

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BILLY JOE BREWSTER, JR., et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 PHILIP E. BERGER, in his official capacity as ) Case No: 2:19-cv-37-D  
 President<sup>1</sup> Pro Tempore of the North Carolina )  
 Senate, et al. )  
 )  
 Defendants. )  
 )  
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**RESPONSE TO NOTICE OF RELATED CASE**

*Harper* Plaintiffs’ Notice of Related Case [D.E. 2] filed on November 1, 2019 and State Defendants Notice of Related Case [D.E. 5], lack merit and are a transparent attempt to forum shop to a Judge that the proposed intervenors, and State Board defendants, who are aligned in the *Harper* case, believe will be more favorable to their cause.

While *Harper* Plaintiffs are correct that many of the same parties in *Harper v. Lewis*, 5:19-cv-00452-FL are Defendants in the instant action, this is simply not enough to meet the definition of related cases under Local Civil Rule 40.3. In addition to cases involving substantially the same parties, the cases must “call for a determination of the same or substantially related or similar questions of law.” Local Civ. R. 40.3(a)(2).

The *Harper* case, which was remanded to State court on October 22, 2019, involves claims under the North Carolina Constitution. Specifically, *Harper* Plaintiffs allege violations of the Free Elections Clause of the North Carolina Constitution, the Equal Protection Clause of the North

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<sup>1</sup> The Amended Complaint lists Senator Berger as “Speaker” Pro Tempore, but he is actually President Pro Tempore of the North Carolina Senate.

Carolina Constitution, and that the Congressional Plan also violates their Freedom of Speech and Freedom of Assembly under the North Carolina Constitution. *Harper* Plaintiffs allege no federal claims.

Conversely, the instant action arises under the Elections Clause of Article I and the First, Fifth, and Fourteenth Amendments to the United States Constitution, as well as the Federal Declaratory Judgment Act, 42 U.S.C. § 1983 and the All Writs Act, 28 U.S.C. § 1651. *See* D.E. 16-1 p. 10. Plaintiffs in this action bring no challenges under the North Carolina Constitution. There is not a single overlap in claims between the plaintiffs in *Harper* and *Brewster*.

*Harper* Plaintiffs in fact vigorously opposed the idea that their claims are in any way related to federal claims. In fact, *Harper* Plaintiffs in their Emergency Motion to Remand the *Harper* case admitted that their lawsuit was brought “exclusively under the North Carolina Constitution” and that “state constitutions can provide standards and guidance for *state courts* to apply” *See* D.E. 19, 5:19-cv-00452 p. 1; 10 (emphasis in original). *Harper* Plaintiffs highlighted the differences in federal and state jurisdiction, and emphasized that their claims were brought solely under the North Carolina Constitution. *See id at.* 1, 9-10. Because of their representations made to the federal court in *Harper*, these parties are estopped from now arguing that their claims are based on similar questions of law to the federal constitution.

Further, *Harper* Plaintiffs’ arguments that these cases involve the “exact same” federal constitutional arguments is simply false. The argument for removal in *Harper* was centered around the Voting Rights Act. Plaintiffs in *Brewster* have alleged no such issues here. As such, none of the same claims are present in these two cases.

Finally, the views of the State Board Defendants as reflected in their Notice of Related Case, or otherwise, do not reflect the views of Legislative Defendants who are separately

represented by counsel in this matter. The State Board Defendants filed their Notice of Related Case within 24 hours of the filing of the original case in this matter without any consultation with Legislative Defendants, in a clear attempt to seek a more favorable forum for their agenda. Legislative Defendants may very well support some or all of the relief sought by the *Brewster* plaintiffs as the state court has left the North Carolina General Assembly in the present untenable circumstances of having enjoined the current congressional plan just weeks away from the filing period for candidates for those offices while inviting or encouraging the General Assembly to replace that plan with new legislation, which will likely violate the rights of North Carolina voters and candidates under the due process and equal protection clauses of the United States Constitution.

Respectfully submitted, this the 7<sup>th</sup> day of November, 2019.

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

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<sup>2</sup> D.E 7 erroneously reports that the Attorney General's office represents Legislative Defendants Berger and Moore, and accepted service on their behalf. D.E. 13 shows that Legislative Defendants are represented by Ogletree Deakins, who accepted service on their behalf.

**CERTIFICATE OF SERVICE**

It is hereby certified that on this date 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.

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DATED this the 7<sup>th</sup> day of November, 2019.

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