

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA LEAGUE
OF CONSERVATION VOTERS, et al.,
Plaintiffs-Appellees.

From Wake County

vs.

21 CVS 015426

Representative Destin Hall, et al.,
REPRESENTATIVE DESTIN HALL, et al.,
Defendants-Appellants.

**DEFENDANT-APPELLEES' MOTION FOR INITIAL EN BANC HEARING
AND MOTION TO EXPEDITE DECISION ON INITIAL EN BANC HEARING**

Pursuant to N.C. Gen. Stat. § 7A-16 and North Carolina Rule of Appellate Procedure Rules 2, 31.1(c), 37(a), Defendant-Appellees Representative Destin Hall, in his official capacity as Chair of the House Standing Committee on Redistricting, Senator Warren Daniel, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections, Senator Ralph Hise, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections, Senator Paul Newton, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections, Representative Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Senator Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, (the "Legislative Defendant-Appellees") file this Motion for Initial En Banc Hearing and Motion to Expedite Decision on Initial En Banc Hearing.

This Motion seeks en banc review of the Court's 6 December 2021 decision to allow a temporary stay in this matter, as well as en banc consideration of Plaintiff-Appellants' Petition for Writ of Supersedeas or Prohibition. Legislative Defendants' Appellees further request that the Court suspend the rules, to the extent necessary, and expedite consideration of the Motion for Initial En Banc Hearing.

INTRODUCTION

This case presents the rare occasion on which this Court should exercise its authority to hear cases en banc. On mere hours notice and through the filing of approximately a thousand pages, Plaintiff-Appellants asked this Court to enter an injunction stopping North Carolina's ordinary election administration processes in order to force the legislature to redraw the 2021 Congressional, State House, and State Senate Plans (the "Enacted Plans") because they believe the Enacted Plans do not sufficiently advantage their preferred candidates. Plaintiff-Appellants notably sought this relief after it was denied by the bipartisan three-judge panel whom, after considering the thousands of pages of submissions from all parties and hearing hours of argument from all counsel prior to entering their decision. Ultimately, it entered an order finding that, inter alia, Plaintiff-Appellants were unlikely to succeed on the merits because their claims were not justiciable, they were unlikely to establish standing, and they were unlikely to succeed on their Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly claims, and established *as a factual matter* that the General Assembly acted with discriminatory intent in adopting North Carolina's 2021 redistricting plans governing congressional and

legislative elections. The panel also found that Plaintiff-Appellants were not seeking to maintain the status quo but, rather, to create a new condition that had not existed to that point, that the Plaintiff-Appellants failed make their necessary irreparable harm showing, and that the State and the public would suffer irreparable harm if the requested injunction were granted. *See generally North Carolina League of Conservation Voters et al. v. Hall et al.*, 21 CVS 015426 (WAKE), 3 December 2021 Order on Plaintiffs’ Motion for Preliminary Injunction, at Appendix to Plaintiff-Appellants’ Petition for Writ of Supersedeas or Prohibition pp.1-13.

Despite that clean holding against the Plaintiff-Appellants on every aspect of their preliminary-injunction motion below, a panel of this Court entered today an Order enjoining the ability of the State to administer the 2022 elections for Congress, the North Carolina Senate, and the North Carolina House of Representatives.

Nevertheless, the panel has thrown the 2022 election cycle into unprecedented uncertainty—and for no good reason. This case is a poor vehicle for resolution of the underlying justiciability question Plaintiffs-Appellants highlighted in their briefing: whether claims of so-called “partisan gerrymandering” are justiciable. Plaintiffs-Appellants failed to persuade a bipartisan three-judge panel that they are likely to establish that the 2021 enacted plans are, in fact, “partisan gerrymanders” or even that they have brought a cognizable case (since they have not joined plaintiffs residing in all challenged districts). Thus, Plaintiffs-Appellants are likely to fail on the merits regardless of how the justiciability question is ultimately resolved, and this case is a poor vehicle for addressing the question at all.

Expedited en banc consideration of this matter, including review of the 6 December 2021 temporary stay order as well as consideration of Plaintiff-Appellants' Petition for Writ of Supersedeas or Prohibition, is essential due to the extraordinary nature of the relief sought by Plaintiff-Appellants in the Petition and the relief just granted by this Court. *See* N.C. R. App. P. 31.1(a)(2). Initial en banc hearing will help secure and maintain uniformity of decisions of this court and lower courts. *Id.* 31.1(a)(1). Defendant-Appellants request that this Court grant their Motion, review the Court's grant of Plaintiff-Appellants' Motion for Temporary Stay en banc, and decide all matters related to the Petition for Writ of Supersedeas or Prohibition en banc.

PROCEDURAL HISTORY

On 16 November 2021, the Plaintiff-Appellants filed their Complaint, challenging the 2021 Congressional, State House, and State Senate Plans (collectively, the "Enacted Plans") as, *inter alia*, alleged unconstitutional partisan gerrymanders under the North Carolina Constitution. Solely relying on their partisan gerrymandering-based claims, Plaintiff-Appellants sought to preliminarily enjoin the Appellee-Defendants from using the Enacted Plans in administering any elections and order the Legislative Defendants to redraw the Enacted Plans or impose a court-ordered redistricting plan, perhaps based on the *NCLCV* Plaintiffs' self-titled "Optimized Maps." *See* Appendix to Plaintiff-Appellants' Petition for Writ of Supersedeas or Prohibition at pp.528-32.

On December 3, 2021, after the submission of thousands of pages of evidence and argument from all the parties, the three-judge panel appointed to hear these cases pursuant to N.C. Gen. Stat. § 1-267.1 held a hearing on the *NCLCV* Plaintiffs' Motion for Preliminary Injunction.¹ Following this hearing, the Court entered an order denying Plaintiff-Appellants' requested injunctive relief. The panel also certified its order as immediately appealable pursuant to Rule 54 of the North Carolina Rules of Civil Procedure. That same day, the *NCLCV* Plaintiffs and *Harper* Plaintiffs noticed their appeals. Here, the *NCLCV* Plaintiff-Appellants filed an approximately 1000-page motion seeking to have the Court of Appeals enter the injunction which was denied by the three-judge panel. See https://www.ncappellatecourts.org/show-file.php?document_id=295238 In two hours, Legislative Defendants-Appellees submitted a brief response opposing Plaintiff-Appellants' temporary relief. See <https://www.ncappellatecourts.org/search-results.php?sDocketSearch=P21-525&exact=1> (docket for P21-525; response has not posted yet). Shortly thereafter, the Court granted Plaintiff-Appellants' Motion, and entered an order enjoining North Carolina's administration of the 2022 elections in regards to the races for Congress, the North Carolina Senate, and the North Carolina House of Representatives.

¹ The Court also consolidated the *Harper* and *NCLCV* cases *sua sponte* on December 3, 2021. The *NCLCV* Plaintiffs and the *Harper* Plaintiffs noticed their appeals separately, and submitted different filings to the Court of Appeals and Supreme Court. Compare Court of Appeals P21-525 (*NCLCV*) with Supreme Court 413P21 (*Harper*).

Due to the extraordinary nature of the relief granted by the panel that initially determined Plaintiff-Appellants' Motion, this Court should (1) review the Court's decision to grant the Motion for Temporary Stay en banc, and (2) hear the Petition for Writ of Supersedeas or Prohibition en banc.

ARGUMENT

The extraordinary relief granted by the Court requires the extraordinary procedure of an initial hearing en banc for several reasons.

First, the Temporary Stay upends North Carolina's Congressional and state legislative elections in a way that is not appropriate for a stay. Rather, the relief sought by Plaintiff-Appellants was in the nature of a mandatory injunction, not a stay seeking the preservation of the status quo, as recognized by the bipartisan three-judge panel who denied Plaintiff-Appellants' Motion for Preliminary Injunction. This order, which so disrupts the status quo of almost 200 elections statewide, should be reviewed and decided by this court en banc. For the same reasons, the Court should hear the Petition for Writ of Supersedeas or Prohibition en banc, thereby bringing the full wisdom and knowledge of each judge on this Court to bear and providing legitimacy and finality to any such judgment.

Second, an en banc decision will prevent conflicting precedent between panels of this Court. The three-judge panel consolidated two cases for proceedings in front of it; however, those cases have taken separate routes on appeal and en banc determination of the extraordinary relief sought by the Plaintiff-Appellants in this case would prevent conflict between different panels. *Compare North Carolina*

League of Conservation Voters et al. v. Hall et al., 21 CVS 015426 (WAKE) with *Harper et al. v. Hall et al.*, 21 CVS 50085 (WAKE). En banc consideration will ensure rulings in these cases will be consistent.

In short, the exceptional relief allowed by the Court in the Temporary Stay, as well as that sought by Plaintiff-Appellants in their Petition for Writ of Supersedeas or Prohibition merits the exceptional procedure of initial en banc hearing.

MOTION TO SUSPEND THE RULES AND EXPEDITE DECISION ON EN BANC HEARING

Defendant-Appellees further request, pursuant to Rules 2 and 37(a) of the North Carolina Rules of Appellate Procedure, that to the extent this Court suspends the appellate rules to expedite briefing, this Court expedite ruling on Defendant-Appellees' Motion for Initial En Banc Hearing prior to proceeding on the merits of Plaintiff-Appellants' appeal.

Rule 2 authorizes this Court to “suspend or vary the requirements or provisions” of the North Carolina Rules of Appellate Procedure in order “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” “Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances.” *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999) (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)).

While ordinarily Plaintiff-Appellants would have ten days from service of the Defendant-Appellee's Motion for Initial En Banc Hearing to respond, and the Court

would have thirty days to rule on the same, N.C. R. App. P. 31.1(c) in this instance, it is critically important that this Court determine whether to hear this matter en banc prior to ruling on the merits of Plaintiff-Appellants' appeal. As set forth above, given the impact this Court's ruling could have on the electoral process in North Carolina and the uncertainty that would result from such a ruling, an en banc hearing is appropriate, as it would streamline proceedings at this Court and promote judicial efficiency. Thus, to the extent that this Court suspends the rules to expedite briefing and consideration of this appeal, Defendant-Appellees request that this Court order expedited briefing and rule on this Motion prior to hearing this petition on the merits.

CONCLUSION

The Temporary Stay granted today, 6 December 2021, upends the orderly electoral process in North Carolina on hours notice and constitutes a mandatory injunction, not a stay. En banc review of the Temporary Stay, as well as the Petition for Writ of Supersedeas or Prohibition, is appropriate and necessary to ensure that this matter receives expedient, efficient, and sound process and judgment. Accordingly, Legislative Defendants-Appellees respectfully request that this Court grant its Motion to Suspend the Rules and for Expedited Consideration and its Motion for Initial En Banc Hearing.

Respectfully submitted this the 6th day of December, 2021.

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Electronically Submitted

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below
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CERTIFICATE OF SERVICE

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