STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION FILE NO. 18-CVS-9806
NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *Plaintiff,* v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, *Defendants.*	**MOTION TO REMAND**

Plaintiff, the North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP"), respectfully moves to remand this case to a single judge because the three-judge panel lacks jurisdiction under N.C. Gen. Stat. § 1-267.1. Plaintiff conferred with Defendants, and they oppose this motion. In support of this motion, NC NAACP shows the following:

1. In 2017, the U.S. Supreme Court held that the North Carolina legislature was racially gerrymandered in violation of the U.S. Constitution. *Covington v. North Carolina*, 316 F.R.D. 117, 176 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (per curiam). Before remedial elections could take place, legislators from districts that needed to be redrawn initiated the process of amending the

North Carolina Constitution. In total, six amendments were proposed as ballot measures, including a photo voter-ID requirement and an income-tax cap.

2. NC NAACP[1] filed suit in Wake County Superior Court challenging four of the proposed amendments, including the photo voter-ID and tax-cap amendments. NC NAACP argued, among other things, that since the General Assembly that proposed these amendments was determined to be the product of an illegal racial gerrymander, it could not legitimately exercise the people of North Carolina's sovereign power to amend the Constitution (the "racial-gerrymander claims").

3. To prevent these illegally promulgated amendments from being placed on the ballot, NC NAACP moved for emergency injunctive relief. However, the trial court initially found that since NC NAACP's claims constituted a "facial challenge to the validity of an act of the General Assembly," it was required to transfer jurisdiction to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1.

4. NC NAACP thus argued its motion for emergency relief before a three-judge panel. That panel, however, concluded that NC NAACP's racial-gerrymander claims *were not* facial challenges. Rather, it found that those claims constituted "a collateral attack on acts of the General Assembly and, as a result, [are] not within the jurisdiction of this three-judge panel." Order on Injunctive Relief, No. 18-CVS-9805 (N.C. Super. Ct. Aug. 21, 2018). The panel reached the merits of NC NAACP's

[1] Clean Air Carolina ("CAC") was also initially a plaintiff in this case. However, the trial court dismissed CAC for lack of standing. That ruling is not before this Court and is not relevant to this motion.

other claims, and granted the motion for injunctive relief in part and denied it in part. NC NAACP promptly sought emergency relief from the Court of Appeals and the Supreme Court, but the appellate courts declined to hear its petitions.

5. Defendants appealed the three-judge panel's order but did not challenge the panel's decision rejecting jurisdiction over the racial-gerrymander claims. Defendants later moved to dismiss their appeal, which the Court of Appeals granted.

6. Having been denied jurisdiction over its initial claims for emergency relief in front of a three-judge panel, NC NAACP filed a motion for partial summary judgement on its racial-gerrymander claims before a single judge in Wake County Superior Court.[2] Defendants did not object to the jurisdiction of this single judge.

7. After briefing and oral argument, the Superior Court granted the NC NAACP's motion for partial summary judgment and held that the photo voter-ID and tax-cap amendments were void *ab initio*.[3] *N.C. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, No. 18 CVS 9806, 2019 WL 2331258, at *6 (N.C. Super. Ct. Feb. 22, 2019).

8. Defendants appealed, but again failed to contend that the single judge did not have jurisdiction to hear the claims. The Court of Appeals unanimously concluded that it had appellate jurisdiction over the claims, but reversed the Superior Court's Order in a fractured opinion that included a dissent. *N.C. State*

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[2] While the case was pending before the Superior Court, voters rejected two of the amendments at the ballot box, meaning that only the photo voter-ID and tax-cap amendments remained ripe for adjudication.

[3] The other two amendments that the NC NAACP challenged failed to pass.

Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore, 849 S.E.2d 87 (N.C. Ct. App. 2020).

9. The NC NAACP appealed to the Supreme Court of North Carolina. Again, Defendants failed to contest the jurisdiction of the single judge. After briefing and oral argument, the Supreme Court accepted jurisdiction of the case and reversed the Court of Appeals. *N.C. State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Moore*, 876 S.E.2d 513 (N.C. 2022). Neither the majority nor the dissent asserted that jurisdiction in this case should properly have been before a three-judge panel, as opposed to a single judge.

10. The Court concluded that the North Carolina Constitution places limits on the powers of unconstitutionally gerrymandered legislatures "to initiate the process of altering or abolishing the constitution." *Id.* at 519. It also concluded, however, that the trial court should have made specific *factual findings* before declaring the amendments void and remanded this case to the trial court in order to make these findings. As a "threshold matter," the trial court should have examined "whether the legislature was composed of a sufficient number of legislators elected from unconstitutionally gerrymandered districts—or from districts that were made possible by the unconstitutional gerrymander—such that the votes of those legislators could have been decisive in passing the challenged enactments." *Id.* If so, it then should have assessed "whether there was a substantial risk that each challenged constitutional amendment would (1) immunize legislators elected due to unconstitutional racial gerrymandering from democratic accountability going

forward; (2) perpetuate the continued exclusion of a category of voters from the democratic process; or (3) constitute intentional discrimination against the same category of voters discriminated against in the reapportionment process that resulted in the unconstitutionally gerrymandered districts." *Id.*

11. The Supreme Court held that the "trial court's finding" on the extent of the racial gerrymander satisfied the "threshold" inquiry. *Id.* at 538 ("It is indisputable that plaintiff will satisfy this threshold inquiry."). It also recognized that "some" of the trial court's other "findings of fact" were "relevant" to the three "substantial-risk" factors listed above. *Id.* at 539. But since the trial court did not engage with these factors in the proper context and the "parties did not have the opportunity to present all evidence that may be relevant to resolution of this inquiry," the Supreme Court "remand[ed] to the superior court"—the single-judge Superior Court—"for further proceedings consistent with the guidance set forth in [its] opinion." *Id.* at 519–20, 540. Specifically, it directed the Superior Court to hold "an evidentiary hearing" and enter "additional findings of fact and conclusions of law" regarding the three factors noted above. *Id.* at 540. It also held that, "[o]n remand, the parties otherwise remain bound by the trial court's unchallenged findings of fact as contained in its prior order." *Id.*

12. Before the matter was even remanded to the Superior Court, Defendants filed a motion to transfer to a three-judge panel. This was the first time in the multi-year history of this case that Defendants had raised any objection to the three-judge panel's determination that it did not have jurisdiction over the case.

Defendants did not argue that the original determination by the three-judge panel was incorrect, but rather that the test announced by the Supreme Court which "examines the text of each amendment," had transformed NC NAACP's claims into "a facial challenge on remand." Defendants' Motion to Transfer at 4, 6, No. 18-CVS-9806 (N.C. Super. Ct. Sept. 9, 2022).

13. NC NAACP filed a response explaining that a three-judge panel had already determined it did not have jurisdiction to adjudicate this matter. NC NAACP noted that this determination remained the "law of the case," and further noted that both the Court of Appeals and the Supreme Court had declined to question the single-judge panel's jurisdiction.

14. On August 2, 2023, Superior Court Judge Shirley granted Defendants' motion to transfer. Rather than adopt Defendants' reasoning that the case had somehow been "transformed" by the Supreme Court, Judge Shirley directly contravened the prior determinations by the three-judge panel, the Court of Appeals, and the Supreme Court, and concluded that NC NAACP's claims had always been facial challenges and thus subject to N.C. Gen. Stat. § 1-267.1. *Compare* Order Transferring Case to a Three Judge Panel, No. 18-CVS-009806-910 (N.C. Super. Ct. Aug. 2, 2023) (concluding NC NAACP's claims are "direct attacks" on acts of the General Assembly "and thus constitute facial challenges"), *with* Order on Injunctive Relief, No. 18-CVS-9805 (N.C. Super. Ct. Aug. 21, 2018) (determining NC NAACP's racial-gerrymander claims constituted "a collateral attack *on acts of the General Assembly*" and thus were outside the three-judge panel's jurisdiction

(emphasis added)). As a result, Judge Shirley concluded he lacked subject-matter jurisdiction and ordered the case to be transferred to another three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1.

15. While it is true that subject-matter jurisdiction generally can be raised at any time, *Wood v. Guilford Cnty.*, 558 S.E.2d 490, 493 (N.C. 2002), here it was raised and resolved several years ago. The three-judge panel in 2018 determined that it did not have subject-matter jurisdiction. Defendants did not appeal that decision, and the Court of Appeals and the Supreme Court did not recognize any error when the case was brought to them in supersedeas petitions. The case was then brought before a single judge, with no objection from Defendants. The Court of Appeals and Supreme Court took jurisdiction of the case, and the Supreme Court specifically adopted the findings of that single judge. Judge Shirley had no authority to second-guess these higher appellate courts.

16. To the extent Judge Shirley's order relied on reasoning that this case belonged before a three-judge panel from the outset, he did not have the authority to second-guess the prior three-judge panel's determination. That panel plainly held that NC NAACP's as-applied racial-gerrymander claims were "not within the [panel's] jurisdiction." Order on Injunctive Relief, No. 18-CVS-9805 (N.C. Super. Ct. Aug. 21, 2018). That holding remains the "law of the case." *See Hedgepeth v. N.C. Div. of Servs. for Blind*, 571 S.E.2d 262, 265 (N.C. Ct. App. 2002) (concluding that an earlier decision finding subject-matter jurisdiction existed bound subsequent panels in the same case); *In re L.B.*, 646 S.E.2d 411, 413 (N.C. Ct. App. 2007)

(same); *Lowder v. All Star Mills, Inc.*, 372 S.E.2d 739, 740 (N.C. Ct. App. 1988) (same). *But see Wellons v. White*, 748 S.E.2d 709, 720 (N.C. Ct. App. 2013). As a result, Judge Shirley had "no power to review [the] judgment rendered" by the previous three-judge panel on subject-matter jurisdiction. *N.C. Nat. Bank v. Va. Carolina Builders*, 299 S.E.2d 629, 631 (N.C. 1983) ("[T]he well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law[.]" (citation omitted)).

17. To the extent Judge Shirley's reasoning is that the Supreme Court somehow transformed this into a facial challenge, that reasoning also fails. N.C. Gen. Stat. § 1-267.1 requires a "facial challenge to the validity of an act of the General Assembly" to be "heard and determined by a three-judge panel of the Superior Court of Wake County." A facial challenge is one that "establish[es] that a 'law is unconstitutional in all of its applications." *State v. Grady*, 831 S.E.2d 542, 554 (N.C. 2019) (citation omitted). "In contrast, 'the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case.'" *Id.* (citation omitted). To determine the nature of the challenge, courts must look to the plaintiff's complaint or a defendant's responsive pleading. N.C. Gen. Stat. § 1A-1, Rule 42(b)(4).

18. NC NAACP's racial-gerrymander claims are not a facial challenge. As noted by the previous three-judge panel, NC NAACP's claims collaterally attack legislative enactments. Order on Injunctive Relief, No. 18-CVS-9805 (N.C. Super.

Ct. Aug. 21, 2018). NC NAACP is not contending that those enactments are *per se* invalid—that no legislature could ever pass ballot measures with the same language. Rather, NC NAACP is arguing that, as a procedural matter, a specific racially gerrymandered legislature lacked the authority to propose these amendments under a specific set of circumstances. As the Supreme Court recognized, this will be a fact-intensive inquiry requiring an evidentiary hearing. *Moore*, 876 S.E.2d at 540. And as counsel for Defendants conceded in response to questioning from this panel, such an inquiry is generally incompatible with a facial challenge. *See* D. Martin Warf, Response to Questions (Dec. 15, 2023) (agreeing that "evidence is not routinely needed on a facial challenge").

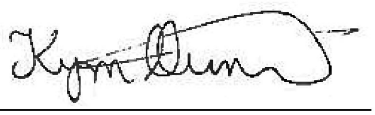
19. Defendants incorrectly suggest that the Supreme Court's new test—which "examines the text of each amendment"—has somehow transformed NC NAACP's claims into "a facial challenge on remand." Defendants' Motion to Transfer, No. 18-CVS-9806 (N.C. Super. Ct. Sept. 9, 2022). Not so. As an initial matter, Defendants provided zero analogous authority to support this novel transformation-on-remand argument. Regardless, there is nothing about the test set out by the Supreme Court that amounts to a change in circumstances that makes this case more suited to jurisdiction under N.C. Gen. Stat 1-267.1(a1) than it was when the three-judge panel determined there was no such jurisdiction. Quite the opposite; the fact-intensive inquiry set forth by the Supreme Court has—if anything—transformed the case into one that is even more "as applied." That is because it requires the reviewing court to look at specific facts related to legislative

motive as well as the impacts of the amendments in context, rather than merely analyze the statutory language. The test also requires the court, "as a threshold matter," to engage in a head-counting exercise to determine if the gerrymander "could have been decisive in passing the challenged enactments." *Moore*, 876 S.E.2d at 519. Thus, the determination of whether the challenged ballot measures are unconstitutional is not only "strongly *influenced* by the facts in [this] particular case," *Grady*, 831 S.E.2d at 554, but is essentially *dictated* by them. That is a classic as-applied challenge.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's Motion to Remand. The matter should be returned to a single judge for additional findings per the Order of the North Carolina Supreme Court.

Respectfully submitted, this the 12th day of January, 2024.



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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following party via email and the electronic filing system as follows:

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This the 12th day of January, 2024.

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