FILED
2021 NOV -5 P 4:28
WAKE CO., C.S.C.
BY

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' MOTION FOR LEAVE UNDER RULE 15(d) TO FILE SUPPLEMENTAL COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

This case is about North Carolina's congressional district maps. Plaintiffs, a group of individual North Carolina voters, filed a complaint in 2019 challenging the map enacted in 2016 as an unconstitutional partisan gerrymander. This Court entered a preliminary injunction barring further use of the 2016 map, holding that its districts were gerrymandered to entrench a 10-3 Republican advantage in violation of multiple provisions of the North Carolina Constitution. The General Assembly then enacted a new map that was used in the 2020 elections, but there has been no judgment and this case remains pending today. Plaintiffs now move for leave under Rule 15(d) to file a supplemental complaint challenging North Carolina's newest congressional map, enacted yesterday as Senate Bill 740, on exactly the same constitutional grounds as before.

This is the paradigmatic case for a supplemental complaint. 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." G.S. 1A-1, Rule 15(d). 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.). And courts have granted leave in circumstances materially identical to those here, including in voting rights litigation where defendants commit constitutional violations related to, but occurring after, the original complaint. *See Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 226–27 (1964); *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016). In such circumstances, supplemental complaints "facilitate the litigation of related issues in a single action," preserving party and judicial resources. *Foy v. Foy*, 57 N.C. App. 128, 132–33, 290 S.E.2d 748, 750–51 (1982). Given these efficiency interests, only a finding of "substantial injustice" to the opposing party can justify denying a motion for leave to file a supplemental complaint. *vanDooren v. vanDooren*, 37 N.C. App. 333, 337–38, 246 S.E.2d 20, 23–24 (1978).

Rule 15's liberal standards are amply met here. Plaintiffs' proposed supplemental complaint alleges substantially similar misconduct as the original complaint—namely, it explains that North Carolina's recently enacted 2021 congressional map, just like the 2016 map, is an extreme partisan gerrymander that systematically packs and cracks Democratic voters to guarantee that Republicans will win 10 seats and Democrats will win 3 seats (plus one competitive district). The 2021 Plan splits each of North Carolina's three most populous counties—Guilford, Mecklenburg, and Wake—three ways, packing and cracking their Democratic voters, and many of its districts closely resemble the gerrymandered 2016 districts in shape and effect. The supplemental complaint, moreover, asserts identical legal claims on behalf of the same plaintiffs against the same official-capacity defendants, and seeks identical forms of relief as the original complaint. This case is at an early procedural stage, with no discovery having been conducted, no judgment entered, and no appeal taken. And the interests of judicial economy overwhelmingly favor allowing the supplemental complaint, given this Court's deep familiarity with the legal and factual issues presented. In these circumstances, it is difficult to see what prejudice Defendants could possibly claim from allowing a supplemental complaint.

Meanwhile, denying leave would threaten profound irreparable harm to Plaintiffs and millions of other North Carolina voters, as the commencement of a new lawsuit and appointment of a new panel would risk delay that could prevent adjudication of a constitutional challenge to the map in time to grant relief for the 2022 elections. Indeed, with the candidate filing period currently set to open on December 6, 2021—one month from now—it would be extremely difficult for an entirely new panel of judges to adjudicate a challenge to the map in time. Allowing the supplemental complaint here thus will guard against a "loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution," which, as this Court has

recognized, would "undoubtedly be irreparable if congressional elections [were] allowed to proceed under" an unconstitutionally gerrymandered map. Order on Inj. Relief at 14. Leave to file the attached supplemental complaint should be granted. If leave is granted, Plaintiffs are prepared to file their motion for a preliminary injunction promptly.

BACKGROUND

A. Procedural History

Plaintiffs filed this action on September 27, 2019, asserting that North Carolina's 2016 congressional map (the "2016 Plan") was an extreme partisan gerrymander in violation of the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. The Verified Complaint detailed specific ways in which the 2016 districts had been gerrymandered to pack and crack Democratic voters across the State, ensuring Republicans would always win 10 of the State's then-13 congressional seats. Plaintiffs asked the Court to "[d]eclare that the 2016 Plan is unconstitutional and invalid" and to "[e]njoin" use of the 2016 Plan in "the 2020 primary and general elections." Compl., Prayer for Relief ¶¶ a, b. Plaintiffs also asked the Court to "[e]njoin Defendants … from using past election results or other political data in any future redistricting of North Carolina's congressional districts to intentionally dilute the voting power of citizens or groups of citizens based on their political beliefs, party affiliation, or past votes," and "from otherwise intentionally diluting the voting power of citizens or groups of citizens in any future redistricting of North Carolina's congressional districts based on their political beliefs, party affiliation, or past votes." *Id.* ¶¶ d, e.

On October 28, 2019, this Court granted Plaintiffs' motion for a preliminary injunction, barring use of the 2016 Plan in the 2020 elections. The Court held that "there is a substantial likelihood that Plaintiffs will prevail on the merits of this action by showing beyond a reasonable doubt that the 2016 congressional districts are extreme partisan gerrymanders in violation of the

North Carolina Constitution[]." Order on Inj. Relief at 14. The Court found that, if the 2020 elections went forward under gerrymandered districts, "the people of our State will lose the opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Id.* at 15. The Court noted that the General Assembly had "discretion" to adopt a remedial plan before the Court took on that task, and "respectfully urge[d] the General Assembly to adopt an expeditious process" that "ensures full transparency and allows for bipartisan participation and consensus to create new congressional districts" that comply with the North Carolina Constitution. *Id.* at 17–18.

On October 30, 2019, Speaker Moore announced that Legislative Defendants would create a joint House and Senate Select Committee to draw a remedial plan. The next day, Plaintiffs moved for summary judgment, seeking a permanent injunction barring use of the 2016 Plan in future elections and prohibiting the use of partisan data or other efforts to dilute voting power on partisan grounds. The full House and Senate then passed the remedial plan as House Bill 1029 (the "2019 Plan") on straight party-line votes, on November 14 and 15. On November 15, Legislative Defendants moved for summary judgment, arguing that this case was moot and that Plaintiffs "must file a new lawsuit" to challenge the 2019 Plan. Leg. Defs.' Summ. J. Br. at 5. In opposing summary judgment, Plaintiffs explained that the case was not moot in light of the forward-looking declaratory relief sought in the complaint, and because the 2019 Plan, like the 2016 Plan, was an extreme partisan gerrymander that "guarantee[d] an 8-5 Republican advantage under any realistic election environment." Pls.' Opp. to Mot. Summ. J. at 15; *see id.* at 9–34.

On November 20, the Court on its own motion stayed the candidate filing period for the 2020 congressional primaries and set a hearing on the parties' motions for December 2. At the conclusion of that hearing, the Court lifted its stay of the filing period. *See* 12/2/19 Tr. at 8

(Exhibit 1 to Proposed Suppl. Compl.). The Court explained that it had not determined whether the 2019 Plan complied with the North Carolina Constitution, and that the Court "d[id] not reach th[e] issue" of "whether this action is moot." *Id.* at 6. The Court observed that "although one can certainly argue that the process" leading to enactment of the 2019 Plan "was flawed or that the result is far from ideal," the "net result" was that the "grievously flawed 2016 congressional map has been replaced." *Id.* at 7. Accordingly, the Court "determined that it w[ould] not invoke its equitable authority to further delay the election." *Id.* at 8. The "results [were] not perfect," but the Court noted that "the current legislative and congressional maps resulting from a decade of litigation w[ould] themselves be replaced after the 2020 election cycle." *Id.* at 8–9. The Court expressed "fervent hope that the past 90 days" since the filing of the original complaint in this case would become "a foundation for future redistricting in North Carolina and 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." *Id.* at 9.

In May 2020, following the March primary elections, Legislative Defendants renewed their motion for summary judgment on mootness grounds. Plaintiffs' opposition reiterated that the case was not moot, stressing the importance of a declaratory ruling that the 2016 Plan violated the North Carolina Constitution because "finding this case wholly moot would allow Legislative Defendants to escape judicial review of the 2016 Plan and create a roadmap for how to escape review of future plans," including those produced during "the next round of redistricting in 2021," that "are challenged in court." Pls.' Opp. to Renewed Mot. Summ. J. at 2–3. The Court has not ruled on Legislative Defendants' motion. In the November 2020 general elections held under the 2019 Plan, Republicans won 8 seats, and Democrats won 5.

B. The 2021 Congressional Plan

Following the 2020 decennial census, which apportioned North Carolina an additional congressional seat, the General Assembly began the process of drawing new congressional districts. On August 12, 2021, the House and Senate Redistricting Committees adopted official criteria. While the adopted criteria nominally forbade use of "[p]artisan considerations and election results data," they freely permitted use of "local knowledge of the character of communities and connections between communities," as well as "[m]ember residence." Unlike the 2016 adopted criteria, which provided that "[r]easonable efforts shall be made not to divide a county into more than two districts," the 2021 criteria did not counsel against splitting counties more than twice. The 2021 criteria were otherwise materially identical to those used in drawing the 2016 Plan.

Over the next two months, Legislative Defendants undertook an opaque, hurried redistricting process—detailed more fully in the proposed supplemental complaint attached as Exhibit 1—that openly flouted the prohibition on partisan considerations. In summary: The House and Senate redistricting committees waited until September 1 to announce initial public hearings to be held from September 8 through 30. The number of hearings was a small fraction of those held in prior redistricting cycles. Only 13 hearings were initially scheduled—compared to the 63 scheduled in the previous redistricting cycle—with only three scheduled to begin outside of the typical workday and none on weekends.[1] The hearings had no option for virtual participation, and were held in locations that avoided large cities like Raleigh, Greensboro, and Asheville. Legislators then began drawing potential maps for consideration by the Committees. At that point, the nominal prohibition on partisan considerations was discarded. The General

[1] *Compare* House Comm. on Redistricting & Sen. Comm. on Redistricting & Elecs., *Joint Public Hearing Schedule* (Sept. 13, 2021), https://bit.ly/3kusGBx, *with* N.C. Gen. Assembly, *North Carolina Redistricting—2011 Public Hearing Information*, https://bit.ly/3bHFpvG.

Assembly set up two rooms with four computers each on which legislators could draw maps. Although the software on those computers did not allow the uploading of partisan data, nothing prevented legislators from carrying in a printout of a map drawn using prohibited partisan data and simply copying the district boundaries from the pre-drawn, partisan map. That is exactly what happened. When asked about this practice, the Committee chairs expressed no interest in trying to prevent the use of pre-drawn maps. While the Committees scheduled four additional public hearings on October 25 and 26 regarding proposed maps, they provided only a few days' notice and permitted only 210 North Carolinians to attend, with each attendee given only two minutes to speak. Meanwhile, legislators continued to draw maps until the very end of October, even after these public hearings. Once Legislative Defendants filed the map that was ultimately enacted as the 2021 Plan, they held no further public hearings.

Unsurprisingly, this process yielded an extreme partisan gerrymander, enacted by strict party-line votes in the Senate and House on November 2 and 4, 2021. As set forth in the proposed supplemental complaint, the 2021 Plan, like the 2016 Plan, meticulously packs and cracks Democratic voters in each and every district, without exception. And as with the 2016 Plan that this Court enjoined, expert analysis confirms that the 2021 Plan is an extreme, intentional partisan gerrymander that dilutes Democratic votes and prevents Democratic voters from electing candidates of their choice. Just like the 2016 Plan, the 2021 Plan guarantees that Republicans will win 10 seats and Democrats will win 3 seats, with one competitive district. By way of example, the 2021 Plan splits each of North Carolina's three most populous counties—Guilford, Mecklenburg, and Wake Counties—three ways, packing and cracking their Democratic voters. *Id.* And several of its districts look and operate similarly to districts in the 2016 Plan: For example, District 10 in the 2021 Plan, like District 13 in the 2016 Plan, pairs High Point and

other Democratic voters in Guilford County with heavily Republican counties to the west of the Triad, diluting Democratic voting power.

ARGUMENT

I. The Proposed Supplemental Complaint Satisfies Rule 15(d)

A. Leave to File Supplemental Pleadings Is Freely Granted

Rule 15(d) of the North Carolina Rules of Civil Procedure provides: "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense." G.S. 1A-1, Rule 15(d). This provision is "a counterpart to federal Rule 15," *id.* cmt. note, and North Carolina courts routinely treat the two as interchangeable, *see Van Dooren*, 37 N.C. App. at 338, 246 S.E. at 24.

Supplemental pleadings under Rule 15(d) are assessed the same way as amended pleadings under Rule 15(a)—*i.e.*, courts "freely give leave when justice so requires"—with the difference being that "supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented." *McKnight v. McKnight*, 25 N.C. App. 246, 250, 212 S.E.2d 902, 905 (1975). Supplemental pleadings "may be allowed at any time," including after trial or "even after an appeal." 1 N.C. Civil Prac. & Proc. § 15:6 (6th ed.). And supplemental pleadings can set forth "separate or additional claims" and "include new parties" "so long as some relationship exists between the original action and the supplemental claims." *Garey v. James S. Farrin, P.C.*, 2018 WL 4688389, at *6–7 (M.D.N.C. Sept. 29, 2018) (citing *Rowe v. U.S. Fidelity & Guaranty Co.*, 421 F.2d 937, 943 (4th Cir. 1970)).

Supplemental pleadings under Rule 15(d) serve to "facilitate the litigation of related issues in a single action," *Foy v. Foy*, 57 N.C. App. at 132–33, 290 S.E.2d at 750–51, which "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). As the Fourth Circuit has explained, "requiring [a] plaintiff 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 Keith v. Volpe*, 858 F.2d 467, 476 (9th Cir. 1988) ("interests of judicial economy" favored granting leave for supplemental pleading).

Accordingly, North Carolina courts allow supplemental pleadings "with great liberality and almost as a matter of course." 1 N.C. Civil Prac. & Proc. § 15:6 (6th ed.); *Franks*, 313 F.3d at 198 n.15 ("leave should be freely granted"). "Generally, the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party." *vanDooren*, 37 N.C. App. at 337–38, 246 S.E.2d at 23–24. Supplemental pleading are "[s]o useful" "and of such service in the efficient administration of justice that they ought to be allowed as of course, unless some particular reason for disallowing them appears." *New Amsterdam*, 323 F.2d at 28–29 (cited in *vanDooren*, 246 S.E.2d 20); *see also Ashton v. City of Concord*, 337 F. Supp. 2d 735, 740–41 (M.D.N.C. 2004) (similar). Appellate courts reverse denials of leave when a supplemental pleading "would facilitate the litigation of related issues in a single action," *Foy*, 57 N.C. App. at 132-33, 290 S.E.2d at 750–51; *see also, e.g.*, *New Amsterdam*, 323 F.2d at 28–29; *Franks*, 313 F.3d at 198.

Applying these standards, courts have permitted supplemental pleadings to challenge a wide variety of post-complaint conduct by defendants related to, but occurring after, a prior complaint. *E.g.*, *Foy*, 57 N.C. App. at 129, 290 S.E.2d at 750–51 (new breaches of contract); *Ashton*, 337 F. Supp. 2d at 740–41 (continued denials of lease applications); *New Amsterdam*, 323 F.2d at 28–29 (new transfers of funds); *see also vanDooren*, 37 N.C. App. at 337, 246

S.E.2d at 23 (new "allegations that defendant had assaulted and threatened [the plaintiff] and had engaged in a course of adulterous conduct"). The U.S. Supreme Court in *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964), for instance, upheld use of a supplemental complaint to challenge the defendants' new and continuing efforts to segregate Virginia's schools, many of which occurred several years after the filing of the original complaint—and after appeal of the dismissal of that complaint. *Id.* at 226–27. The new unlawful acts (the funding of segregated private schools and closing of public schools) differed qualitatively from the original ones (the direct segregation of public schools). *See id.* Nevertheless, Rule 15(d) "plainly permit[ted] supplemental amendments to cover events happening after suit," and the plaintiffs' additions were "well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." *Id.* at 227.

Courts have recognized the particular value of supplemental pleadings in voting rights cases, which often feature shifting legislation and government conduct during litigation. For example, in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016), the plaintiffs challenged Ohio's voter-identification and provisional-ballot laws in 2006, and in 2010 they entered a consent decree restricting enforcement of those laws. *Id.* at 620. After 2014 legislation substantially changed Ohio's voting requirements, the plaintiffs moved to file a supplemental complaint asserting constitutional and statutory claims against the new legislation. *Id.* at 621. The defendants argued that supplementation was improper because the new complaint was filed "years after" the court "entere[d] the consent decree"—"a final order"—and because there were "overlapping claims" in a related case that was "closer to trial." Br. of Appellants at 38, 2016 WL 4010413. The Sixth Circuit disagreed. 837 F.3d at 625. The allegations in the supplemental complaint were proper under Rule 15(d) because the new Ohio

statutes "superseded the consent decree's protections and because both provisions allegedly imposed burdens that would impede voting in similar ways as the voter-identification provisions originally challenged." *Id.* The "'focal points' of both complaints [were] the same: ensuring all ballots, but particularly provisional and absentee ballots, ... are not unfairly excluded and left uncounted due to illegal voter identification rules." *Id.* (alteration in original). Moreover, "[t]he interest of judicial economy, although not necessarily enough in and of itself, also militate[d] in favor of allowing supplemental pleadings. When a dispute is complicated and protracted, and a new complaint the likely alternative, allowing supplemental pleadings before a court already up to speed is often the most efficient course." *Id.*

B. There Is No Reason to Deny Leave Here

Under these principles, there is ample reason to grant leave under Rule 15(d). Plaintiffs' proposed supplemental complaint "set[s] forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented," G.S. 1A-1 Rule 15(d), namely, the recent enactment of the 2021 Plan. And the allegations in the supplemental complaint are not merely "related" to those in the original complaint, *Foy*, 57 N.C. App. at 132–33, 290 S.E.2d at 751; they substantially overlap. In the original complaint, Plaintiffs asserted that the 2016 Plan was gerrymandered to guarantee an 10-3 Republican advantage in violation of the Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. The complaint explained that Legislative Defendants drew each and every district to maximize and entrench Republican advantage. As for remedies, the complaint sought to enjoin further use of the 2016 Plan and more broadly to enjoin future partisan gerrymandering. Specifically, Plaintiffs requested an injunction barring the use of "past election results or other political data in any future redistricting of North Carolina's congressional districts to intentionally dilute the voting power of citizens or groups based on their political beliefs, party

affiliation, or past votes"; and prohibiting any effort to "otherwise intentionally dilute[e] the voting power of citizens or groups of citizens in any future redistricting of North Carolina's congressional districts based on their political beliefs, party affiliation, or past votes." Compl., Prayer for Relief ¶¶ d, e.

Plaintiffs' proposed supplemental complaint asserts exactly the same legal claims against the same official-capacity defendants, making substitutions only as necessary to account for turnover in personnel. The supplemental complaint explains that the 2021 Plan suffers exactly the same constitutional defects as the 2016 Plan. Specifically, just like the 2016 Plan, the 2021 Plan was drawn deliberately to maximize Republican partisan advantage, and the map achieves that goal, as shown by its methodical packing and cracking of Democratic voters, and as confirmed by expert analysis showing its districts to be extreme partisan outliers. The 2016 Plan guaranteed an 10-3 Republican advantage and Rep. Lewis explained at the time that 10 guaranteed Republican seats was the maximum gerrymander possible; the 2021 Plan guarantees a 10-3 Republican advantage, plus one competitive district. In short, the 2021 Plan "impose[s] burdens that would impede voting in similar ways as the … provisions originally challenged," and thus the "'focal points' of both complaints are the same." *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625.

The supplemental complaint also seeks identical forms of relief as the original complaint: an injunction blocking use of the 2021 Plan and preventing future efforts at partisan gerrymandering like those that produced the 2016, 2019, and 2021 Plans. Ex. 1, Prayer for Relief ¶¶ b–f. Indeed, the allegations of the supplemental complaint are contemplated in the original complaint itself, which requested an injunction to prevent the use of partisan information to dilute citizens' political power in "future" districting. Compl., Prayer for Relief ¶ d. In

crafting the 2021 Plan, Legislative Defendants have thus committed the very acts that the original complaint sought to enjoin. Supplementing the complaint to add specific allegations to that effect is "well within the basic aim of the rules to make pleadings a means to achieve an orderly and fair administration of justice." *Griffin*, 377 U.S. at 227.

Supplementation of the complaint will not cause any prejudice to Defendants, let alone the type of "substantial injustice" necessary to warrant denying leave. *vanDooren*, 37 N.C. App. at 337–38, 246 S.E.2d at 23–24. Plaintiffs have filed this motion within a day of enactment of the 2021 Plan. *See Franks*, 313 F.3d at 193, 198 n.15 (finding no prejudice where supplemental complaint filed "less than three months after" the new government action being challenged). As discussed, the legal claims in the two complaints are identical, and the factual allegations substantially overlap given the close similarity between the 2016 Plan and the 2021 Plan in terms of their extreme partisan-outlier status and even some of their specific districts. Courts allow supplemental pleadings even when their allegations differ significantly from those in the original complaint—for example, challenging novel methods of unconstitutional discrimination, *see Griffin*, 377 U.S. at 226, or materially different restrictions on voting, *see Ne. Ohio Coal. for the Homeless*, 837 F.3d at 619–25. This case poses no such issue. And regardless, Legislative Defendants will have the opportunity to respond to the supplemental complaint and to assert any differences between the 2016 and 2021 Plans that they believe to be legally relevant. In fact, because Legislative Defendants will have exactly the opportunity to respond as they would in a newly filed case, it is hard to see how a claim of prejudice is even possible.

The procedural posture of this case confirms the absence of prejudice. Plaintiffs filed the original complaint on September 27, 2019, and three days later sought a preliminary injunction. After expedited briefing, this Court entered a preliminary injunction less than a month after the

motion was filed. Although the parties briefed motions for summary judgment, the Court did not resolve those motions, and there has been no discovery, no trial, and no appeal. Leave under Rule 15 is routinely granted in cases at far later stages, including those "made on the day the trial calendar was called," *Watson v. Watson*, 49 N.C. App. 58, 61, 270 S.E.2d 542, 544 (1980); after entry of a final consent decree, *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625; or on remand from appellate proceedings, *Griffin*, 377 U.S. at 226–27; *see also* 1 N.C. Civil Prac. and Proc. § 15:6 (6th ed.). This is nothing like the rare cases in which leave has been denied, where supplementation "would unduly delay the resolution of [a] case" in a late procedural stage. *Biosafe-One, Inc. v. Hawks*, 639 F. Supp. 2d 358, 370 (S.D.N.Y. 2009) (court had "already dismissed plaintiffs' complaint in its entirety and discovery has closed"), *aff'd*, 379 F. App'x 4 (2d Cir. 2010).

Finally, the "interest of judicial economy" overwhelmingly favors supplementation. *Ne. Ohio Coal. for the Homeless*, 837 F.3d at 625. This Court is more than "up to speed" on the parties' dispute, *id.*, and has deep familiarity with the subject matter of this case, having resolved a related challenge to gerrymandered state legislative districts in 2019, and having granted a preliminary injunction in this case. "All involved—plaintiffs, defendants, and district court—[a]re familiar with the underlying action." *Keith*, 858 F.2d at 476.

By contrast, if leave to supplement is denied, it will require the filing of a new case and the assignment of a new three-judge panel—the very sort of "cost, delay and waste" that Rule 15(d) aims to avoid. *New Amsterdam*, 323 F.2d at 28–29. In fact, because of the timing of the enactment of the 2021 Plan, denying leave risks substantial prejudice to Plaintiffs and millions of North Carolinians. As explained more fully in the accompanying motion to expedite, Plaintiffs have filed this motion within days of enactment of the 2021 Plan because time is of the essence.

As the experience of 2019 shows, a challenge must be briefed and considered expeditiously if a remedial map is to be enacted in time for use in the 2022 congressional elections. And Legislative Defendants delayed the process of enacting this map as long as they possibly could, with the evident goal of inhibiting judicial review in time for the 2022 elections. Especially because of that gambit, requiring the commencement of a new lawsuit, and the subsequent appointment of a new panel, could impede any newly empaneled court's ability to meaningfully review the 2021 Plan prior to its use in next year's congressional elections. As this Court has properly recognized, the "loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution" would "undoubtedly be irreparable if congressional elections [were] allowed to proceed under" an unconstitutionally gerrymandered map. Order on Inj. Relief at 14. Leave to file the supplemental complaint should be granted to avoid such grave harm.

II. This Court as Currently Constituted Can Grant this Motion

The two Judges of this panel have authority to grant this motion. G.S. § 1-267.1(a) provides that redistricting challenges "shall be heard and determined by a three-judge panel of the Superior Court of Wake County," organized pursuant to subsection (b). Subsection (c) then provides 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 … except by a three-judge panel of the Superior Court of Wake County organized as provided by" subsection (b). These statutory provisions permit a majority of the three-judge court to grant motions like this one. Unlike provisions governing other types of three-judge courts under North Carolina law, Section 1-267.1 does *not* require any quorum to conduct its business. *Compare* G.S. § 7A-16 (in the North Carolina Court of Appeals, "three judges shall constitute a quorum for the transaction of the business of the court when sitting in panels of three judges"). And subsection (c) merely requires that the panel have been "organized as provided" in subsection

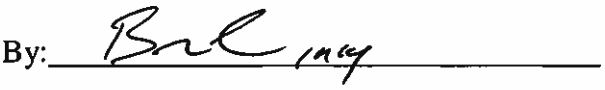
(b), as this panel was. *See State v. Lane*, 26 N.C. (4 Ired.) 434, 435, 450–53 (1844) (while statute required appointment of "three Judges" to "the Court," two judges had power to take any action as "the Court" even without the third Judge).

But in any event, for present purposes the requirements of subsection (c) are irrelevant. Subsection (c) refers only to an "order or judgment … affecting the validity of" redistricting legislation, *i.e.*, an order or judgment on the merits. Motions for leave under Rule 15, unlike final "order[s] or judgment[s]," are quintessentially procedural, resting "within the trial judge's discretion." *vanDooren*, 37 N.C. App. at 337, 246 S.E.2d at 23. Allowing filing of a supplemental complaint is not an "order or judgment … affecting the validity of" the 2021 Plan, and there is accordingly no question that two judges of the panel can grant leave to file a supplemental complaint.

CONCLUSION

For the foregoing reasons, leave to file the proposed supplemental complaint should be granted.

Dated: November 5, 2021

By: 

PATTERSON HARKAVY LLP

Burton Craige, NC Bar No. 9180
Narendra K. Ghosh, NC Bar No. 37649
Paul E. Smith, NC Bar No. 45014
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Counsel for Plaintiffs

ELIAS LAW GROUP LLP

Marc E. Elias*
Aria C. Branch*
Lalitha D. Madduri**
Jacob D. Shelly**
Graham W. White*
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
MElias@elias.law
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

Abha Khanna*
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Phone: (206) 656-0177
Facsimile: (206) 656-0180
AKhanna@elias.law

ARNOLD AND PORTER KAYE SCHOLER LLP

Elisabeth S. Theodore*
R. Stanton Jones*
Samuel F. Callahan**
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
elisabeth.theodore@arnoldporter.com

Counsel for Plaintiffs
* Admitted *pro hac vice*
** *Pro hac vice* forthcoming

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to the following persons at the following addresses which are the last addresses known to me:

Amar Majmundar
Stephanie A. Brennan
Paul M. Cox
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
amajmundar@ncdoj.gov
sbrennan@ncdoj.gov
pcox@ncdoj.gov
Counsel for the State Board of Elections and its members

Phillip J. Strach
Michael McKnight
Alyssa Riggins
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com
Counsel for the Legislative Defendants

John E. Branch III
Nathaniel J. Pencook
Andrew Brown
Shanahan Law Group, PLLC
128 E. Hargett Street, Suite 300
Raleigh, NC 27601
jbranch@shanahanlawgroup.com
npencook@shanahanlawgroup.com
abrown@shanahanlawgroup.com
Counsel for the Defendant-Intervenors

E. Mark Braden
Richard B. Raile
Trevor M. Stanley
Baker & Hostetler, LLP
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, DC 20036-5403
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
Counsel for the Legislative Defendants

This the 5th day of November, 2021.

Burton Craige