STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 18-CVS-009806-910

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.

REPLY IN FURTHER SUPPORT OF DEFENDANTS' DISPOSITIVE MOTION

It is undisputed that a lot has happened since Plaintiff filed its Second Amended Complaint on August 9, 2018. (*See* Plt. Br. 1). But contrary to Plaintiff's briefing, the procedural developments here support dismissal under N.C. R. Civ. P. 12(c).

On February 22, 2019, Judge Collins entered his order granting summary judgment in favor of Plaintiff in part. (*See* Def. Appx. B). It was that order alone that was the subject of appellate review. On August 19, 2022, the North Carolina Supreme Court held for the first time that "acts proposing constitutional amendments passed by a legislature composed of a substantial number of legislators elected from unconstitutionally racially gerrymandered legislative districts, after the unlawfulness of those districts has been conclusively established, are not automatically shielded by application of the de facto officer doctrine." *N.C. St. Conf.*

of the NAACP v. Moore, 382 N.C. 129, 167, 876 S.E.2d 513, 540-41 (2022). (See Def. Appx. C). The Court also, again for the first time, determined that once a trial court finds that a sufficient number voters from legislators elected from unconstitutionally gerrymandered districts "could have been decisive in passing" challenged state constitutional amendments, then the court must balance the equities to determine whether retroactively invalidating state constitutional amendments is necessary. *Id.* at 133, 876 S.E.2d at 519. Three questions assist the trial court with this inquiry: "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 district." *Id.*

Approximately three weeks after remand, Legislative Defendants filed a motion to transfer the case to a three-judge panel on September 9, 2022. Plaintiff filed a response on September 16, 2022. Nothing further happened in the case until February 13, 2023, when Plaintiff filed a motion for a status conference. Defendants' motion to transfer was then noticed for a hearing, which was heard on April 28, 2023. That same day, the North Carolina Supreme Court released its opinion in *Holmes v. Moore*, 384 N.C. 426, 886 S.E.2d 120 (2023), which held the implementing legislation for the Voter ID Amendment, N.C. Sess. Law 2018-144, was not unconstitutional

because it was neither intentionally discriminatory nor produced a disparate impact along racial lines.

Judge Shirley entered an order granting Legislative Defendants' motion to transfer to a three-judge panel on August 2, 2023. In that Order, Judge Shirley clearly concluded that "[t]he Supreme Court's analysis clearly reveals that Plaintiffs' claims, which are collateral attacks on the Amendments themselves, are also direct attacks on the Session Laws and thus constitute facial challenges to acts of the General Assembly which initiated the amendment process at issue." (Def. Appx. D). Unsatisfied with Judge Shirley's ruling, Plaintiff moved to remand the case to a single judge panel on January 12, 2024, which this panel denied.

This timeline shows that Defendants' Amended Dispositive Motion, brought pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure, is procedurally proper and otherwise within the scope of the Supreme Court's remand, and that both the new standard from the Supreme Court in this case and the burden of proof for facial challenges apply.

I. Defendants' Amended Dispositive Motion is within the scope of the Supreme Court's remand and can be lawfully granted.

Defendants' Amended Dispositive Motion is within the scope of remand and, as such, can be lawfully granted.

The Supreme Court's mandate in this case was to "reverse the decision of the Court of Appeals and instruct that court to remand this matter to the trial court for further proceedings consistent with this opinion." *Moore*, 328 N.C. at 167-68, 876. S.E.2d at 540-41. That is the procedure the Court directs. Though there are specific

instructions in the body of the opinion regarding an evidentiary hearing, the Court twice repeated the general[1] mandate for "further proceedings consistent with this opinion." *Id.* at 133-34, 876 S.E.2d at 519-20. *See Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015); *State v. Watkins*, 246 N.C. App. 725, 732, 783 S.E.2d 279, 284 (2016) (limited remands "clearly convey" a limited scope of the trial court's authority on remand).

Defendants' Amended Dispositive Motion argues that even taking the prior findings of fact and factual allegations in Plaintiff's Amended Complaint as true, the Voter ID and Tax Cap Amendments should not be retroactively invalidated under the three-part test set forth by the Supreme Court. This Motion, and the hearing on the Motion, is a further proceeding as consistent with the Supreme Court's opinion.

Even considering the instructions within the body of the opinion that remand to the trial court is "solely for an evidentiary hearing," there is no limitation on the kind of hearing—simply that the findings of fact of previously determined are still binding.[2] *Moore*, 328 N.C. at 166, 876 S.E.2d at 540.

[1] It is unclear whether the North Carolina Supreme Court makes the distinction between general and specific mandates on remand in the same manner as the Court of Appeals has in the cases Plaintiff cites. And most of the federal cases discussing the distinction between general and specific mandates in the Fourth Circuit are limited to issues regarding sentencing for criminal convictions on remand.

[2] Plaintiff's attempt to narrowly interpret the remand as "solely for an evidentiary hearing" is a bit tongue and cheek because, read literally, it would also divest this Court of entering a scheduling order for discovery because there is no express mention of discovery in the opinion.

Furthermore, a plain reading of the mandate does not otherwise limit the scope of what the trial court can or cannot find on whether there was a substantial risk that each challenged amendment would meet one of the three new factors. This is distinguishable from several cases Plaintiff cites, which include extraordinarily specific language. *See Bodie*, 239 N.C. App. at 285, 768 S.E.2d at 882 (holding the mandate on remand that the trial court "(1) classify the second mortgage on the Soquilli house as marital debt; (2) find the value of that mortgage; and (3) adjust the distributional decision accordingly" necessarily authorized the trial court to adjust any findings impacted by new mortgage value, including findings related to tax obligations); *State v. Kelliher*, 900 S.E.2d 239, 2024 WL 2014207, at *5 (May 7, 2024) (holding the mandate to "remand to the trial court with instructions to enter two concurrent sentences of life with parole" divested the trial court of its discretion to enter a consecutive sentence). Instead, the Supreme Court's remand included directions to consider the evidence presented at the summary judgment phase[3] in light of the new three-part test. That "evidence" as the Court notes, was findings relevant to Plaintiff's allegations of harm for the purposes of standing, *Moore*, 328 N.C. at 165, 876 S.E.2d at 539, taken from Plaintiff's amended complaint and not findings in the context of the new test propounded by the Court. *Id*. at 166, 876 S.E.2d at 540. Defendants' Amended Dispositive Motion is squarely within that mandate of

[3] After all, the Order that the Supreme Court was considering on appeal was Judge Collins' Order from an evidentiary hearing entering partial summary judgment in Plaintiff's favor.

further proceedings consistent with the Court's opinion, and this panel has authority to hear and decide the Motion.

II. Defendants' Amended Dispositive Motion is otherwise procedurally proper.

Defendants' Amended Dispositive Motion, brought pursuant to N.C. R. Civ. P. 12(c), is procedurally proper for several reasons. First, a Rule 12(c) motion for judgment on the pleadings can be brought at any time "[a]fter the pleadings are closed but within such time as not to delay the trial." N.C. R. Civ. P. 12(c). This includes on remand. *See Fox v. Johnson*, 243 N.C. App. 274, 281-82, 777 S.E.2d 314, 321-22 (2015). Plaintiff's argument that "it comes far too late in the proceedings to be considered" is without merit. (Plt. Br. p. 15).

Second, all materials that Plaintiff claims are outside the pleadings are either properly cited legal authorities or adjudicative facts that are judicially noticeable at any time of the proceedings. N.C. R. Evid. 201. *See Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669, 675 (judicial notice of acts of the North Carolina General Assembly passed while the case was pending); *Norman v. Duke Univ.*, 260 N.C. 1, 20-21, 131 S.E.2d 909, 922 (1963) (judicial notice of historical material); *Goldston v. State*, 199 N.C. App 618 625, 683 S.E.2d 237, 242 (2009) (taking judicial notice of documents published by the N.C.G.A.); *see also Territory of Alaska v. American Can Co.*, 358 US 224, 226-7 (1959); *State v. Swink*, 151 N.C. 726, 726, 66 S.E. 448, 448 (1909). (Plt. Br. at 13). Defendants' Motion is procedurally proper and may be decided on the present record.

III. Applying the proper standards, Defendants are entitled to judgment on the pleadings as a matter of law.

Plaintiff claims that Defendants shift the burden of proof and misconstrue substantive standards in this Motion. (Plt. Br. pp. 15-24). Not so. Instead, the Supreme Court's 2022 opinion in this case and subsequent determination that remand presents a facial challenge must be read in harmony. When applying the appropriate standards for a facial challenge, Defendants are entitled to a judgment on the pleadings under Rule 12(c) taking all legally possible factual allegations in the Second Amended Complaint and prior findings of fact as true.

A. The North Carolina Supreme Court's August 2022 Opinion clarified this case as a facial challenge.

On August 2, 2023, Judge Shirley concluded that "the Supreme Court's analysis clearly reveals that Plaintiffs' claims, which are collateral attacks on the Amendments themselves, are also direct attacks on the Session Laws and thus constitute facial challenges to acts of the General Assembly which initiated the amendment process at issue. The facial challenges were properly raised in the pleadings stages. Compl. ¶95; First Am. Compl. ¶95; Second Am. Compl. ¶95." (See Appx. D). Judge Shirley's determination is binding, *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983), and Plaintiff is estopped from arguing otherwise. (*See* Plt. Br. at pp. 7-8).

Even so, the Supreme Court's opinion here did not overrule the burden of proof for facial constitutional challenges. This Court can, and should, read the Supreme Court's 2022 opinion in conjunction with Judge Shirley's August 2023 opinion. The

Supreme Court's new three-part test is measured by the "under no circumstances" facial challenge test, which was reaffirmed in *Holmes v. Moore*, 284 N.C. 426, 436, 886 S.E.2d 120, 129 (2023) (quotations omitted, alterations in original), as follows:

> "In addressing the facial validity of [a statute]., our inquiry is guided by the rule that a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." . . . To succeed in this endeavor, one who facially challenges an act of the General Assembly may not rely on mere speculation. Rather, "[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid."

As such, Defendants set forth the correct burdens of proof[4] and, as explained below, Plaintiff cannot meet those burdens even when taking all well-pleaded factual allegations in the Second Amended Complaint as true.

B. Considering all legally possible facts in Plaintiff's Second Amended Complaint as true, Defendants are entitled to a judgment as a matter of law.

Plaintiff repeatedly accuses Defendants of failing to give due regard to the factual allegations in Plaintiff's Second Amended Complaint that were adopted by the Supreme Court. (*See, e.g.*, Plt. Br. at p. 20). But under a Rule 12(c) Motion, "[a]ll allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed

[4] To suggest that Defendants' Motion violates Rule 11 or the Rules of Professional Conduct is a step too far. (Plt. Br. at 15, n. 5). Defendants made the Motion in good faith in light of the ambiguity in the Supreme Court's 2022 Order in this case and the unique procedural posture over six-plus years of litigation.

admitted by the movant for purposes of the motion." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974).

The findings of fact that the Supreme Court singled out as potentially relevant to the three factors were, by the Court's own admission, allegations of standing, and are now legally impossible when considered substantively:

> 31. Members of the NC NAACP, who include African-American and Latino voters in North Carolina, and the NAACP itself are directly harmed by the proposed Voter ID constitutional amendment. Members will be effectively denied the right to vote or otherwise deprived of meaningful access to the political process as a result of the proposed Voter ID requirement. The proposed Voter ID amendment will also impose costs and substantial and undue burdens on the right to vote for those and other members."
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> . . .
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> 33. The income tax cap constitutional amendment harms the NC NAACP, its members, and the communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt public schools, eliminated or significantly reduced funding for communities of color, and otherwise undermined economic opportunity for the non-wealthy.

Moore, 328 N.C. at 165, 876 S.E.2d at 539. Those are the only two factual findings that the Supreme Court said were relevant on remand.

Taking what is legally possible as true in those findings and Plaintiff's Second Amended Complaint, Plaintiff cannot prove that the challenged amendments, on their face, pose a "substantial risk" of (1) immunizing legislators from democratic accountability; (2) perpetuating the continued exclusion of a category of voters from the democratic process; or (3) constituting intentional racial discrimination. *Id.* at 165, 876 S.E.2d at 539. As explained in Defendants' opening brief, finding number 31 is now legally impossible in light of *Holmes v. Moore* 384 N.C. 426, 460, 886 S.E.2d 120, 144 (2023) and *N. Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 298 (4th Cir. 2020). And, paragraph 33 refers to the tax cap, but the amendment did not "place" the flat artificial limit on income taxes—a flat ceiling was already in existence in the Constitution prior to the amendment. *See, e.g., Lambert v. Cartwright*, 160 N.C. App. 73, 77, 584 S.E.2d 341, 344 (2003) (granting motion for judgment on the pleadings to probation officer because the Court determined, despite the allegations of fact regarding her liability, that she was a public official entitled to immunity.)

Allegations of a complaint are not always going to measure up to claims or support defenses in the same way over time because the law is not static. A change in law, particularly here as it relates to the constitutionality of voter identification legislation in North Carolina, can create differences between how a claim or judgment may fare overall. But this Court is called upon to measure allegations about the application of fact to law as of the law today. What legal issues were perhaps capable

of being furthered through allegations in 2018 have since been resolved as a matter of law today.

CONCLUSION

For these reasons, and for those set forth in Defendants' Memorandum in Support, Defendants' Amended Dispositive Motion should be granted in its entirety.

Respectfully submitted, this the 11th day of October, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 11, 2024, a copy of the foregoing was served upon the parties listed below by email at the addresses indicated below:

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