, training election officials, conducting absentee and in-person voting, and tabulation and canvassing of election results. Affidavit of Karen Brinson Bell, *Common Cause v. Lewis*, Case No. 18-CVS-14001.[5] Election officials

[4] It can only be assumed that once this Court lifts its injunction of the filing dates, the time period for filing will last approximately the same length of time, if not less.
[5] Ms. Bell's Affidavit is attached to Legislative Defendants' Response to Plaintiffs' Motion for Preliminary Injunction as Exhibit 2.

must also geocode voters and prepare ballots, processes that will each likely take weeks. *Id.* ¶¶ 3–6, 10. Further, election officials are bound by state and federal law, which require absentee ballots to be mailed out 50 and 45 days prior to any election, respectively. N.C. Gen. Stat. § 163-227.10(a) (2019), 52 U.S.C. § 20302(a)(8)(A) (2018). With North Carolina's congressional primary elections currently scheduled to take place on March 3, 2020 and early voting beginning on February 12, 2020—mere months away—election officials must mail out absentee ballots on or before January 12, 2020 or January 18, 2020 respectively, deadlines that will surely run before the process requested by Plaintiffs is completed. *See Id.*; Affidavit of Karen Brinson Bell, *Common Cause v. Lewis*, Case No. 18-CVS-14001.

The United States Supreme Court has repeatedly held that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). These considerations include that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. "As an election draws closer, that risk will increase." *Id.* at 5. Courts must therefore weigh such factors as the harms associated with judicial action or inaction, the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id.* at 4-5. Other relevant factors that a Court must weigh when evaluating whether to grant extraordinary relief affecting impending elections include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts. *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

In accordance with this hesitation to intrude into the conduct of elections, the United States Supreme Court has long rejected just the sort of last-minute changes to elections

Plaintiffs are requesting here, even when faced with constitutional violations. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming decision of district court permitting election to proceed under map with constitutional infirmities because "primary election was only three months away"); *Kilgarlin v. Will*, 386 U.S. 120, 121 (1967) (per curiam) (affirming district court's action permitting 1966 Texas election to continue under a "constitutionally infirm" plan due to the proximity of the election date). As the United States Supreme Court stated in *Reynolds v. Sims*, 377 U.S. 533 (1964):

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

Reynolds, 377 U.S. at 585. Through *Purcell* and *Reynolds v. Sims*, the United States Supreme Court has made clear that, even when faced with constitutional violations, eleventh-hour disruptions to elections must be avoided. *See also Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 152428, *3–*4 (M.D.N.C. Sept. 4, 2018) (per curiam).

The North Carolina Supreme Court has soundly adopted the United States Supreme Court's consideration of the proximity of forthcoming elections in withholding immediate relief in cases requiring redistricting. *See Pender Cty. v. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007) (staying a judicial remedy requiring redistricting, opting to do so only after following election) *aff'd sub nom, Bartlett v. Strickland*, 556 U.S. 1 (2009); *see also Beech Mt. v. Genesis Wildlife Sanctuary*, 247 N.C. App. 444, 459, 786 S.E.2d 335, 346 (2016) (citing *Pender Cty.*, 361 N.C. at 516, 649 S.E.2d at 380) (acknowledging that North Carolina courts are "first and foremost bound by" decision of the United States Supreme Court).

It is hard to imagine a greater disruption to an election process than what Plaintiffs demand in their Motion. They ask the Court to again throw North Carolina's 2020 elections into chaos and cause further confusion and disenfranchisement. Plaintiffs even ask that this Court delay the March 2020 primaries.[6] In their fever dream of partisan gerrymandering activism, the Plaintiffs severely simplify the electoral and campaign processes while disregarding the harm that will befall the state, North Carolinians, and the parties to this action. This Court must not tolerate such harmful disruption to North Carolina's elections, and Plaintiffs' Motion for Review and Motion for Summary Judgment should be denied.

CONCLUSION

The 2019 Plan enacted by the General Assembly replaces the challenged 2016 Plan and addresses in a material way the specific issues with the congressional districts raised by Plaintiffs in their Complaint. Since the challenged 2016 Plan will no longer be used to administer the 2020 elections, the claims in Plaintiffs' Complaint are now moot and their Motion for Summary Judgment should be denied. Additionally, Plaintiffs have failed to submit sufficient evidence of constitutional infirmities with the 2019 Plan warranting the extraordinary relief of moving the 2020 congressional primary date. This Court lacks the constitutional authority (and thus jurisdiction) to determine the time, manner, and place of congressional elections. As such, the Motion for Review must be denied.

[6] As discussed *supra* Section III, a state court does not have the authority to move a federal election date set by legislative action.

This the 22nd day of November 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MOTION FOR REVIEW upon all parties to this matter by email as follows:

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