No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al.,

Plaintiffs-Appellants,

REBECCA HARPER, et al.,

Plaintiffs-Appellants, and

COMMON CAUSE,

Plaintiff-Intervenor-Appellant,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants-Appellees.

From Wake County
21 CVS 015426
21 CVS 50085

HARPER AND _NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS_ PLAINTIFFS-APPELLANTS' RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPEAL AND CROSS-MOTION FOR SUMMARY AFFIRMANCE

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Courts have "discretion[]" to weigh motions to dismiss an appeal and exercise that discretion to deny dismissal to "curtail strategic behavior," *Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004), and avoid "prejudice[]," 1 *North Carolina Appellate Practice and Procedure* § 32.02. Denial is warranted here.

Legislative Defendants' motion is a transparent effort to prevent this Court from addressing important questions—questions that Legislative Defendants have erroneously told the U.S. Supreme Court are unresolved—about the meaning of North Carolina statutes that authorize North Carolina courts to conduct state constitutional review of congressional-districting plans, including N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, and 120-2.4. Their reason for doing so is clear: Legislative Defendants do not want this Court to confirm in this appeal that those statutes mean what they say, *i.e.*, that the North Carolina legislature has authorized North Carolina courts to review the constitutionality of congressional redistricting maps and, if the legislature fails to enact a lawful remedy after being given the chance, to adopt their own maps. Such a holding would unravel Legislative Defendants' (baseless) arguments in the U.S. Supreme Court that this Court's decision invalidating the enacted 2021 congressional plan under the North Carolina Constitution usurped the power of "the Legislature" in violation of the Elections Clause of the U.S. Constitution, art. I, § 4, cl. 1. Legislative Defendants instead wish to preserve the ability to ask the U.S. Supreme Court in *Moore v. Harper*, No. 21-1271, to construe those state statutes as something other than a clear legislative authorization.

Legislative Defendants' attempted dismissal is pure gamesmanship: While they claim to seek dismissal because "2022 is the only election to which the remedial Congressional Map will apply," Mot. at 3, that has been true during the entire five-month period when the Legislative Defendants pursued this appeal and argued for the adoption of their own proposed remedial map (which, if approved, would govern 2024 and beyond). What changed was only the U.S. Supreme Court's grant of certiorari and the Legislative Defendants' realization that this appeal could prevent their efforts to mischaracterize North Carolina law in the U.S. Supreme Court.

Legislative Defendants cannot have it both ways—arguing about the meaning of North Carolina law to the U.S. Supreme Court while simultaneously withdrawing any attempt to have this Court address their misinterpretation of state statues and the state constitution. Basic principles of federalism dictate that this Court be given the opportunity to elucidate important questions of state law bearing on a pending federal case, rather than allowing Legislative Defendants to mischaracterize North Carolina law to the U.S. Supreme Court.

Dismissal would also reward Legislative Defendants' strategic behavior. Legislative Defendants pressed ahead in this appeal until last week, just days after Plaintiffs filed notices in this Court making clear the potential consequences of this appeal for the U.S. Supreme Court proceedings in *Moore*. The timing of Legislative Defendants' motion reveals it to be engineered so that they can continue, in *Moore*, to deny the clear North Carolina law showing that the General Assembly has authorized state judicial review of congressional-districting plans under the state constitution.

Instead of dismissing the appeal, the Court should affirm the trial court's order adopting an interim remedial congressional plan pursuant to N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, and 120-2.4. But if the Court grants Legislative Defendants' request to dismiss, the Court should clarify that Legislative Defendants' voluntary dismissal waives their opportunity to challenge the trial court's final judgment and any prior rulings in this case, and reaffirm that the statutes enacted by the General Assembly authorize North Carolina courts to review and remedy congressional-districting plans under the North Carolina Constitution. *See* N.C. R. App. P. 37(e)(2) (appeals "appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court").

I. Dismissal of Legislative Defendants' Appeal Is Unwarranted

Rule 37(e) provides that when a party seeks to dismiss an appeal after the record has been filed, "[t]he appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court." The Rule is materially identical to Federal Rule of Appellate Procedure 42(b)(2), which provides that an appeal "may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court."

Courts applying this standard recognize that dismissal is "discretionary" and "not automatic," *Albers,* 354 F.3d at 646, and dismissal "may be denied in the interest of justice or fairness," *Federal Practice and Procedure* § 3988 (5th ed. 2022) (quoting *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dep't of Env't Prot.*, 31 F.3d 18, 22 (1st Cir. 1994)). For example, courts will refuse to dismiss an appeal if the other parties "will be prejudiced by the dismissal." 1 *North Carolina Appellate Practice and Procedure* § 32.02; *see Bynum v. Wilson Cty.*, 215 N.C. App. 389 (2011) (weighing "benefits" of dismissal of Defendants'

appeal against the "adverse impact upon Plaintiffs"). Another "good reason to exercise discretion against dismissal is to curtail strategic behavior." *Albers*, 354 F.3d at 646 (denying motion to dismiss appeal because appellant was "attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion").

Dismissal here is unwarranted for both of these reasons: It is the obvious product of strategic behavior and would prejudice the other parties and the public.

First, the context of Legislative Defendants' request to dismiss their appeal reveals it is pure gamesmanship. Until last week, Legislative Defendants consistently expressed a desire to actively pursue this appeal and resisted efforts to accelerate the schedule for briefing and argument, acknowledging that districts are set for the 2022 election. In their motion for an extension of time filed 14 June 2022, for example, Legislative Defendants cited "conflicting professional obligations" that necessitated "additional time to prepare Legislative Defendants' appellant brief." Legislative Defs.' Mot. for Ext. of Time at 2-3. Legislative Defendants viewed it as "more appropriate for this case to proceed on a normal timeframe," given that "the election districts are set for the 2022 election." *Id.* at 2. They reiterated these views on 7 July, responding to a motion to expedite the briefing schedule and oral argument. *See* Legislative Defs.' Objection to Suspending Rules at 2-3.

Legislative Defendants abruptly changed course after 8 July, when Plaintiffs filed notices regarding the effect of *Moore v. Harper*—which will consider the lawfulness of both this Court's decision to invalidate Legislative Defendants' original congressional map and also the trial court's decision to modify Legislative Defendants' proposed remedial

map. Plaintiffs argued for swift resolution of Legislative Defendants' appeal, as *Moore* provided this Court an opportunity to reaffirm important principles of North Carolina law. In particular, Plaintiffs highlighted their argument in the U.S. Supreme Court that, even under Legislative Defendants' erroneous Elections Clause theory, this Court's decision invalidating the 2021 congressional plan complied with the Elections Clause because "the Legislature" here (North Carolina's General Assembly) has enacted multiple statutes authorizing state judicial review of congressional-districting legislation and accompanying remedial procedures, *see* N.C. Gen. Stat. §§ 120-2.3, 120-2.4(a1), 1-267.1(a). Plaintiffs underscored that Legislative Defendants had erroneously argued that these statutes do not—and could not, consistent with the state separation of powers—authorize state constitutional challenges to congressional-districting plans. Pls.' Notice in Support of Mot. to Expedite at 2; *see also* Reply Supp. Cert. at 6, *Moore*, No. 21-1271 (May 27, 2022) (contending that statutes' authorization of state judicial review of congressional maps under state constitution is "far from clear"). "By acting expeditiously, this Court" could "resolve what Legislative Defendants claim is an unresolved state-law question before the U.S. Supreme Court hears *Moore*" and avoid the "risk that the U.S. Supreme Court could guess about the meaning of state law in order to resolve Legislative Defendants' federal Elections Clause arguments." Pls.' Notice in Support of Mot. to Expedite at 4.

Three business days later, Legislative Defendants suddenly advised they no longer wish to pursue their appeal. Their purported justification for seeking dismissal is that because "2022 is the only election to which the remedial Congressional Map will apply," terminating the appeal will "avoid further cost and confusion." Mot. at 3.

But this is not new information. The trial court's remedial order made clear—and Legislative Defendants for *months* have recognized—that the court-adopted map is an "Interim Congressional Plan" that has been "approved for the 2022 North Carolina Congressional elections." R p 4887; *see, e.g.*, Leg. Defs.' Mot. for Stay at 2 (Feb. 23, 2022) (court adopted remedial plan "on which to conduct the 2022 North Carolina congressional elections"). The trial court even expressly invoked N.C. Gen. Stat. § 120-2.4(a1), which authorizes the imposition of "an interim redistricting plan *for use in the next general election only*." *See* R p 4887. Legislative Defendants nonetheless chose to pursue their appeal to ask this Court to adopt their own proposed remedial congressional map, which would, if approved, govern for 2024 and beyond. What changed is that the U.S. Supreme Court granted certiorari in *Moore* and Legislative Defendants realized that this Court could put a stop to their efforts in the U.S. Supreme Court to mischaracterize clear North Carolina law. The timing and context of their sudden dismissal request makes any other justification implausible. This "strategic behavior" alone warrants denial of their motion. *Albers*, 354 F.3d at 646.

Second, dismissing Legislative Defendants' appeal may prejudice Plaintiffs, North Carolina's citizens, and the judicial decision-making process. Had Legislative Defendants not pursued their appeal to this Court, it would have materially weakened their argument for certiorari in the U.S. Supreme Court. Now that the U.S. Supreme Court has granted that petition, it is poised to decide a consequential case about the meaning of the federal Elections Clause that implicates a critical, antecedent question of state law. The question presented to the Supreme Court—as formulated by Legislative Defendants—is whether "a

State's judicial branch may nullify the regulations governing the 'Manner of holding Elections for Senators and Representatives … prescribed … by the Legislature thereof,' U.S. CONST., art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a 'fair' or 'free' election." Pet. for Writ of Cert. at i, *Moore*, No. 21-1271 (Mar. 17, 2022). Again, because North Carolina's "Legislature" has "prescribed" that North Carolina courts have the power to adjudicate state constitutional challenges to congressional-districting plans and to remedy state constitutional violations, Legislative Defendants' Elections Clause theory fails *even on its own terms*.

The people of North Carolina thus have a strong interest in having this Court adjudicate the issues the Legislative Defendants asked it to decide—and to reaffirm that the General Assembly *has* authorized the adjudication of Plaintiffs' challenges under the North Carolina Constitution, and has done so consistently with North Carolina's separation of powers. To be clear: Plaintiffs do not believe there is any reasonable dispute, based on established North Carolina law, that the state statutes at issue are valid legislative authorizations for state courts to review and remedy congressional-districting legislation that violates the North Carolina Constitution. *See, e.g.*, *Harper v. Hall*, 380 N.C. 317, 323, 868 S.E.2d 499, 510 (2022) (specifically directing the trial court "to oversee the drawing of the maps by the General Assembly or, if necessary, *by the court*" (emphasis added)). But Legislative Defendants continue to contend otherwise in the U.S. Supreme Court, claiming that, *as a matter of North Carolina state law*, these statutes do not authorize North

Carolina courts to exercise "substantive power," and instead "do no more than govern the *procedure* that applies in whatever districting challenges may be authorized by other, substantive provisions of law." Reply Supp. Pet. for Writ of Cert. at 6, *Moore*, No. 21-1271 (May 27, 2022). Yet questions of North Carolina law can be finally resolved *only* by this Court. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."); *Leiter Mins., Inc. v. United States*, 352 U.S. 220, 229 (1957) (a state supreme court is "the only court that can interpret" a "state statute … with finality"). A ruling from this Court would drive a stake through Legislative Defendants' baseless claims that state law either favors them or is unsettled.

Critically, if the U.S. Supreme Court were to agree with Legislative Defendants that there is presently no definitive guidance from this Court on the state-law questions at issue, there is a risk that the U.S. Supreme Court could guess about the meaning of state law in order to resolve Legislative Defendants' federal Elections Clause arguments. *Cf. Berger v. North Carolina State Conference of the NAACP*, No. 21-248, slip op. at 11-12 (U.S. June 23, 2022) (U.S. Supreme Court, in the absence of guidance from this Court, interpreting North Carolina Constitution and holding that it does not preclude North Carolina statutes purporting to authorize legislative leaders to serve as "agents of the State" for purposes of defending state law in federal court).

Because dismissal would impede this Court's ability to rectify Legislative Defendants' misstatements in *Moore* about the meaning and determinacy of state law—

and is a cynical effort to wrest the case from this Court—Legislative Defendants' motion should be denied.

II. This Court Should Affirm the Trial Court's Decision

Instead of dismissing Legislative Defendants' appeal, the Court should issue an order affirming the trial court's final judgment rejecting Legislative Defendants' proposed remedial congressional plan and adopting a court-drawn interim remedial plan. When dismissal of an appeal is improper and a court can resolve an appeal on the record before it, affirming the trial court's judgment is an appropriate remedy. *Albers*, 354 F.3d at 646. That remedy is warranted here. The trial court properly rejected the enacted remedial congressional plan as a clear violation of this Court's constitutional standard: It failed to "give voters of all parties substantially equal opportunity to translate votes into seats across the plan." *Harper v. Hall*, 380 N.C. 317, 383, 868 S.E.2d 499, 546 (2022).

Legislative Defendants' arguments to the contrary lack merit. They have contended that "[i]n selecting its own remedial congressional map," the trial court violated the Elections Clause, which in their view "provides that the North Carolina General Assembly is responsible for establishing congressional districts." Legislative Defs.' Mot. for Stay at 19. In particular, Legislative Defendants claim that "the trial court lacked authority to reject the General Assembly's remedial congressional plan and doing so violated the separation of powers and overrode the North Carolina General Assembly in setting the lines of congressional districts." *Id.*

But the trial court "overrode" nothing, because the North Carolina General Assembly *itself* authorized North Carolina courts to review congressional-districting plans

under the North Carolina Constitution. The General Assembly passed a statute expressly authorizing a special three-judge trial court to hear "action[s] challenging the validity of any act . . . that . . . redistricts . . . congressional districts," N.C. Gen. Stat. § 1-267.1(a); to issue "judgment[s] declaring unconstitutional . . . any act . . . that . . . redistricts . . . congressional districts," *id.* § 120-2.3; and, key here, to implement "an interim districting plan" if the General Assembly does not "remedy any defects" in its plan within two weeks, *id.* § 120-2.4(a), (a1). *Every step* taken by this Court and the trial court—including to invalidate the enacted 2021 plan and replace it with an interim remedial plan—was authorized by the General Assembly itself. Legislative Defendants' Elections Clause argument thus necessarily fails: "the Legislature" here "prescribed" all relevant aspects of the judicial review leading to adoption of the interim plan, U.S. CONST., art. I, § 4, cl. 1.

Legislative Defendants have also argued that the trial court exceeded its remedial authority under North Carolina law by adopting an interim congressional plan of its own after finding the General Assembly's remedial plan invalid. *See* Legislative Defs.' Mot. for Stay Pending Appeal at 15 (Feb. 23, 2022) ("The trial court erred in going beyond the legislatively enacted remedial plans and drafting a congressional plan of its own."). That argument, too, ignores the plain text of the relevant North Carolina statutes. Again, the General Assembly has expressly authorized the trial court to implement "an interim districting plan" if the General Assembly did not "remedy any defects" in its plan within two weeks. N.C. Gen. Stat. § 120-2.4(a), (a1). The trial court complied with that authority. Following this Court's order, the trial court gave the General Assembly an opportunity to redraw the congressional plan; found it did not "remedy" the constitutional "defects" this

Court had identified; and implemented "an interim districting plan" that began with the General Assembly's map and "modif[ied]" it only as necessary "to bring it into compliance with [this Court's] order." R p 4887 (citing N.C. Gen. Stat. § 120-2.4(a1)).

Finally, Legislative Defendants take issue with the Special Masters' finding that their proposed remedial congressional plan was a pro-Republican gerrymander that violated this Court's constitutional standard. But as Legislative Defendants have recognized, factual findings "are reviewed for clear error." Leg. Defs.' Mot. for Stay at 16 (quoting *State v. Reed*, 373 N.C. 498, 507, 838 S.E.2d 414, 421 (2020)); *see also, e.g.*, *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (factual findings need only be supported by substantial evidence).

The record precludes any possible showing of clear error. Legislative Defendants enacted a remedial plan that replicated a central, unconstitutional feature the trial court identified in the invalidated 2021 plan: the "creation of three safe Republican districts in the Piedmont Triad area." R p 3672. Unsurprisingly, three of the four Special Masters' assistants, along with all of the parties' experts, found that the enacted remedial plan was a pro-Republican gerrymander across a wide variety of metrics identified as relevant in this Court's decision. As Dr. Bernard Grofman summarized, the enacted remedial plan "creates a distribution of voting strength across districts that is very lopsidedly Republican," and all "statistical indicators of partisan gerrymandering strongly suggest the conclusion that this congressional map should be viewed as a pro-Republican gerrymander." R pp 5040-42. The record provided ample evidence supporting the trial court's conclusion that the enacted remedial plan once again violated the North Carolina Constitution, and for its imposition

of an interim remedial plan pursuant to the state statutes authorizing judicial review of congressional-districting plans under the state constitution. *See* N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, 120-2.4.[1]

The trial court's decision should be affirmed.

III. If this Court Grants Dismissal, It Should Dismiss on Terms That Prevent Further Gamesmanship and Reduce the Prejudice to Plaintiffs

If this Court grants Legislative Defendants' motion to dismiss their appeal, it should provide two clarifications that will prevent further gamesmanship and mitigate the potential prejudice to Plaintiffs and the public. *See* N.C. R. App. P. 37(e)(2) (authorizing dismissal "upon such terms … as fixed by the appellate court").

First, the Court's order should make clear that dismissal of the appeal leaves in effect the trial court's final order adopting the interim remedial congressional plan and

[1] *See* R p 5046 (Dr. Eric McGhee finding that the congressional map had an efficiency gap between 6.4 and 7.6%, a mean-median differential exceeding 1%, and partisan symmetry values showing that Republicans would be expected to win 5% more seats than Democrats at equal vote shares); R p 5079 (Dr. Sam Wang finding average election would produce 8.7 Republican seats and 5.3 Democratic ones, with efficiency gap exceeding 7%); R p 4756 (*Harper* and *Common Cause* Plaintiffs' experts Dr. Jonathan Mattingly and Dr. Gregory Herschlag finding that under the enacted remedial plan, for any given statewide election with equal vote shares, Republicans will more likely than not elect 2 more seats than Democrats; that the efficiency gap exceeded 7% and the mean-median difference exceeded 1%; and that, had Legislative Defendants had simply picked 20 plans at random from Dr. Mattingly's ensemble, there is a 99.998% chance they would have found a plan with better partisan symmetry than S.B. 745); R p 4815 (*NCLCV* Plaintiffs' expert Dr. Moon Duchin finding that the enacted remedial plan favored Republicans by an average of 2.5 seats at equal vote shares, and across 52 sample elections averaged 10 Republican seats and 4 Democratic seats); R p 4413 (Legislative Defendants' expert Dr. Michael Barber finding that, in elections when Democrats win nearly 55% of the vote, they would still only be expected to win eight congressional seats, whereas Republicans with only 51% vote could expect to win 10 seats).

renders it a final judgment. All prior opinions and interlocutory orders in this case merge into that judgment. *Yale v. Nat'l Indem. Co.*, 602 F.2d 642, 647 (4th Cir. 1979) ("North Carolina, of course, takes the traditional view that interlocutory orders are subject to change and to direct attack throughout the proceedings in which entered; that unless changed or vacated sua sponte or on direct party attack they are merged in any final judgment; and that they are thereafter subject to attack only as an incident to attack upon the final judgment." (citing *Skidmore v. Austin*, 261 N.C. 713, 136 S.E.2d 99 (1964)). By dismissing their appeal of this final judgment, Legislative Defendants *as a matter of North Carolina law* will have waived their opportunity to challenge the trial court's final judgment and any prior rulings in this case as violative of state or federal law. The Court's order should make that point express.

Second, to mitigate the potential for the prejudice, this Court should exercise its discretion under Rule 37(e)(2) to reaffirm that the statutes enacted by the General Assembly authorize North Carolina courts to review and remedy congressional-districting legislation under the North Carolina Constitution. *See* N.C. Gen. Stat. §§ 1-267.1(a), 120-2.3, 120-2.4.

Respectfully submitted, this 18th day of July, 2022.

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certify that the foregoing document was prepared using a 13-point proportionally spaced font with serifs.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of July, 2022, a copy of the foregoing document was electronically filed and served by electronic mail on counsel of record for Defendants-Appellees as follows:

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