

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

COMMON CAUSE, *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
)  
ROBERT A. RUCHO, in his official )  
capacity as Chairman of the North )  
Carolina Senate Redistricting Committee )  
for the 2016 Extra Session and Co- )  
Chairman of the Joint Select Committee )  
on Congressional Redistricting, *et al.*, )  
)  
Defendants. )

---

CIVIL ACTION  
NO. 1:16-CV-1026-WO-JEP  
  
THREE-JUDGE COURT

League of Women Voters of North )  
Carolina, *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
)  
Robert A. Rucho, in his official capacity )  
as Chairman of the North Carolina )  
Senate Redistricting Committee for the )  
2016 Extra Session and Co-Chairman of )  
the 2016 Joint Select Committee on )  
Congressional Redistricting, *et al.*, )  
)  
Defendants. )

---

CIVIL ACTION  
NO. 1:16-CV-1164-WO-JEP  
  
THREE JUDGE COURT

**LEGISLATIVE DEFENDANTS' RESPONSE TO COURT ORDER**

On July 16, 2018, the court entered an order directing Plaintiffs, among other things, to make several expert witnesses available for deposition by Legislative Defendants prior to July 31, 2018. (D.E. 133, pp. 4-5).

In its Order, the court stated that the United States Supreme Court had issued its mandate in this case on July 13, 2018. (*Id.* at p. 4) Respectfully, that was incorrect. The Supreme Court rendered its opinion in this matter on June 25, 2018. U.S. Supreme Court R. 45 states that the Supreme Court retains jurisdiction over an appeal for twenty-five (25) days after entry of a judgment, to allow time for rehearing motions, before it relinquishes jurisdiction to a lower court through entry of a mandate or the provision of a certified copy of its judgment. *See* U.S. Sup. Ct. R. 45(2)-(3). Thus, pursuant to R. 45, the earliest the Supreme Court would have issued its mandate then is July 20, 2018, not July 13, 2018.

Appellate courts retain jurisdiction over an appeal until they have issued a mandate and a lower court is generally without jurisdiction to act in the matter, despite a decision by the appellate court, until the mandate is issued. *See e.g. Zaklama v. Mount Sinai Medical Center*, 906 F.2d 645, 649 (11th Cir. 1990); *U.S. v. Cook*, 592 F.2d 877,880 (5th Cir.), *cert denied*, 442 U.S. 921 (1979) (appellate “court retains jurisdiction over an appeal until it has issued a mandate to implement its disposition”). A review of the Supreme Court dockets for other recent cases decided by a three-judge panel, like this one, further confirms that the Supreme Court has not yet relinquished jurisdiction. In *North Carolina, et al. v. Covington*, the Supreme Court issued its opinion on June 5, 2017, however it did not issue its mandate until twenty-five (25) days later on June 30,

2017. See *North Carolina, et al. v. Covington*, No. 16-1023 (U.S. Feb. 23, 2017), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-1023.htm>. When the Court issued its mandate, the docket clearly reflected that it had done so with an entry denoted “JUDGMENT ISSUED.” *Id.* Correspondingly, the Middle District docket for *Covington* reflects that on June 30, 2017 it also received “certified” copies of the Supreme Court’s judgment per the requirements of R. 45. See D.E. 158 & 159, *Covington et al. v. N.C.*, No. 1:15-cv-00399 (M.D.N.C. Jun. 30, 2017).

In contrast, there is no “JUDGMENT ISSUED” entry on the Supreme Court’s docket for this case. See *Rucho et al. v. Common Cause et al.*, No. 17-1295 (U.S. Mar. 14, 2018) <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1295.html>. Further, this court’s docket does not show any entries reflecting receipt of “certified” copies of the Court’s judgment. This is because the Supreme Court has not issued its mandate relinquishing jurisdiction back to this court.

Because the Supreme Court did not issue its mandate on July 13<sup>th</sup>, this Court did not have jurisdiction to enter its July 16, 2018 Order. Accordingly, Legislative Defendants respectfully request that the Court vacate its Order and reissue it with new deadlines at the proper time following the Supreme Court’s actual issuance of its mandate.

Finally, Legislative Defendants respectfully renew their request that they be allowed not only to depose Plaintiffs’ expert witnesses, but also Plaintiffs themselves. Likewise, as requested in their prior response, Legislative Defendants request that they be allowed to present counter expert testimony to all new opinions provided by Plaintiffs’

experts at deposition or in declarations filed with this Court. In order for this to be a meaningful opportunity, Legislative Defendants request that the evidentiary record be reopened in this matter and the Court schedule a new trial after a reasonable discovery period of at least two (2) months.

Respectfully submitted, this the 17th day of July, 2018.

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

/s/ Phillip J. Strach  
Phillip J. Strach  
N.C. State Bar No. 29456  
Michael D. McKnight  
N.C. State Bar No. 36932  
phil.strach@ogletree.com  
michael.mcknight@ogletree.com  
4208 Six Forks Road, Suite 1100  
Raleigh, North Carolina 27609  
Telephone: (919) 787-9700  
Facsimile: (919) 783-9412  
*Counsel for Legislative Defendants*

**CERTIFICATE OF SERVICE**

It is hereby certified that the foregoing **LEGISLATIVE DEFENDANTS'**  
**RESPONSE TO COURT ORDER** has been electronically filed with the Clerk of Court  
using the CM/ECF system which will provide electronic notification of the same to the  
following:

Edwin M. Speas, Jr.  
Carolina P. Mackie  
Poyner Spruill LLP  
P.O. Box 1801 (27602-1801)  
301 Fayetteville St., Suite 1900  
Raleigh, NC 27601  
espeas@poynerspruill.com  
cmackie@poymerspruill.com  
*Attorneys for Common Cause Plaintiffs*

Gregory L. Diskant  
Susan Millenky  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, New York 10036  
[gldiskant@pbwt.com](mailto:gldiskant@pbwt.com)  
[smillenky@pbwt.com](mailto:smillenky@pbwt.com)  
*Attorneys for Common Cause Plaintiffs*

Emmet J. Bondurant  
Jason J. Carter  
Benjamin W. Thorpe  
Bondurant, Mixson & Elmore, LLP  
1201 W. Peachtree Street, NW, Suite 3900  
Atlanta, Georgia 30309  
[bondurant@bmelaw.com](mailto:bondurant@bmelaw.com)  
[carter@bmelaw.com](mailto:carter@bmelaw.com)  
[bthorpe@bmelaw.com](mailto:bthorpe@bmelaw.com)  
*Attorneys for Common Cause Plaintiffs*

Alexander McC. Peters  
Senior Deputy Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602

Allison Riggs  
SOUTHERN COALITION FOR SOCIAL  
JUSTICE  
1415 W. HWY. 54, STE. 101  
DURHAM, NC 27707  
Email: [emily@southerncoalition.org](mailto:emily@southerncoalition.org)  
Email: [anita@southerncoalition.org](mailto:anita@southerncoalition.org)  
*Attorneys for League of Women Voters of  
North Carolina Plaintiffs*

Danielle M. Lang  
CAMPAIGN LEGAL CENTER  
1411 K STREET NW  
SUITE 1400  
WASHINGTON, DC 20005  
202-736-2200  
Fax: 202-736-2222  
Email: [dlang@campaignlegalcenter.org](mailto:dlang@campaignlegalcenter.org)  
*Attorneys for League of Women Voters of  
North Carolina Plaintiffs*

Annabelle E. Harless  
Ruth M. Greenwood  
CAMPAIGN LEGAL CENTER  
73 W. MONROE ST., STE. 322  
CHICAGO, IL 60603  
312-561-5508  
Fax: 202-736-2222  
Email: [aharless@campaignlegalcenter.org](mailto:aharless@campaignlegalcenter.org)  
*Attorneys for League of Women Voters of  
North Carolina Plaintiffs*

Nicholas O. Stephanopoulos  
UNIVERSITY OF CHICAGO LAW  
SCHOOL  
1111 E 60TH STREET  
CHICAGO, IL 60637  
773-702-4226  
Email: [nsteph@uchicago.edu](mailto:nsteph@uchicago.edu)  
*Attorneys for League of Women Voters of  
North Carolina Plaintiffs*

This the 17th day of July, 2018.

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

/s/ Phillip J. Strach

Phillip J. Strach

34867395.1