NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24-CVS-3534

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants.

MEMORANDUM IN OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case presents a major question of first impression for the courts of this State. Our state Constitution established a republican form of government under which the people are sovereign and through periodic elections they choose or remove their servants in the legislature, judiciary, and executive. It is often said that our Constitution cannot contradict itself, and so it is absurd to suppose that the people surrendered their rights to control their government by empowering the legislature to enact discrete election regulations that are not "fair". Our Supreme Court has expressed what every North Carolinian regards as their birthright: "[t]he people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials." *Ponder v. Joslin*, 262 N.C. 496, 500, 138 S.E.2d 143, 147 (1964). The essence of this Complaint is that an unfair election is unconstitutional, and that the judiciary has an obligation to right the wrong.

The Declaration of Rights in Article I of the North Carolina Constitution sets out these core principles: elections are to be frequent (§ 9), free (§ 10), and fair (an implicit unenumerated right). It is indisputable that the right to "fair" elections is a precondition to the guarantees "of frequent" and "free" elections. After all, what good are "frequent" or "free elections if those elections are not "fair?"

A synonym to "fair" is "impartial." "Impartial" is defined by the Merriam-Webster Dictionary as "not partial or biased: treating or affecting all equally," a concept with which the judiciary is very familiar. The oath of office taken by members of the judiciary of this state obligates them to "impartially discharge all the duties" of their office. Even the Code of Judicial Conduct, Canon 3 is titled: "A judge should perform the duties of his office *impartially* (emphasis added) and diligently." Applying the concept of fair or impartial is neither novel or difficult nor beyond the scope of decision making by the judiciary.

Plaintiffs, individually, and on behalf of all the citizens of North Carolina contend that they are guaranteed "fair" elections—otherwise their other constitutional guarantees are of little or no value. Article I, § 36 of the North Carolina Constitution captioned "Other rights of the people" explicitly provides "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const. Art. I, § 36. This guarantee first adopted by North Carolina's 1868 Constitution is modeled on the Ninth Amendment in the U.S. Bill of Rights. The right to "fair" elections is an unenumerated right reserved by the people of North Carolina and fundamental to the very concept of elections and the underpinnings of democracy.

While Plaintiffs frame this unenumerated right in the context of the term "fair", Roger Polin, Senior Fellow in Constitutional Studies at the CATO Institute, and a national expert on unenumerated rights, proposes this approach to delineating unenumerated rights—"far more useful would be to ask simply what right(s) the statute or executive action at issue is protecting, or what compelling state interest is served by upholding the statute or action…." CATO Institute Commentary, May 9, 2023. In this case, the compelling state interest served by upholding the right to a fair election is effective representative democracy in North Carolina. The source of this protection is the common law of North Carolina and the Declaration of Rights of the North Carolina Constitution, which is a limitation of the powers of the General Assembly.

The facts of this case raise the fundamental question whether citizens have a right to have the election of their representatives free from governmental efforts to purposefully "fix" or "preordain" the result of those elections. The facts alleged in the Complaint state a claim for relief which is fundamental to our constitutional republic system of government.

Without "fair" elections, the framework of our government would rest not on principle and the will of the people, but instead on partisan politics exercised not by political parties or particular entities, but by the heavy hand of government itself—in this case, that hand being that of the General Assembly. By intentionally manipulating the electoral odds and stacking the electorate to give an unfair electoral advantage to a particular political party and its candidates in selected districts, the General Assembly has attempted to preordain the outcome of elections in certain districts as set out in the Complaint and violate the constitutional right of its citizens to a fair election.

Here, Plaintiffs seek an affirmative declaration of their constitutional right to "fair" elections in North Carolina and a determination that the legislative apportionment of citizens into districts for the election of Congress, the North Carolina Senate, and the North Carolina House violate the right to "fair" elections. Taking the allegations as true for purposes of Defendants' Motion to Dismiss, each Plaintiff suffered specific and traceable injury in their voting district at the direct hand of the Legislative Defendants. Upon this constitutional unenumerated right as discussed more fully herein, the elections in specific district as forth below violate Plaintiffs' constitutional rights to fair elections.

FACTUAL BACKGROUND

For brevity, Plaintiffs incorporate by reference the allegations of their Complaint, but the following is a short summary of those allegations:

In October 2023, the General Assembly of North Carolina submitted a "2023 Congressional Plan Criteria" (see attached Exhibit A) and a "2023 Senate Plan Criteria" (see attached Exhibit B). In those plans, the General Assembly included criteria for apportioning voters that states in part:

> "Political Considerations. Politics and political considerations are inseparable from districting and apportionment. (Citation omitted). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions . . . but it must do so in conformity with the State Constitution."

Id. Defendants did, in fact, consider partisan advantage and incumbency protection in the apportioning of NC 6, NC 13, NC 14, SD 7 and HD 105, as well as other districts, in violation of the North Carolina Constitution. As alleged in the Complaint, the House Redistricting Committee never adopted criteria in 2023, unlike in past redistricting efforts. Instead, in August of 2023, the Redistricting Chair instructed their taxpayer-funded expert to draw lines in secret using "guidelines." (See attached Exhibit C). No one saw these guidelines or the resulting map until it was introduced and passed in October of 2023.

In complying with the required apportionment of citizens to various districts, the governmental entities performing this function in the 21st century have extraordinary technological resources and data upon which they can rely to apportion citizens into discrete districts for discrete elections. Using these technology resources and data, governmental entities are able to pick and choose which pools of voters, usually defined by precincts or by census blocks, are apportioned into each distinct district. Further, this technology and data provides substantial information about each pool of voters including, in part: party registration, race, ethnicity, and the voting tendencies for that precinct. All of this information fully provides those governmental entities in control of the apportionment, the ability to predict to a reasonable degree of certainty the election results for future elections within each newly apportioned district.

In the adoption of SB 757 "Congressional Districts 2023," the members of the General Assembly controlling the apportionment process used technology and data to reapportion voters, creating a demonstrable advantage for their political party in the ensuing elections in those districts. Likewise, in SB 758 "Realign NC Senate Districts 2023" and HB 898 "House Redistricting Plan 2023", the members of the General Assembly controlling the apportionment process used technology and data to reapportion voters, creating a demonstrable advantage for their political party ensuring the outcome of the elections in those districts.

The process utilized by the Legislative Defendants to apportion citizens into these electoral districts in 2023 was largely void of transparency and created in secret consultation with a redistricting expert from Ohio. Shockingly, neither the public nor representatives of the minority party leadership were allowed to participate in the apportionment process or observe the process to determine which citizens in which precincts or census blocks would be aggregated together to form electoral districts. Despite subsequent process of superficial transparency, a full ninety-five percent of the census blocks utilized in the preparation of the map remained unchanged from the original created by the secret process with only minor, technical changes taking place prior to passage.

Most clearly as to Congressional districts NC 6, NC 13, NC 14, and legislative districts SD 7 and HD 105, Defendants Berger and Moore and their allies and agents preordained the outcome of the election in at least three ways:

1. They took substantial numbers of voters likely to support their party's candidates and moved them into these districts;
2. They took certain voters likely to oppose their party's candidates out of their district and moved them into districts where their votes would be negated or minimized so as to not be determinative in deciding the outcome of the election; and,
3. They generally reapportioned the voters in NC 6, NC 13, NC 14, SD 7 and HD 105 in such a way as to turn the districts from competitive to favoring one political party's candidates, in this case the Republican Party.

Plaintiffs incorporate for purposes of this brief the specific allegations in the Complaint as to the actions of Defendants in reapportioning voters for NC 6, NC 13, NC 14, SD 7 and HD 105.

GOVERNING STANDARDS

The issue on a Rule 12 motion "is not whether [the] plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support the claim." *Howe v. Links Club Condo. Ass'n, Inc.,* 263 N.C. App. 130, 137, 823 S.E.2d 439, 447 (2018). Thus, the "essential question" is "whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266, 827 S.E.2d 458, 465 (2019).

For these reasons, a Rule 12 motion should not be granted unless "it appears certain that [the plaintiff] could prove no set of facts which would entitle [it] to relief under some legal theory." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010); see also, e.g., *Energy Invs. Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000.) ("Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.").

When courts are called upon to interpret a provision in Article I of the North Carolina Constitution which the Defendants' motion asks the Court to do here, these rules apply with even greater force. The North Carolina Supreme Court has repeatedly cautioned which trial courts must "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions [in Article I of the North Carolina Constitution]," because these provisions "were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Tully v. City of Wilmington*, 370 N.C. 527, 533, 810 S.E.2d 208, 214 (2018) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)).

Under these legal standards and governing constitutional principles, Defendants' motion fails for the reasons that follow.

ARGUMENT

I. The citizens of North Carolina have unenumerated rights under the N.C. Constitution which are judicially enforceable.

The first core question raised by the Complaint is whether the Plaintiffs, and in essence, all citizens of North Carolina, have "unenumerated" rights under the North Carolina Constitution. As the majority in *Harper v. Hall, 384 N.C. 292, 886 S.E.2d 393 (2023)* (referred to herein as *"Harper III"*) stated:

> [T]he constitution is interpreted based upon its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretation of that text should consistently reflect what the people agreed the text meant when they adopted it.

Harper III at 297. Article I, § 36 of the North Carolina Constitution undeniably recognizes the citizens of this state retain certain unenumerated rights. Specifically, Article I, § 36 provides that: "*[t]*he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const., Art. I, Section 36.

In their treatise on *The North Carolina State Constitution,* the authors including the current Chief Justice of the North Carolina Supreme Court, Chief Justice Paul Martin Newby, describe this section as follows:

> Although the people of North Carolina have expressly declared many rights in Article I, they have not attempted a complete enumeration. This section may have been rendered necessary by the introduction to the declaration of rights, also added in 1868, describing its purpose as the recognition and establishment of '*the* great, general, and essential principles of liberty and free government'. The fact that the section harks back to Section 1, which recognizes 'inalienable rights' and then lists four 'among these.' *Section 36 reminds us that the whole declaration of rights, despite its great importance, is no more than that: a selection only, not a complete catalog.*

John V. Orth & Paul Martin Newby, *The North Carolina State Constitution*, Oxford University Press 2nd Ed. 2013, pg. 92 (emphasis added). This point is further echoed in the *Harper III* majority opinion: "The Declaration of Rights is an expressive, *yet non-exhaustive list of protections* afforded to citizens against government intrusion, along with 'the ideological premises that underlie the structure of government.'" *Harper III* at 351. (emphasis added).

In analyzing whether a North Carolina citizen's fundamental rights include the right to fair elections under the state Constitution's unenumerated rights clause, it is critical to understand the historical context presented. As the Court in *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 3 N.C. 42, 1 Martin 48 (1787) stated in that seminal decision:

> "…at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people, ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment by their delegates, met in Congress, and formed that system. Or those fundamental principles comprised in the constitution…."

Id. Bayard anchored its decision in the fundamentals of a republican form of government that animate and perpetuate stable society. *Bayard* noted the Constitution does not expressly prohibit legislators from "render[ing] themselves the Legislatures of the State for life, without further election of the people." *Id.* However, such acts would be invalid because the unenumerated right to a fair election and transition of power otherwise would improperly empower the legislature to "repeal or alter the Constitution" and "dissolve the government thereby established." *Id.* *Bayard* stands for the principle that it is the judiciary's obligation to not permit *expressio unius* arguments to subvert the Constitution's proper functioning. Taken to its logical end, *Bayard* in essence reflects the time-honored judicial remedy under the constitution against otherwise unchecked, self-perpetuating power of a branch of government.

What was implicit since North Carolina's founding was made explicit in 1868 when the "Reconstruction Constitutional Convention" included a provision in the Declaration of Rights which explicitly recognized the people of the state retained unenumerated rights in addition to those expressly stated.

These ideas continue to the present. As the *Harper III* majority states, "The constitution is our fundamental social contract and an agreement among the people regarding *fundamental principles*. The state constitution is different from the Federal Constitution: the Federal Constitution is a limited grant of power while the state constitution is a limitation on power." *Harper III* at 297 (emphasis added). Thus, the rights protected by the North Carolina Constitution, both enumerated and unenumerated, serve as the people's protection against abuses by government which violate these fundamental rights. The North Carolina Constitution limits the power of state government, including legislative acts, which violate the rights of the people.

The *Bayard* decision established for the first time in our state's history the concept of judicial review and predated the U.S. Supreme Court decision in *Marbury v. Madison*, 5 U.S. 137 (1803). *Bayard* firmly declared the judiciary's duty to strike down a law passed by the General Assembly that violates the rights of the people: "Consequently, the constitution (which the judicial power was bound to take notice of as much as any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect." *Bayard*, 1 N.C. 5, pp 7-8.

The challenge in addressing the question of unenumerated rights as opposed to a claim under an enumerated right, is determining what right or rights the framers of the Constitution would have expected but not specifically included in the text. One guide for this determination can be found in Ninth Amendment jurisprudence under the U.S. Constitution. The Ninth Amendment provides: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., 9th Amend.

Anthony Sanders, Director of the Center for Judicial Engagement for the Institute for Justice, recently argued: "[protecting unenumerated rights] is the story of Americans recognizing the dangers that governments pose and expansively shackling those governments into the future." Anthony B. Sanders, *Baby Ninth Amendments – How Americans Embraced Unenumerated Rights and Why it Matters*, University of Michigan Press, 2023, pg. 7 (addressing state constitutions' incorporation of an unenumerated rights savings clause similar to that of the Ninth Amendment). Sanders goes on to quote North Carolina's first United Supreme Court Justice: "[t]o quote just one Founder, future Supreme Court justice, Jame Iredell, speaking at the North Carolina ratifying convention: 'Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id.* Roger Pilon, previously quoted, stated in response to Sanders:

> [w]e have done that through constitutions that not only grant power but say also what governments 'shall not' do. Their etcetera clauses state plainly that rights not enumerated in a constitution shall not be 'denied, disparaged, or impaired.' And because they are found in *written* constitutions, it falls to the judiciary to enforce them, just as is done with clauses protecting enumerated rights."

CATO Institute Commentary, May 9, 2023, by Roger Pilon.

Therefore, it is unquestionable the citizens of North Carolina have reserved, unenumerated fundamental rights pursuant to Article I, Section 36 which cannot be impaired or denied. And it is the judiciary's absolute responsibility to protect those rights.

II. The citizens of North Carolina have an unenumerated right to fair elections and to be protected from government action which attempts to compromise those elections by purposeful legislation which preordain the outcome of those elections.

As stated in the FOREWORD TO FIRST EDITION (1993) of the Professor Orth and Chief Justice Newby treatise: "State constitutions generally and North Carolina's constitution in particular are rich sources of fundamental principles of democratic government and guarantees of individual liberties." Orth & Newby, *The North Carolina State Constitution, 2nd Ed.*, Forward to First Edition.

Indeed, these fundamental principles and guarantees of individual liberties were recognized from the very inception of independence from Great Britain when the people of North Carolina by the adoption of the original state constitution and the prefatory Declaration of Rights in December 1776 created a system of government for the new State of North Carolina. Critical to this new structure of government and the declaration of powers which the new government would have was the election of the representatives elected by the people who would exercise the powers granted.

Throughout the constitutional developments of the State of North Carolina from 1776, through 1868, and to the modernized version of the Constitution in 1971, the Constitution has repeatedly affirmed the eligibility of citizens to vote and the constitutional requirement for officeholders to be elected by those eligible citizens. The North Carolina Constitution includes two specific rights in Article I, related to elections. Article I, Section 9 provides for "Frequent elections" and Section 10 provides for "Free elections". In addition to those rights dealing specifically with elections, the State has enacted a myriad of laws regulating the conduct of elections for public offices and empowering the State Board of Elections to protect the sanctity of those election laws. By legislative mandate:

> [t]he State Board of Elections shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district and shall report violations of the election laws to the Attorney General or district attorney or prosecutor of the district for further investigation and prosecution.

N.C.G.S. § 163-22(d).

Similarly, the concept or right to "fair" elections can be traced through the North Carolina Founding Fathers and to the origins of representative democracy. In framing the initial constitution for the newly independent State of North Carolina, drafters sought advice from John Adams of Massachusetts. Adams published his guidance in "Thoughts on Government" in April of 1776:

> The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. *Great care should be taken to effect (sic) this, and to prevent unfair, partial, and corrupt elections.* (emphasis added).

In his inaugural address delivered on March 4, 1797, newly elected President John Adams stated:

> In the midst of these pleasing ideas we should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties *if anything partial or extraneous should infect the purity of our free, fair, virtuous and independent elections.*

> (emphasis added). If an election is to be determined by a majority of a single vote, and that can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not the nation for the national good.

These understandings and admonitions as articulated by John Adams over two hundred years ago, have continued to be an over-arching theme over the course of the centuries. In 1875, in *Van Bokkelen v. Canaday*, 73 N.C. 198 (1875), the Supreme Court struck down unfair election regulations as a "plain violation of fundamental principles…too plain for argument." Writing for the court, Justice Edwin Godwin Reade's opening lines are: "Our government is founded on the will of the people. Their will is expressed by the ballot." This landmark case establishing the unenumerated fundamental right to a fair election has never been repealed.

In 2001, a constitutional challenge was brought on behalf of a group of plaintiffs, individually and in their official capacities, including the Chairman of the North Carolina Republican Party, challenging the legislation passed by the Democratic-controlled General Assembly in 2001 apportioning voters and creating state House and Senate Districts. See *Stephenson v. Bartlett (Stephenson I),* 355 N.C. 354, 562 S.E. 2d. 377 (2002). While this challenge focused on the state legislative districts and sought the Court's interpretation and application of the North Carolina Constitution's "whole county provision", the plaintiffs in *Stephenson* presented evidence at the trial level pointing out the impact of the legislature's actions on the concept of fair government in North Carolina. This evidence was presented through the testimony of John Davis, Executive Director of NCFREE, a non-partisan membership organization. *See* Plaintiffs/Appellee's Brief to N.C. Supreme Court, pg. 35-39 and attached hereto as Exhibit D. At the time of his testimony, Mr. Davis had been projecting elections results in North Carolina since 1992.

Moreover, in their brief in 2002, the plaintiffs (by and through their attorneys Thomas A. Farr, (the now Honorable United States District Court Judge) James C. Dever III, Terence D. Friedman and Phillip A. Strach) stated as follows: "[t]he 2001 Senate and House redistricting plans completely ignore the role of counties in North Carolina, and are intended to significantly increase the Democrat majorities in both houses of the General Assembly, to protect Democrat incumbents, and to protect a relatively smaller number of Republican incumbents." *Id.*, pg. 39; Exhibit D. After extensively quoting the evidence of the lack of competitive districts created by the challenged plans, the *Stephenson* plaintiffs stated:

> Defendants are fighting to preserve plans that – by design – give the voters no choice in the majority of Senate and House elections. Further, their plans apparently give voters a true chance to elect representatives in only 3 out of 170 races. No wonder one political commentator has likened North Carolina to a third-world country – with the proviso that voters in most third-world countries have more options than the people of North Carolina when it comes to electing candidates of their choice to the Senate or House. John Fund, Red-Light District, Wall St. Journal, Mar. 13, 2002.

Id. Exhibit D.

While the *Stephenson* case focused on the "whole county provision" in the N.C. Constitution and not on the right of citizens to fair elections, the sentiment expressed in the brief lends substantial support to the concept of fair elections. The argument advanced by the *Stephenson* plaintiffs' brief underscores Plaintiffs' position in the case *sub judice*:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. **Other rights, even the most basic, are illusory if the right to vote is undermined.** *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L.Ed.2d 481 (1964) (emphasis added). The 'right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds,* 377 U.S. at 555, 84 S. Ct. at 1378.

Id. at 86. The legislative action challenged in this case and the fundamental right to have elections free from government intervention attempting to "stack the deck", strikes right "at the heart" of representative government and the constitutional underpinnings of that representative government - fair elections.

While the case law over the years has rarely dealt with the constitutional implications and meaning of the Frequent election clause and the Free election clause, *Harper III* did quote from one North Carolina Supreme Court opinion discussing the Free elections clause. The *Harper III* majority quotes from *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), a case involving a quo warranto action alleging election fraud. The *Harper III* majority quotes:

> In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Const. of North Carolina, we find it written: 'All elections ought to be free.' Our government is founded on the consent of the governed. A free ballot *and a fair count* (emphasis added) must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot." at 702, 191 S.E. at 747.