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

THE CITY OF GREENSBORO, et al.,

Plaintiff,

vs.

GUILFORD COUNTY BOARD OF ELECTIONS,

Defendant.
_____/

Civil Action
No. 1:15CV559

Greensboro, North Carolina
December 13, 2106
9:30 A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS

THE COURT: Good morning. We're here for the pretrial conference on City of Greensboro against Board of Elections, 15CV559, set for trial in January. And also, so I can talk with you all about the motion for partial judgment on the pleadings.

Let me just get my pieces of paper organized. First, if I can ask everybody to identify themselves for the record and the court reporter. I think I know most of you all, but go ahead, for the plaintiff.

MR. STARRETT: Brian Starrett on behalf of the City of Greensboro.

MR. PHILLIPS: Jim Phillips, Greensboro.

MS. RIGGS: Allison Riggs, for the Southern Coalition for Social Justice of Durham, on behalf of the individual plaintiffs.

MS. SEAWELL: Emily Seawell, on behalf of the individual plaintiffs.

MR. PAYNE: Mark Payne, on behalf of the Board of Elections.

THE COURT: Thank you. I did have a brief chat with Judge Webster, just about scheduling matters, so we could deal with those today.

I have your joint motion to modify the scheduling orders and set a trial date. I just wanted to check with him

to be sure his part of this matter would be resolved in time for us to have a trial during the January term.

So I thought, just to deal with the scheduling matters first, he indicated he was expecting a decision, you know, within a week or so. He didn't promise that and I'm not promising that, but I said to him that I was thinking I might set it for trial the week of February 6th, which technically is outside the January term, but I actually have several cases for trial, and one of them is supposed to last two weeks, so I'm going to be in trial the other weeks in January, if everything goes.

I thought I would give us a little more time in this one so you can deal with whatever fallout there is from Judge Webster's decision, and it might facilitate the trial prep process.

Does that sound okay to everybody?

MS. RIGGS: Yes, Your Honor.

THE COURT: I believe something I saw said the plaintiff thought the case would take about four days.

MS. RIGGS: We, in our joint 26(f) report that we filed, we agreed with all parties that we expected the trial to take two days.

THE COURT: Sorry. I've gotten confused with one of the other cases I'm having a pretrial conference on.

MS. RIGGS: I do think that is the maximum. I don't

anticipate it taking any longer than that.

With respect to setting a firm date the week of February 6th, that works well. We do anticipate calling to the stand two members of the General Assembly, and since the legislature is in session at that point, it would be ideal if one of our two trial dates could be a Monday or a Friday, because that is when they are not in session.

THE COURT: We'll plan on starting on Monday. I don't anticipate that being a problem based on the other cases I have to try, even if every one of them went to trial, which as everybody in the room knows is, unlikely. They could all go to trial. We'll start on Monday. It is non-jury, right, so we don't need to worry about that.

I neglected to bring with me a copy of the local rules.

MR. STARRETT: Your Honor, if I may, I would be happy to hand up a couple.

THE COURT: The Middle District -- I'll just look at you all's proposal. I remember looking at it. It probably was going to be fine and everybody agreed with it, including the intervenors, who aren't here anymore.

Trial briefs and proposed findings of fact and conclusions of law, 21 days before trial. Responses, seven days thereafter, and replies three days thereafter, you have proposed. That seems reasonable.

A joint exhibit list, which certainly would be nice, 28 days before trial, or separate exhibit lists 28 days before trial. Objections, seven days later. I'm sorry, I think I may have misspoken. I'm reading your proposal. If you submit a joint exhibit list, 28 days before trial. If you submit separate exhibit lists, the plaintiff's would be 35 days before trial. Objections, seven days later. Defendants would be 28 days before trial. Objections, seven days later.

Witness lists and deposition designations due the same time as exhibit lists. Counter-designations or objections, seven days later. And here we are having the pretrial conference, which I obviously did not think needed to be rescheduled.

If we do need to have further discussion about admissibility of evidence or objections to exhibits, I would anticipate we just handle them during the trial, since it will be non-jury, and we won't have -- usually I don't like to do that because it wastes their time, but if I don't have a jury, it doesn't really matter.

Is that okay with everybody? Everybody is nodding yes.

I will grant the motion to modify the scheduling order and to set a trial date. I will set the trial for Monday, February 6th, to start at 9:30 in the morning.

I will adopt the schedule that the parties proposed

in their motion on the docket at 105, concerning trial briefs, findings of fact, proposals, exhibits, witness lists, deposition designations, et cetera.

For deposition testimony, you know, certainly if it is short, it might be preferable for you to just read it into the record. I'm expecting there might be some public interest in the trial, and that's probably the most transparent way to do it. I would hope that you wouldn't do any deposition testimony that would be longer than, you know, 15 or 20 minutes.

Do you anticipate that?

MS. RIGGS: No, Your Honor.

THE COURT: Okay. If I can suggest that. Usually non-jury trials I just let you hand it up, but I think in this case it is probably just better to have somebody sit on the witness stand and be the witness and save me some reading and everybody will know what all of the evidence is.

I do want to talk about the motion for partial judgment on the pleadings, but before I turn to that, are there other scheduling or housekeeping matters related to the trial that anyone wants to address for the plaintiff?

MS. RIGGS: No, Your Honor.

THE COURT: Mr. Payne.

MR. PAYNE: None, Your Honor.

THE COURT: All right. So on the motion for judgment

on the pleadings, I did ask the clerk to communicate with you all informally, just so you know what my questions were. I'm not trying to prevent you from addressing anything that you think is important, but I was a little concerned that maybe the matter was not appropriate for judgment on the pleadings. You know, in the normal case, which this is not, because we don't really have anybody defending the law, you would expect there would be some evidence from the defendants about a rational basis, but this is not a summary judgment motion.

I guess I could -- you know, I could imagine a rational basis under certain facts. So, let's just imagine, hypothetically, that some hypothetical town or city in North Carolina, not Greensboro, every two years they had a referendum and they changed how they wanted the city council or city governments to be managed, and they did this for several -- you know, several times; four, five times. You can imagine the legislature saying, look, that's unreasonable, you need some stability, we're not going to let you all do that. That's extreme, but, you know, so given that, I question whether it is appropriate for judgment on the pleadings. So, that's my main question about it.

I'm happy to hear from you otherwise anything that you want to add or say about that motion. I take it, Mr. Starrett, from the way you are nodding, that you are the one who is going to be talking about this.

MR. STARRETT: You have observed correctly, Your Honor.

THE COURT: All right. Go ahead.

MR. STARRETT: Well, I certainly want to explain to the Court why we determined that 12(c) was the appropriate vehicle, and certainly answer the specific questions that came from the correspondence about what appear to be on the face, conflicting pleadings from the intervenors.

THE COURT: I did forget to mention that, that the intervenors did allege on information and belief that other municipalities were similarly situated.

MR. STARRETT: I certainly want to address that, and the Court's question about Club Italia from the Sixth Circuit, and statements in that case about the rational basis and where one might be found and how it might be found.

As a general proposition, Your Honor, Rule 12(c), as you well know, the non-moving party is entitled to all deference in their allegations, but in their well-pleaded allegations -- and we think there are at least two reasons why the allegations that are in the intervenor's answer, and particularly in paragraph 79 that Your Honor asked about, are not entitled to what would typically be the traditional deference that a non-moving party on 12(c) would get.

As we start by noting that that allegation is made upon information and belief. Now, upon information and belief

allegations are sometimes appropriate, and in situations where the knowledge or information that is being alleged in that allegation is particularly in the custody or control or exclusive knowledge of an opponent. That's not what we have here.

The allegation in paragraph 79 by the intervenors, discusses what the law in the State of North Carolina is and has been with regards to the rights of referendum initiative for other citizens and other municipalities. That, Your Honor, is a question of public record.

So in particularly, there is a question on which we believe the Court can take judicial notice. In fact, there is -- I want to -- I'll note that this Court's opinion in *EEOC versus Circuit City Stores*, which is 394 F. 2d. 747, it says --

THE COURT: I have been here long enough that people are quoting me to myself. Go ahead.

MR. STARRETT: In considering a motion under Rule 12(c), a Court may take notice of facts that are part of the public record without converting the motion to a summary judgment motion under Rule 56.

So generally, the Judicial Notice Doctrine provides exception to the deference that is owed under 12(c). So not only do we think that upon the information and belief component, the allegation by itself means that that allegation is not entitled to what the deference of the Court might

otherwise give it is, the fact that the allegation relates to matters of public record, which can appropriately be noticed under the Judicial Notice Doctrine independently, confirms that that allegation, and what appears to be the facial conflict of our allegation 79 and the intervenor's allegation 79, there is actually no genuine conflict there because of the Judicial Notice Doctrine.

So again, that information is not in our exclusive custody or control, it is a matter of public record. And relatedly, statutes, if there were any questions that the statutes or the laws of North Carolina are not subject to public record and therefore the Judicial Notice Doctrine, I'll point the Court to a Western District of North Carolina case, *Jones versus Penn National Insurance Company, 835 F. Supp. 2d, 89*, with a pin cite at 95. I'll quote: "By definition, laws, statutes and other public acts are matters of public record." And that case in fact cited a Supreme Court of the United States case from 1885, *Lamar versus Micou, 114 U.S. 218*, which says, "The law of any state of the union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice without plea of proof."

THE COURT: Without plea -- it is a beautiful courtroom, but a little hard to hear if you are not speaking into the microphones.

MR. STARRETT: Without plea of proof. And so as a general proposition because of the, upon information and belief component, and because the matters about which that allegation concerns the laws in North Carolina, the question then becomes, well, what are the laws in North Carolina, and is that allegation supported by the laws or not.

So, Your Honor, as we did when we brought the first complaint and as we did when we decided to bring the motion via 12(c), we have done extensive research of every law that touches on the rights of initiative in the petition that we have ever found in North Carolina and, in fact, we have prepared all of that research.

If I may approach, Your Honor, I would be happy to hand this compilation up to the Court.

THE COURT: Yes. You've given Mr. Payne a copy?

MR. STARRETT: I'm about to do that right now.

Again, Your Honor, this is just a compilation of the research that we have undertaken to look at any laws that touch on the rights of initiative and petition -- I'm sorry, referendum and initiative in North Carolina.

Just to walk you through briefly what I just handed up, the first numbered page describes in a couple of paragraphs the nature of the research we did, and then walks -- this document walks through in four tabs, and summaries of those tabs, what we have found.

So briefly, tab one and the table describing that which is on page three of the hand-up that I just gave you, relates to any annotations from 168-103, which is the Referendum Statute, to determine any time a law has been passed in North Carolina related to the referendum right, we did a couple of things. We looked at every annotation to that statute and we have searched the General Assembly's websites for any session laws going all the way back to 1959, 1960 legislative sessions, to determine what laws have been passed by the General Assembly related to the referendum.

As you'll see in the summary on page three of our research on that issue, the only things we found were instances in which the General Assembly decided whether it was creating a new town, to make the threshold be 20 percent of the municipal population rather than 10 percent. Now, I think there is good rationale for why that might to be, to create stability in a new town, but that is certainly quite, quite different than the absolute withdrawal of the right of referendum from a citizenry. So that's the research related to anything that's touched on 168-103.

Going to the next bit of research in this document, which is described at the top of page four, and it is reflected in tab two, the detailed research. Similar research on 168-104, the right of initiative. We searched all of the annotations and all of the session law since 1959 and '60,

which, by the way, is nine years before these laws were ever even passed, just to make sure. The only result we found there was a reduction of the required percentage of citizens to bring an initiative in the City of Charlotte. It was reduced from 10 percent to 6 percent, which, I think, makes some sense, given the size of Charlotte. Certainly I think that's logically viewed as an expansion of the right of initiative, not a limitation, and certainly not a withdrawal, as we have here.

Tab three, which is again summarized on page four of the document I've just handed up, we searched any reference to part four of Article V of Chapter 168 verbatim. In fact, that's how the reference is made in the Greensboro Act, just like that. We searched anything we could find where any session law has ever made that reference. What we returned is, that only the Greensboro Act is one which draws the rights of initiative and referendum. We found no other instances of anything close to that.

Lastly, tab four, is just a providing to Your Honor what I'll call the parallel provision related to the rights for county actors, county citizens. The county statute does not provide for a citizen initiated referendum to change the structure of a county government. Instead, it just mandates that all such changes be initiated by a county board of commissioners and then submitted by referendum.

So the point there of course is, looking to that as a parallel vehicle where the General Assembly might have withdrawn the rights of initiative in the petition does not work, because those rights don't operate in a parallel fashion in a county setting.

So for all of those reasons, that pleading -- the reason we chose 12(c) with regard to this potential conflict is the upon information and belief that we don't think this is entitled to credence, and the Judicial Notice Doctrine which the Court can use and should use on 12(c), finds no conflict in the pleading and, in fact, confirms that that allegation in the intervenor's paragraph 79 is not correct.

Unless the Court has questions on that, I would like to briefly turn to the question on Club Italia.

THE COURT: It has been cited several times, that case, in the Sixth Circuit.

MR. STARRETT: I can represent to the Court, we have looked at the quote that the Court noted to us. It appears that as a general proposition, the Fourth Circuit appears to operate similarly in how they look at -- perform a rational basis analysis, but I think there are several really important distinctions between the types of cases in which that analysis makes sense and Club Italia in particular.

Club Italia noted -- the Sixth Circuit noted in that case that the plaintiff had failed to allege that it was

singled out for adverse treatment. This was a classic sort of classification cases, creating one class of people and a separate class of people. That's not what we have here. We have not failed to allege a singling out. This is all about singling out. This is sort of an unprecedented singling out in our view, so we have specifically made that allegation.

Now, the Club Italia court also says, that of course a defendant typically in a rational basis analysis has no burden to bring evidence for it, but that's actually only true if two other things are true, and those two things are, if the Court can conceive of a rational basis based on the Court's rational speculation. So those two things still have to be true in the context of a rational basis analysis that the Court needs to perform here. So again, the Court has to conceive of one based on rational speculation.

Your Honor, I will admit that we have done a lot of brainstorming at this table about what a rational basis might be for this law, and came up with at least one line of thinking similar to what Your Honor suggested a little while ago, but to be frank, Your Honor, we just cannot define one.

Here is a few that we've tried our best to come up with, and one is similar to your own. We came up with the idea of the stability of the city government. Perhaps there is lots of change back and forth, costly change. I think on the face of the Act, we can knock that one off.

This Act was passed on the eve of an election, right before the voters -- the candidates were to register, and so that on its face, appears to suggest that stability was in fact not a concern, and there is nothing in the history of Greensboro, nothing in the public record of the referendum history in Greensboro that suggests that any flip-flopping or changes with any frequency has occurred.

It is hard to -- so it is hard to give that rational basis credence, because there is just no history of it in the City of Greensboro.

Other ideas we came up with, experimentation, let's try something new. Well, that's not what the General Assembly did with this law. The General Assembly, as Your Honor noted in your injunction order, the General Assembly went with one of the old standbys, and so the idea that we might want to try something different or experiment with a new structure or a new sort of rigidity in that structure, we don't find that that's got any rational support.

The only other example we -- or possible rational basis we could come up with, as I noted a few minutes ago in research of 168-103, when a new town is created, sometimes the General Assembly requires a higher threshold for a referendum to be passed, 20 percent instead of ten.

I think that makes sense in the setting of a new town. You would want your citizens to agree they are going

into something together for the first time and it has consequences to them, but that's not what we have here, either. This is not a tweaking of how many people get to participate or must affirmatively participate and go along for something to be enacted. This is an absolute withdrawal, and we just can't find that anywhere.

The bottom line, Your Honor, is that this case is unique in a couple of ways. It is pretty unusual to have an equal protection case where a single entity or a single person is the subject of a withdrawal of rights. We tried hard to find that case and have not found it.

The other thing that I think is unique about this case is, that the equal protection rights that the citizens of Greensboro enjoy here are a little bit -- I guess the word is derivative. What I mean by that is, as Your Honor knows, the right for initiative and referendum are not absolute Constitutional Rights, they are only granted -- but once they are granted, if they are granted, they enjoy equal protection status and so because the granting of those rights is what triggers the cloak of equal protection, the place you have to look to figure out how distinctions have been drawn in an initiative and referendum is in the laws that have granted those rights in the first instance, and that's what we've done and that's what we just provided to the Court.

So ultimately, the reason we chose to bring the 12(c)

motion rather than a Rule 56, we could not conceive of a rational basis, and we think based on the Court's speculation, there is no rational basis that can be conceived up here, and that's why we brought this suit.

THE COURT: It is your view I don't need to look at any evidence, or lack of evidence, you know, which would make it more of a summary judgment situation?

MR. STARRETT: I think, again, because of the context of this particular right being as I said, derivative of the granting of a referendum and initiative, I think the evidence, quote, unquote is actually the law that has been passed to date in our state regarding these rights and the desperate treatment or not of the citizens and municipalities in North Carolina.

The way I sort of think about the evidence here, it is the body of law that relates to the granting or withdrawing of these rights, and that's why the Notice Doctrine allows you to consider those laws in the concept of a 12(c).

THE COURT: Again, just speaking hypothetically, though, I mean, I understand this isn't the case in here, but what if some legislature in offering this bill or speaking about it on the floor of the House or the Senate, had said something that maybe could be taken as a rational basis. I mean, that, outside of what you're talking about, and is more like evidence, and so I guess I'm struggling a little bit.

This is a super-technical, I guess, civil procedure

problem, not really related to the merits. It's just, do I have to -- do you understand what I mean? I'm just struggling a little bit with whether it is appropriate for -- speaking generally and not, you know, in this particular case, where best I can tell, nobody is going to offer any evidence like we've been speculating about, but in some case it could happen that somebody would offer a suggestion or a reason, and in order to give the defendant an opportunity to do that or for it to appear from the record, don't I need some evidence?

MR. STARRETT: So I think, Your Honor, what the Court is struggling with is the same thing we have struggled with at its core. It is the proving of a negative, trying to figure out why a purported reason is not rational. I understand that. Again, we've struggled with that notion, but here, again, I think the Court can and should try to define a rational basis based on its own reasonable speculation, as Club Italia itself says.

So we tried to define a reasonable -- based on reasonable speculation, a rational basis. We can't. I don't think we would have brought the 12(c) if we were aware or if statements existed, as Your Honor just suggested in a hypothetical. If those existed, the 12(c) may not have been appropriate. We don't think those do exist. If they did, I think they might well be in the world of public record, though I can't swear to that as I stand here.

I don't think that in the absence of a factual record the Court is left to just pluck at the determination on the 12(c). I think looking at the laws that are on the books is sufficient for making a determination on 12(c).

Of course as Your Honor well knows, if a conversion of the motion ultimately Your Honor feels is appropriate, you know, we may have to bring forth whatever we can bring forth to try to shore up the impact on Greensboro and the uniqueness of this law, but I think the uniqueness stands alone based on the public record and laws that have come down from the General Assembly since the 1950's.

THE COURT: Okay.

MR. PHILLIPS: Your Honor, if I may real quickly. As Mr. Starrett said, I think that there is this, "any conceivable basis language," which really does put you into proving a negative and just sort of letting the mind of man wonder around and sort of see what you can think up, but the case law doesn't really seem to do that after that statement is said. You know, then it said, if the Court can conceive of one, and so -- and in the case law, it appears that what is conceivable is pretty quick and easy for the Court in those situations, like in Club Italia. They wanted to expedite it and they wanted to make sure that the company that had fronted the money got their money back.

In some other cases where prisoners are treated

differently -- well, the Department of Corrections wanted to be able to control the prison.

So I think that saying that you're going to go everywhere and try to think of everything, is what is said, but it's not the next step the court takes in those cases. It is, does something come to mind, is it viable and supported by the evidence, and does that work.

THE COURT: As you just said, viable and supported by the evidence. See, that kicks me over to summary judgment.

MR. PHILLIPS: And so what I was going to say is, if the Court wants to convert this to a motion for summary judgment, we don't object to that. For instance, with regard to the issue that you raised out-of-the-box this morning about what if the City of Greensboro willy-nilly changed back and forth. My recollection, as I stand here is, that Mayor Vaughn's affidavit addresses that question, which I think would be appropriate for consideration if the Court converted this. It talks about how long this had been the form of government, how often that, in fact, the referendum has not taken place very frequently, if at all, until this past election. So that would be addressed.

If the Court would like for us to conceive above and beyond and submit additional affidavits this week, we would be glad to do that.

THE COURT: All right. Thank you.

Anything for the individual plaintiffs?

MS. RIGGS: Your Honor, I wanted to offer that, likewise, we agree that 12(c) is appropriate, but should you want to convert it, we have those transcripts from committee hearings. We believe there is nothing in there to provide some other rational basis that we haven't contemplated, but if it would help the Court feel comfortable that there are no other rational bases, we would be happy to provide those.

THE COURT: They are not already in the record, are they?

MS. RIGGS: They are not.

THE COURT: Okay. What does the defendant have to say?

MR. PAYNE: I'm becoming distressingly comfortable with being in an unusual situation. I am in the same posture that I've been from the beginning of this case, that I personally think my mandate and the obligation of my client is to not advocate for or against any law passed by the General Assembly, because our obligation is to fulfill our legal obligations and let somebody else figure out what those legal obligations are. So, I'm in the -- so I, again, am in a position where I think I can make observations. I don't think I can make an argument.

One thing -- and one of my observations is, the fact that I'm sitting alone at this table, tells me that there is

not sort of the crucible of a give-and-take that you see in a normal trial, so I think it is incumbent of this Court to recognize that all the time -- and realize that, one, election cases are -- you know, I don't have to tell anybody in this room, are of amazingly significant importance. And, there is precious few out there to grab ahold of and use as precedent, and so every case that is an elections case, you've got to assume is going to have broad applicability in some form or fashion.

So, this is an important case and one that I wish that crucible of conflict was there so we had that comfort level. That's one way of saying -- and the other thing that I observe is the same observation you made, when we come to trial on this, this is a case that's going to be very -- it is going to be a very public case. There is going to be a lot of folks in this room, because it is an elections case, because it is important, and one of the things that I think is incumbent upon the plaintiff and defendant is, to make sure that at the end of all of these proceedings, there is a rational basis for this decision, and that that basis is as well vetted as possible.

I think in practical terms, there is very little difference between a summary judgment, a judgment on the pleadings and a trial. My only concern is, that I think where we need to end up is, we need to have -- we need to be able to, at the end of this say, the analysis was full, complete and

every issue was uncovered and examined.

All of this is leading up to one more observation, again, not opinion. I think a summary judgment or trial is a stronger standard to lay, not only at the end of this case, but when you're comparing the results of this case and trying to apply it to other election situations.

THE COURT: Okay. Thank you. That's helpful. It is unusual. Of course in this case the intervenors were still in the case when the motion for judgment on the pleadings was filed, and they, as I recall, not only did not respond in opposition, they moved to withdraw, saying they thought the plaintiffs should win, basically. I paraphrased that.

MR. PAYNE: Your Honor, and that's one more complication in there that makes it hard for me to say anything stronger than I have. In fact, I think I can't say anything stronger than I have. But, that is an unusual situation. If we had -- if the intervenors were here or if the intervenors had even taken a stand at that point, that would be very different. The plain fact is, they didn't.

Two other observations that I failed to make and I feel like I need to. I talk a lot about being up here by myself. I think at the end of this trial, the Court has to make some decision as to necessary parties and appropriate parties. One thing that I do not want to -- again, to try to do my role right, plaintiffs could have brought in other

defendants, but other defendants could have asked to come in here.

There is -- you know, we are at this situation because of voluntary choices by possible intervenors, by actual intervenors and by possible parties. So I'm not trying to create any -- I'm not trying to create any implications by saying I'm here alone, but that observation needs to be made.

THE COURT: Now I didn't go back and look at that law before I came in today, but I believe I have looked at that and addressed it at least to some extent, and I don't remember anything out of the Fourth Circuit, that would undermine what I've decided. You know, they can -- if nobody appeals, I guess they won't decide whether I was right or wrong, but, you know, I appreciate what you are saying.

It is a little unusual, when ordinarily, you -- or at least I don't go out and do independent research. I look at what the parties have given me. If it suggests something that I think might be helpful, maybe, you know, I do a little bit. Ordinarily I rely on the parties to tell me what is relevant, but here, I want to be sure I get it right, so I think it puts an additional burden on, really, on everybody in the case to think about it a little differently, just to be sure the right result is reached.

Okay. Any rebuttal argument? No. So I believe I would feel more comfortable in this situation either addressing

this issue on a summary judgment motion or at trial. I'm comfortable converting it to a motion for summary judgment, or just giving you -- I mean, I guess I can do it a couple of different ways. If I convert it, I would like to see the evidence that Ms. Riggs referenced.

I'm not trying to make people spend more time and money on additional briefs, if they are not needed. I think you all have briefed it pretty well.

Would it be appropriate to convert it to a summary judgment motion, give the plaintiffs -- how much time do you need? Three days, five business days?

MR. PHILLIPS: Next Monday, Your Honor.

THE COURT: Monday the 19th, to file any additional evidence. I would particularly like the public -- whatever is available from public records about the debate, if any. And you know, beyond that, I don't know. Whatever you can do and then I'll evaluate it then.

If the defendant -- would three business days after that be adequate for the defendant to present any evidence in opposition?

MR. PAYNE: Yes.

THE COURT: And so that would be the 22nd. And I would not anticipate requiring additional briefing unless you all just want to write some additional brief. Nobody wants to.

MR. PAYNE: I would be surprised if that's necessary.

THE COURT: And then after I look at it, if I need any additional briefing -- you all have told me the law. It's just this little procedural thing that's giving me some problems here, so we'll do that.

MS. RIGGS: I just wanted to clarify, the publicly available data are audio files of committee meetings and the floor debates. Sometimes there are written transcripts. They have not indicated to us they will not, so we had a court reporter transcribe --

MR. PAYNE: And I can't imagine we would have any objection or anything like that to that.

THE COURT: All right. Good. If anybody does need additional time, either the plaintiff or defendant, you just let me know. We've got, what, six or seven weeks until the trial starts, so I can give you several extra days that next week. There is holidays around now, so I'm not trying to ruin anybody's December.

All right. Then you all will get me the trial briefs, the proposed findings of fact, if you are going to submit them. You know, I appreciate the defendant's position, which might make any proposed findings from you limited, but I would ask, Mr. Payne, if there are, even if you don't want to suggest a particular result, if you do have findings of fact or conclusions of law that you think would be important to be in the decision, I would certainly welcome your thoughts --

MR. PAYNE: I appreciate that, and I would be happy to continue the dance.

THE COURT: -- in the format of proposed findings, but I'm not going to order you to submit an order with proposed findings contrary to your position in the case.

MR. PAYNE: I understand.

THE COURT: What else do we need to address before we adjourn?

MR. PAYNE: Just a procedural question. Is this going to become part of the record?

THE COURT: Yes. How about if we mark it. That would be the best thing to do.

MR. PHILLIPS: We can submit that on Monday.

MR. PAYNE: It clearly would be wise for this to be part of the record at some time, in some form or fashion.

THE COURT: I agree. I'll ask the plaintiff to submit the document that he handed up in the exact same form on the electronic record, when you file any other additional evidence. I mean, I'll keep this one, but you're not going to change it so it will be the same. Good. Thank you. That's a good point. What else?

MR. PAYNE: If they find some other thing they can amend it down the road. I doubt that they would.

THE COURT: If you do amend it, just be sure to say so, so I can throw this one away.

Then just the logistics of trial, since we won't have a jury, you know, will be fairly straightforward. We can take up evidentiary objections during the trial. I would -- this doesn't apply to you, Mr. Payne, because as you keep telling me, you're sitting there by yourself, but as to the plaintiffs, I would ask for each witness and each specific aspect of the trial you all pick someone, so you got one lawyer examining a witness and making objections to cross-examination questions. You got one lawyer making -- well, I guess if you wanted to divide the opening by cause of action or something like that, I guess I would let you do that, but don't repeat yourself if you do that. But particularly as to the witnesses, I don't want one lawyer examining the witness and then another lawyer jumping during cross or serial rebuttal by more than one lawyer, so I'll ask you all to do that, limit that.

I'll try to be ready to spend some time with your trial briefs and proposed findings before the trial starts so that I know we've got some deadlines. The filing period is not until the summer, right? Is that correct?

MR. STARRETT: That's correct, Your Honor. I think it is in July.

THE COURT: Okay. I'm pretty speedy, ordinarily. So I expect you all to be prompt, and I try to hold myself to the same standard, so that is not going to cause any problems. I just wanted to be sure I knew that schedule so we had a

decision out in plenty of time for somebody to go talk to the Fourth Circuit if they wanted to.

Anything else? No. All right. I'll look for you all's materials and see you all on February the 6th. Court is adjourned.

(Court adjourned at 10:20 a.m.)

C E R T I F I C A T E

I, J. CALHOUN, RPR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the above-entitled matter.

Date: 1-19-17

J. Calhoun, RPR
United States Court Reporter
324 W. Market Street
Greensboro, NC 27401