

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA**
Civil Action No. 2:19-CV-37

BILLY JOE BREWSTER, JR., et al.,

Plaintiffs,

v.

PHILLIP E. BERGER, in his official capacity
as Speaker Pro Tempore of the North Carolina
Senator, et al.,

Defendants.

NOTICE OF RELATED CASE

Plaintiffs in *Harper v. Lewis*, No. 5:19-cv-00452-FL (E.D.N.C.) hereby notify the Court that the above-captioned case, styled *Brewster v. Berger*, No. 2:19-CV-00037 (E.D.N.C.), is related under Local Civil Rule 40.3 to *Harper*. *Brewster* should be assigned to Judge Flanagan, who presides over *Harper*. The *Harper* Plaintiffs have filed this Notice of Related Case on the *Harper* docket as well.

Harper, No. 5:19-cv-00452-FL, is a state constitutional challenge, filed on September 27, 2019 in Wake County Superior Court, to North Carolina's 2016 congressional redistricting plan. Defendants include Senator Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Representative Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (together, "Legislative Defendants"), along with the State Board of Elections and its members (collectively, the "State Board Defendants"). Three Republican members of the U.S. House of Representatives also were permitted to intervene in the case as defendants, both in their official capacities and in their personal capacities as voters.

On October 14, 2019, Legislative Defendants removed *Harper* to this Court, on the theory that the *Harper* Plaintiffs' claims, if successful, would purportedly conflict with federal law. The next day, the *Harper* Plaintiffs filed an Emergency Motion to Remand and to Expedite Resolution of Motion to Remand. *Harper*, ECF No. 19. The *Harper* Plaintiffs moved to expedite resolution of the remand motion based on the impending deadlines for the 2020 primary elections and the need to ensure sufficient time to implement a new congressional plan for those elections. *Id.* at 28. On October 17, 2019, the action was reassigned from Chief Judge Boyle to Judge Flanagan, who had presided over the removal of a prior state court redistricting action earlier this year.

On October 22, 2019, this Court granted the motion to remand, holding, among other things, that it was "uncertain and speculative whether the ultimate relief sought in plaintiffs' complaint in the form of new plans comports with the North Carolina Constitution would conflict with federal law." *Harper*, ECF No. 33 at 8 (E.D.N.C. Oct. 22, 2019) (internal quotation marks omitted). This Court retained jurisdiction for purposes of the *Harper* Plaintiffs' forthcoming motion for fees and costs; the *Harper* Plaintiffs will contend in that motion that the removal was an effort to obstruct the state court proceedings to prevent a new congressional plan from being put into place for the 2020 primary elections.

Following remand, on October 28, 2019, the state court granted the *Harper* Plaintiffs' motion for a preliminary injunction. The state court enjoined "Legislative Defendants and State Defendants, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them . . . from preparing for or administering the 2020 primary and general elections for congressional districts under the 2016 congressional [plan]." *Brewster*, ECF No. 1-1 (state court's preliminary injunction decision).

On October 31, 2019, the *Brewster* Plaintiffs filed their complaint in this Court. The *Brewster* Plaintiffs are “voters and a candidate in the upcoming primary elections for congress in North Carolina.” *Brewster*, ECF No. 1 at 1-2. According to a press release, the suit is supported by the National Republican Redistricting Trust (NRRT);¹ the General Counsel of the NRRT also serves as counsel of record in *Harper* for the members of Congress who intervened in the case as defendants. The named defendants in *Brewster* are Senator Berger, Speaker Moore, and the members of the State Board of Elections, all of whom are also defendants in *Harper*. The *Brewster* Plaintiffs ask this Court to “enjoin[] the Defendants, its agents, officer and employees from enforcing[,] implementing or giving any effort to enforce a congressional election based on a map or plan different from that currently enacted by the State Legislature.” *Brewster*, ECF No. 1 at 24. The *Harper* Plaintiffs intend to file a motion to intervene in *Brewster* later today.

Harper and *Brewster* meet the definition of related cases under Local Civil Rule 40.3 for three independent reasons. First, the cases “concern substantially the same parties.” Local Civ. R. 40.3(a)(1). As mentioned, all of the defendants in *Brewster* are also defendants in *Harper*. And as mentioned, all of the *Harper* Plaintiffs will be filing a motion to intervene as parties in *Brewster*. The *Harper* Plaintiffs will be seeking to intervene on the grounds that, *inter alia*, the *Brewster* action seeks to enjoin the *Harper* litigation and to overturn the relief that the *Harper* Plaintiffs have already obtained and will obtain from the state court in the proceedings there.

Second, “the cases call for a determination of the same or substantially related or similar questions of law.” Local Civ. R. 40.3(a)(2). The *Harper* removal litigation and the newly filed *Brewster* litigation both concern the jurisdiction and authority of this Court, as a federal court, to interfere with the *Harper* Plaintiffs’ state court lawsuit challenging North Carolina’s 2016

¹ <https://www.thenrnt.org/2019/10/31/nrrt-chairman-scott-walker-issues-statement-on-north-carolina-lawsuit-supported-by-fair-lines-america-foundation/>

congressional plan under the North Carolina Constitution. Moreover, the *Harper* Plaintiffs' forthcoming motion for fees and costs based on the removal will focus on a question that will also be central in *Brewster*: whether Legislative Defendants and their allies are improperly attempting to use the federal judiciary to obstruct state court litigation—indeed, the exact same state court litigation which this Court recently remanded. Finally, *Harper* and *Brewster* involve the exact same federal constitutional arguments for why a new congressional plan purportedly cannot be put into place. The Legislative Defendants and Intervenor Defendants in *Harper* have asserted—both in their Answers and in their oppositions to the preliminary injunction—that implementing a new congressional plan purportedly would violate the federal Constitution due to their alleged reliance interests on the old plan and upcoming deadlines for the next election.² The *Brewster* Plaintiffs make identical federal constitutional arguments. Given that a case is treated as the same, continuous action upon removal and remand, *Harper* and *Brewster* involve identical questions of law.

Third, “there will be an unduly burdensome duplication of labor and expense ... if the cases are conducted before different judges.” Local Civ. R. 40.3(a)(3). Barely a week after Judge Flanagan remanded *Harper* on an emergency basis so that the state court proceedings could proceed swiftly, *Brewster* now seeks to enjoin *Harper*. If *Harper* had somehow remained in federal court and was proceeding swiftly on the merits, and *Brewster* was then filed to enjoin *Harper*, the case undoubtedly would have been assigned to Judge Flanagan. This scenario should be no different—*Brewster* seeks to enjoin Judge Flanagan's case.

What's more, the *Harper* Plaintiffs' imminent motion to intervene in *Brewster* will center on the *Harper* Plaintiffs' state constitutional claims and the nature and timing of the relief they

² See Legislative Defendants' Answer, *Harper*, ECF No. 31; Legislative Defendants' Opp'n to Mot. for Preliminary Injunction, *Harper*, ECF No. 29; Intervenor's Proposed Answer, <https://tinyurl.com/y3bcpbym>; Intervenor Defendants' Resp. in Opp'n to Mot. for Preliminary Injunction, <https://tinyurl.com/y62urjt4>.

seek in the ongoing, expedited state court proceedings. Judge Flanagan is extremely familiar with these issues from the *Harper* removal proceedings. There is no need to burden a different judge with a duplicative effort to learn these issues on a short timeline, both for resolving the motion to intervene in *Brewster* and the merits of that case. And that aside, the repeated efforts of Legislative Defendants and their allies to gain a specific federal forum will be interpreted by the public as an effort at gamesmanship. *See Harper*, ECF No. 8 at 3.

Respectfully submitted this 1st day of November, 2019.

/s/ Burton Craige

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**Pro Hac Vice motions forthcoming.*

CERTIFICATE OF SERVICE

I hereby certify that on this date, November 1, 2019, I caused the foregoing document to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of North Carolina. I further certify that simultaneously with this filing via CM/ECF, I caused the foregoing document to be served by electronic mail on counsel of record as well.

DATED: November 1, 2019

/s/ Burton Craige
Burton Craige