NORTH CAROLINA CASWELL COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 363
RICHARD DAVID WRENN, et al., Plaintiffs, vs. CASWELL COUNTY BOARD OF ELECTIONS, et al., Defendants, and THE NORTH CAROLINA STATE CONFERENCES OF NAACP BRANCHES, Defendant-Intervenor.	ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER came on for hearing on December 2, 2021, with the parties' agreement, on the plaintiffs' motion for preliminary injunction. Robert N. Hunter, Jr., attorney at law, appeared for the plaintiffs. Brian Ferrell and Pressly M. Millen, attorneys at law, appeared for the defendants. Allison J. Riggs, attorney at law, appeared for the intervenor(s). The parties have submitted affidavits, documents, and memoranda of law in support of their respective positions, and a hearing has been conducted in open court during which they have had opportunity to be heard. After considering the record, including the Verified Complaint of Plaintiffs and its attached exhibits, filed November 16, 2021, the Notice of Filing of

Defendants, filed December 1, 2021, the Declaration of David Owen (and its attached exhibits), and the Corrected Affidavit of Christopher Dalton Ketchie, filed December 2, 2021, as well as the memoranda and arguments of counsel for Plaintiffs, Defendants, and Defendant-Intervenor, the court determines, in the exercise of its discretion, that the motion should be denied.

A. Nature of action. This action was commenced on November 16, 2021. The plaintiffs allege that the Caswell County Board of Commissioners' resolution adopted November 15, 2021 ("the Resolution"), which made changes to the geographic configuration of the county's five commissioner districts, violates the 14th and 15th Amendments to the United States Constitution and Article I, Sections 1, 2, 3, 10, 14, 19, 35 and 36 of the North Carolina Constitution, resulting "in part by being stigmatized by being divided by race and color for purposes of electing county commission districts having their votes diluted . . . ." (Verified Complaint, para. 23)

They also allege that a 1987 "consent order"[1] in a case in the United States District Court for the Middle District of North Carolina entitled "National Association for the Advancement of Colored People v. Caswell County, North Carolina, et al" (Case No. C-86-676-G), that provided for the elimination of election of all commissioners at large and implementation of a plan to elect five of seven

[1] The plaintiffs, defendants, and intervenor all use "consent order" to describe the resolution of the case. Actually, no consent order was entered; rather, on August 4, 1989, The Honorable Richard C. Erwin entered an "Order on Final Judgment" and a "Final Judgment." The former summarized the plaintiff's claim of dilution of "minority voting strength," the terms of a settlement agreement offered by the parties for his approval, and his reasons for approval. The latter simply dismissed the action with prejudice. Nonetheless, for purposes of this motion, and because of the parties' apparent agreement, it is assumed that Judge Erwin's approval of the settlement agreement constitutes the equivalent of a consent order.

commissioners by district and two at large, was violated by the Resolution. The plaintiffs also allege that in connection with the adoption of that resolution, the Board violated North Carolina's "Open Meetings Law" and N.C. Gen. Stat. Section 153A-22A.

The plaintiffs pray for relief in various (and sometimes conflicting or alternative) forms, including (1) that the court declare the Resolution unconstitutional "on its face," for violating the rights of county "residents and voters" to equal protection, diluting the right to vote without a "compelling state justification" or a narrowly tailored district plan implementing the least intrusive means, and not adopting a district plan according to statute and the open meetings law; (2) that the court provide immediate injunctive relief staying elections pending either enactment of a new district plan that meets constitutional requirements or trial; (3) that the court declare the Board to have violated the Open Meetings Law; (4) that the court award them damages, fees and costs; and (5) that the court grant other appropriate relief. (Verified Complaint pp. 16-18) They have also suggested through argument and briefing that this court should issue a preliminary injunction against use of the Resolution creating two minority-majority districts and require the defendants to adopt a new resolution that creates two black-majority districts, or to create districts without consideration of potential voters' race or color.

The plaintiffs offered no argument or other support for the allegations of violation of the Open Meetings Law, and that claim is deemed abandoned.

B. Law applicable to injunctions. Ordinarily, a preliminary injunction preserves the status quo pending a determination on the merits. *Wrightsville Winds Townhouses Homeowners' Ass'n v. Miller*, 100 N.C. App. 531, 536, 397 S.E.2d 345, 347 (1990). A mandatory injunction is typically used to carry out the results of that merits determination. *See First Nat. Bank v. The Peoples Bank*, 194 N.C. 720, 140 S.E. 705 (1927). Consequently, mandatory preliminary injunctions are disfavored. *See Roberts v. Madison County Realtors Ass'n, Inc.*, 344 N.C. 394, 400, 474 S.E. 2d 783, 787 (1996).

The movant for a preliminary injunction has the burden of showing the right to the injunction, and to do so must demonstrate a likelihood of success on the merits and of irreparable harm if the injunction is not granted. *See Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466, 579 S.E.2d 449, 452 (2003). Whether to grant an injunction lies in the discretion of the court after carefully balancing the equities. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980.

C. Findings of fact. The following findings are set out in part to provide further context and in part to inform conclusions. Other findings are set out in the discussion *infra.*

1. Caswell County is a majority-white county.

2. Caswell County's Board of Commissioners consists of seven members, five of which are elected by district and two of which are elected at large. (Declaration of David Owen, sworn to November 29, 2021 ("Owen Decl."), at ¶ 3 (attached to Defendants' Notice of Filing at Ex. 1.)).

3. Prior to 1989, Caswell County commissioners were elected at large.

4. In 1986, a civil action was commenced by the National Association for the Advancement of Colored People, Inc. and others in the United States District Court for the Middle District of North Carolina, against Caswell County alleging, *inter alia*, that the county's election of commissioners at large violated the right of African Americans to equal protection and Section 2 of the Voting Rights Act. ("National Association for the Advancement of Colored People v. Caswell County, North Carolina, et al" (Case No. C-86-676-G) (the federal action")).

5. The parties to the federal action entered into a settlement agreement, among the terms of which was the elimination of total at large election of commissioners and creation of an electoral districting plan providing for seven commissioner seats, five of which were to be single-seat districts and two to be at large seats, with two of the five districts to be majority-black districts. (Exh. C to Verified Complaint, "Order on Final Judgement," pp. 4-5)

6. The settlement agreement was presented to The Honorable Richard C. Erwin for approval and on August 4, 1989, Judge Erwin entered an "Order on Final Judgment" and a "Final Judgment." The former summarized the plaintiff's claim of

dilution of "minority voting strength," the terms of a settlement agreement offered by the parties for his approval, and his reasons for approval. The latter simply dismissed the action with prejudice.

7. Since the entry of the "consent order," commissioner elections in Caswell County have been carried out pursuant to the terms of the settlement agreement.

8. In mid-2021, the Board received 2020 census data which showed a substantial inequality of population among the districts adopted in the then-existing map that had been adopted following the 2010 census. (Owen Decl. ¶ 5.)

9. Based upon population shifts within the County reflected in the 2021 census data, the 2011 electoral districts were 16% out-of-balance from the most-populated district to the least-populated district. (*Id.*)

10. The Board of Commissioners was informed, as reflected in the Minutes of its October 28, 2021 Special Called Meeting (Verified Complaint, Ex. E, at pp. 5-6), that a 10% population deviation would establish a presumed violation of the one-person, one-vote principle established by the U.S. Supreme Court. (*Id.*)

11. The Board of Commissioners was also informed that a threshold of +\-5% was a safer goal given North Carolina-specific case law concerning population equality. (*Id.*; Owen Decl. ¶ 5.)

12. Following receipt of the data and advice, the Board undertook a redistricting process pursuant to N.C. Gen. Stat. § 153A-22. (Owen Decl. ¶ 5.)

13. The Board expressly declared that in doing so, these factors would be considered:

a. Protection of sitting commissioners from being placed in districts with other sitting commissioners.

b. Making districts as nearly equal in population as possible.

c. Compliance with the "consent order."

14. The Board considered redistricting plans presented to it at several meetings (*Id*. at ¶ 6.)

15. The Board conducted a public hearing on November 1, 2021 to solicit public input on proposed redistricting plans. (*Id*.)

16. On November 15, 2021, the Board adopted a "Resolution Finding That There Is A Substantial Inequality Of Population Among Electoral Districts & Redefining Electoral Districts" (the "Resolution"). (Owen Decl. ¶ 7 & Ex. B.).

17. On November16, 2021, this action was commenced.

18. The plaintiffs are white.

19. The districts formed by the Resolution as shown on a map appear to be substantially similar to those shown on a map of the districts as they existed immediately before the adoption of the Resolution (that is, the 2011 map, referred to as the "benchmark plan").

20. The districts formed by the Resolution are not materially more or less compact than those in the benchmark plan. (Corrected Aff. of Christopher Dalton Ketchie, para.6).

21. The districts formed by the Resolution split eight precincts, as compared to seven in the benchmark plan, which when considered in conjunction with the reduction of precincts from eleven to nine since 2011, is not a material difference. (*Id.*, para. 7).

D. Discussion. The motion for preliminary injunction presents clear issues that the following discusses. They include a question concerning the court's subject matter jurisdiction relating to relief apparently sought with respect to the "consent order"; and whether as to other claims the plaintiffs have met their burden of showing likelihood of success on the merits, particularly with respect to the plaintiffs have standing to assert their claims, and the alleged violations of equal protection and the Voting Rights Act.

1. Subject matter jurisdiction for claims involving federal court "consent order." The verified complaint can be read to allege that the plaintiffs seek an order which declares that the current circumstances regarding elections in Caswell County do not require the remedial measures of the "consent order," and directs the Board to adopt a new redistricting plan that satisfies Section 2 of the Voting Rights Act and both the U.S. and N.C. constitutions. It also can be construed to seek an order modifying the "consent order." These claims, which would have a state court abrogate or modify a federal order, raise serious subject matter jurisdiction issues.

Neither party has provided any authority for this court either to abrogate or modify the "consent order," and the court is not aware of any. The parties have, however, provided examples of cases in which an effort to have a state court do so was rejected (*e.g.*, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary injunction, pp. 12-13), and in which a party has moved in the federal court to modify a consent order (*NAACP v. City of Thomasville,* 401 F. Supp. 489 (MDNC 2005)). The latter avenue is available to the plaintiffs here. To the extent that the verified complaint is construed to allege a claim the remedy for which is an order requiring adherence to the "consent order" in the federal case, which is nothing other than an effort to have a state court enforce a federal order, that relief is beyond this court's subject matter jurisdiction. Such claim, if it is alleged will be dismissed without prejudice to the plaintiffs' ability to seek the relief in federal court.

2. Standing. The plaintiffs allege that they have standing to assert a facial challenge to the Board's resolution because they have suffered harm as a result of its adoption in two respects, first, that they have been stigmatized, and second, that their voting rights have been diluted. They have offered no evidence of harm caused by stigma. The generalized assertion that it exists is insufficient to support standing. *See Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556, 569-570 (1984) ("The injury alleged must be, for example, 'distinct and palpable,' . . . and not 'abstract' or 'conjectural' or 'hypothetical,' . . . . The injury

must be 'fairly' traceable to the challenged action, and relief from the injury must be 'likely' to follow from a favorable decision." (Citations omitted.)).

A dilution claim arises when the rights of a protected class are abridged. *See Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 360 (E.D. Va. 2009) (finding plaintiff who "fail[ed] to assert membership in a protected class" failed to carry his burden of "demonstrating that he is a proper party to invoke judicial resolution of the dispute" (quoting *United States v. Hays*, 515 U.S. 737, 742 (1995)). The plaintiffs have not alleged or offered evidence that they are in a protected class, nor have they alleged or offered evidence of how their rights as voters have been abridged by the Resolution. Consequently, the plaintiffs have not met the burden of showing likelihood of success that they have standing to assert these claims.

3. Even if the plaintiffs have standing, they have not offered persuasive evidence or argument sufficient to carry the likelihood of success standard that the Board's Resolution violates equal protection and existing case and statutory law, or that the new district configurations are not in substantial conformity with established procedures for drawing districts.

E. Conclusion. The court concludes (1) that it lacks subject matter jurisdiction with respect to claims for relief that would abrogate or modify the "consent order"; and (2) that the plaintiffs have not met their burden of showing likelihood of success on the merits of their remaining claims, and have not shown that they are likely to succeed on their constitutional claims because, among other grounds, they have failed to demonstrate with competent evidence that historical and traditional redistricting criteria, including equalization of populations across

district and the protection of incumbents was subordinated to considerations of race and that race was the predominant factor in the Caswell County Commission's drawing of the challenged Caswell County Commissioner Districts; and (3) that the motion for preliminary injunction should be denied.

NOW, THEREFORE, IT IS ORDERED that the plaintiffs' motion for preliminary injunction is denied, and with respect to any claim for relief from or concerning the "consent order," denial is without prejudice to their right to seek relief in federal court. The court requests that the Clerk or other appropriate court personnel provide counsel for the parties with file-stamped copies of this order.

This 3d day of December 2021.

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Lindsay R. Davis, Jr.
Retired/Recalled Superior Court Judge