

No.

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE CONFERENCE OF)
THE NAACP, COMMON CAUSE, MARILYN)
HARRIS, GARY GRANT, JOYAH BULLUCK, and)
THOMASINA WILLIAMS,)

Plaintiffs-Petitioners,)

v.)

PHILIP E. BERGER *in his official capacity as*)
President Pro Tempore of the North Carolina Senate;)
TIMOTHY K. MOORE *in his official capacity as*)
Speaker of the North Carolina House of)
Representatives; RALPH E. HISE, JR., WARREN)
DANIEL, PAUL NEWTON, *in their official*)
capacities as Co-Chairmen of the Senate Committee)
on Redistricting and Elections; DESTIN HALL, *in*)
his official capacity as Chairman of the House)
Standing Committee on Redistricting; THE STATE)
OF NORTH CAROLINA; THE NORTH CAROLINA)
STATE BOARD OF ELECTIONS; DAMON)
CIRCOSTA, *in his official capacity as Chair of the*)
State Board of Elections; STELLA ANDERSON, *in*)
her official capacity as Secretary of the State Board)
of Elections; STACY EGGERS IV, *in his official*)
capacity as Member of the State Board of Elections;)
JEFF CARMON III, *in his official capacity as*)
Member of the State Board of Elections; TOMMY)
TUCKER, *in his official capacity as Member of the*)
State Board of Elections; KAREN BRINSON BELL,)
in her official capacity as Executive Director of the)
State Board of Elections,)

From Wake County
No. 21 CVS 014476

Defendants-Respondents.

MOTION PURSUANT TO RULE 2 OF THE RULES OF APPELLATE
PROCEDURE TO EXPEDITE CONSIDERATION OF DECISION IN THE PUBLIC
INTEREST AND MOTION FOR TEMPORARY STAY

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rules 2 and 29(b) of the North Carolina Rules of Appellate Procedure, Petitioners North Carolina NAACP, Common Cause, Marilyn Harris, Gary Grant, Joyah Bulluck, and Thomasina Williams, by and through their undersigned counsel, respectfully move this Court to suspend or vary the requirements of the North Carolina Rules of Appellate Procedure to expedite a decision in the public interest, and to enjoin and temporarily stay the 2022 primary elections and related deadlines, including the close of the candidate-filing that will otherwise proceed on 17 December 2021, as required to prevent irreparable harm to Petitioners during the pendency of this appeal.

This matter concerns unprecedented violations of the North Carolina State Constitution by Legislative-Respondents in undertaking their duty to revise state Senate and House districts after the return of the 2020 decennial census as required by Article II, Sections 3 and 5 of the state Constitution. By statute, the candidate filing period for state legislative office in the 2022 general elections is 6 December through 17 December 2021, and the state legislative primary elections are scheduled to be held on 8 March 2021. N.C.G.S. § 163-1.¹ Petitioners seek to facilitate expeditious review by this Court and prevent irreparable harm to Petitioners and

¹ On 6 December 2021, the Court of Appeals ordered a temporary stay enjoining the opening of the candidate-filing period for the 2022 primary elections for Congress, the North Carolina Senate, and the North Carolina House of Representative and then later vacated that order. *North Carolina League of Conservation Voters, Inc., et al. v. Hall, et al.*, No. P21-525 (N.C. App. Dec. 6, 2021).

other voters of color in North Carolina pending the proper resolution of this matter on appeal.

Petitioners have filed a Petition for Discretionary Review concomitantly with this Motion, with an accompanying Appendix of documents from the record in this matter that are also incorporated by reference and relied upon this Motion. In further support of this Motion, Petitioners show the following:

1. The North Carolina Constitution requires the North Carolina General Assembly to revise state legislative districts at the first regular session convened following the federal decennial census. N.C. Const. art. II, §§ 3, 5. It also enumerates additional limitations upon redistricting, including requiring members of each chamber to represent, as nearly as possible, an equal number of inhabitants, that districts include contiguous territory, and that “no county shall be divided” (the “Whole County Provision.”). *Id.*

2. In *Stephenson v. Bartlett*, this Court sought to harmonize the different North Carolina Constitutional requirements imposed on the redistricting process. *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (*Stephenson I*); *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II*). *Stephenson* expressly mandates the North Carolina General Assembly follow a delineated process and requires “to ensure full compliance with federal law, legislative districts required by the [Voting Rights Act (“VRA”)] shall be formed prior to creation of non-VRA districts.” *Stephenson I*, 355 N.C. at 383.

3. In the 2021 redistricting process, Defendants-Respondents Berger, Moore, Hise, Daniel, Newton, and Hall (“Legislative Respondents”) intentionally adopted procedures prohibiting the Joint Redistricting Committees, and their respective members, from considering racial data under any circumstances during the redistricting process. This includes proposing and passing criteria prohibiting the consideration of racial data and requiring any member proposing a state legislative map to use a predetermined set of county cluster maps, which were created without undertaking the mandate in *Stephenson* to form VRA districts first. App. 229² (Compl. ¶ 62 (describing the Duke Academic Paper and its disclosure that “[t]he one part of *Stephenson v. Bartlett* which this analysis does not reflect is compliance with the Voting Rights Act.”)).

4. Three days after Legislative Respondents announced the required county cluster maps, on 8 October 2021, counsel for Petitioners sent a letter to Legislative Respondents informing them that the refusal to consider any racial data in the adopted redistricting criteria, and their requirement that any proposed maps be drawn within clusters set forth by the Duke Academic Paper (which fail to account for the Voting Rights Act), violated well-established redistricting law. App. 156 (Klein Aff., Ex. M.).

5. Counsel for Petitioners sent another letter on 25 October 2021, after members released a draft Senate and House maps on the General Assembly website,

² Citation to “App.” indicates a reference materials included in the Appendix to Petitioners Petition for Discretionary Review, filed concomitantly with this Motion.

notifying Legislative Respondents that certain clusters are likely to dilute voting power for Black voters in the Northeast. App. 164 (Klein Aff., Ex. N); App. 232 (Compl. ¶ 69). Petitioner Common Cause also provided data on 26 October 2021 to Legislative Respondents indicating legally significant racially polarized voting in two proposed Senate Districts, such that voters of color in these districts would not be able to elect their candidates of choice, indicating effective cross-over districts would be destroyed. App. 232 (Compl. ¶ 69); App. 167 (Klein Aff., Ex. O). Legislative Respondents did not take any corrective action after receiving this information.

6. On 29 October 2021, Petitioners filed a Complaint for Declaratory Judgment and Injunctive Relief. In their Prayer for Relief, Petitioners requested the trial court declare: (a) “Plaintiffs’ legal rights to be free from redistricting that violates the North Carolina Constitution”; (b) “Legislative Defendants’ duty to undertake a redistricting process that complies with the requirements of Article II Sections 3 and 5 of the North Carolina Constitution, as described in *Stephenson v. Bartlett*,” and (d) “Legislative Defendants’ criteria for redistricting unlawful, including the requirement to utilize the Duke Senate Clusters and Duke House Clusters.” App. 247 (Compl. at 38). Petitioners also sought injunctive relief, including an “injunction prohibiting the North Carolina General Assembly from undertaking a redistricting process that fails to adhere to the requirements of the North Carolina Constitution, as set forth in *Stephenson v. Bartlett*,” and an “injunction prohibiting the SBE Defendants from administering the March 8, 2022 Statewide Primary elections before

May 3, 2022 and from administering the candidate filing period before February 1 through 11, 2022.” App. 247-48 (Compl. at 38-39).

7. Petitioners also filed a Motion for Preliminary Injunction on 29 October 2021, seeking an “injunction prohibiting the Legislative Defendants from undertaking a redistricting process that departs from the requirements of the North Carolina Constitution for State Senate and State House of Representatives, including an injunction prohibiting the use of redistricting criteria that violates the requirements of the North Carolina Constitution, as set forth by the North Carolina Supreme Court in the *Stephenson* cases.” App. 275 (Pl.’s Mt. for Preliminary Injunction at 2). Petitioners requested in their Motion, “in order to prevent irreparable harm to Petitioners during the pendency of this litigation, for the Court to enjoin the SBE Defendants from administering the scheduled March 8, 2022 primaries for the 2022 general elections before May 3, 2022, and from administering the corresponding period of candidate filing before February 1 through 11, 2022 to allow for new State Legislative districts to be enacted under a constitutional process.” App. 275-76 (Pl.’s Mt. for Preliminary Injunction at 2-3).

8. Following the filing of this action and request for injunctive relief, the Legislative Respondents hastily adopted and enacted state Senate and House maps within four business days on 4 November 2021. In response to Petitioners’ Complaint, Legislative Respondents’ filed a Motion to Transfer to a three-judge panel pursuant N.C.G.S. § 1-267.1 and Motion to Dismiss Petitioners’ complaint “pursuant to 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure . . . on the grounds that

the Court lacks subject matter jurisdiction to regulate proceedings of the General Assembly and because the issues raised in Plaintiffs' Complaint are now moot." App. 280 (Mot. to Dismiss at 2).

9. The parties submitted memoranda of law, affidavits, and exhibits in support and opposition to the aforementioned motions, and the trial court heard oral argument on 30 November 2021. During oral argument, Counsel for Legislative Respondents admitted that the Legislature failed to undertake any formal analysis to determine whether the final enacted maps complied with the VRA, and asserted the belief they were not required to do so. *See* App. 50 (T p 50, lines 9-13) ("THE COURT: And what analysis has been done to determine whether they're VRA compliant? MR. STRACH: There's been no formal -- there's been no -- the legislature hasn't had a hearing or done anything like that. They're not required to.").

10. On 30 November 2021, the Honorable A. Graham Shirley entered an Order in open court granting Legislative Respondents' Motion to Dismiss and denying Petitioners' Motion for Preliminary Injunction. App. 60-61 (T p 60-61). On 3 December 2021, Judge Shirley issued a written Order. App. 267.

11. Petitioners filed a Notice of Appeal with the Court of Appeals on 6 December 2021, App. 271, and served a Proposed Record on Appeal to Respondents on 6 December 2021. Petitioners have filed a Petition for Discretionary Review of the Order by this Court concomitantly with this Motion.

12. Rule 2 of the North Carolina Rules of Appellate Procedure provides:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may,

except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

13. The Court may invoke Rule 2 to prevent manifest injustice and to expedite decisions in the public interest, including to “settle a question of law that would be certain to otherwise recur.” *State v. Velasquez-Cardenas*, 259 N.C. App. 211, 225 (2018) (invoking Rule 2 to suspend or vary the requirements of Rule 28 regarding the content of briefs in order to “prevent manifest injustice,” “expedite decisions in the public interest,” and “settle a question of law that would be certain to otherwise recur.”).

14. Similarly, under Rule 29(b) of the North Carolina Rules of Appellate Procedure, upon motion by a party or its own initiative, “may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order” for hearing appeals. N.C. R. App. P. 29(b). Petitioners seek temporary suspension or variance of the requirements in Appellate Rules 6, 11, 12, 15, and any other Rules that would preclude expedient consideration of Petitioners’ Petition for Discretionary Review and matter on appeal.

15. In *Stephenson*, the North Carolina Supreme Court issued an expedited scheduling order and further enjoined defendants from conducting primary elections for the Senate and House on 7 March 2002, two days after defendants had filed a notice of appeal to the Supreme Court. *Stephenson v. Bartlett*, 355 N.C. 281, 281-82 (2002). In issuing the injunction, the Supreme Court held that the “principal legal question raised by the present case, arising under the North Carolina Constitution,

is a matter of first impression for this Court” and that notwithstanding the expedited scheduling order “the possibility exists that insufficient time will remain after proper resolution for this appeal by written decision for legislative primary elections, scheduled for 7 May 2002, to proceed in an orderly manner.” *Id.* The Court therefore enjoined the primary elections, “[i]n light of the extraordinary nature of this case and the exigency of the circumstances for the legislative candidates and the citizens of this State.” *Id.* at 282.

16. The same considerations exist here for suspending or varying the Rules of Appellate Procedure to permit the consideration of Petitioners’ Petition for Discretionary Review and an expedited briefing schedule in this matter³ to expedite a decision in the public interest: whether Legislative Respondents violated the state Constitution by failing to follow the direction of the Court in *Stephenson* to ascertain and draw districts required by the VRA in undertaking the redistricting of state Legislative districts.

17. Time is of the essence as the candidate-filing period for the 2022 general elections is set by statute to extend from 6 December and closes on 17 December 2021. N.C.G.S. § 163-1. As of the date of the filing of this Motion, the candidate-filing period was temporarily stayed, and then vacated, by the Court of Appeals. *North Carolina League of Conservation Voters et al. v. Hall*, No. P21-525 (N.C. App. Dec. 6, 2021).

³ Petitioners have no objection to the proposed briefing schedule in the North Carolina League of Conservation Voters, Inc., et al.’s Petition for Writ of Supersedeas or Prohibition and Motion for Temporary Stay at 21, *North Carolina League of Conservation Voters, Inc., et al. v. Hall et al.*, No. P21-525 (N.C. App. Dec. 6, 2021).

This uncertainty at the Court of Appeals in a parallel matter underscores the need for expedited review here. The relief requested in this Motion is further warranted to prevent irreparable harm to Petitioners and the voters of North Carolina before judicial review of Legislative Respondents' actions is possible.

18. Deprivation of Petitioners' fundamental right to have their vote counted equally and to associate freely undermines the public interest in safeguarding rights guaranteed by the state Constitution and in permitting all qualified voters to have a voice in their government. Petitioners' constitutional challenge is therefore a matter of significant public interest and importance that warrants this Court's review. This reason alone is sufficient to justify the Court's immediate attention.

19. Furthermore, this matter also implicates serious issues of separation of powers, and the deliberate actions of legislators to orchestrate a redistricting process that ignores express requirements of the North Carolina Constitution as stated by this Court.

20. Suspension of the rules and a peremptory setting is necessary here to avoid the infringement of Petitioners' and North Carolina voters' fundamental rights and prevent an election from proceeding using maps generated by an unconstitutional redistricting process because "once the election occurs, there can be no do-over and no redress." *Holmes v. Moore*, 270 N.C. App. 7, 35 (2020) (internal citations omitted).

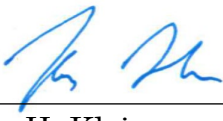
21. Thus, swift action by this Court is the only way to protect the rights of Petitioners. Temporary suspension of the Appellate Rules and a peremptory setting is therefore necessary.

22. For the reasons stated above, Petitioners also respectfully request this Court to enjoin the 2022 primary elections and related deadlines, including the close of candidate-filing on 17 December 2021, pending further order of this Court in light of the extraordinary nature of this case and the exigency of the circumstances, and the possibility that insufficient time will remain after proper resolution of this appeal by written decision for Legislative primary elections, scheduled for 8 March 2022, to proceed in an orderly manner. *See Stephenson v. Bartlett*, 355 N.C. 281 (2002) (enjoining 7 May 2022 primary elections pending further order of the Court).

WHEREFORE, Petitioners respectfully move this Court under Appellate Rules 2 and 29(b) for a peremptory setting of hearing for this appeal at the earliest opportunity following full briefing of the appeal. Petitioners also respectfully request this Court to enjoin and to temporarily stay the 2022 primary elections and related deadlines, including the close of the candidate-filing on 17 December 2021.

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

SOUTHERN COALITION FOR SOCIAL
JUSTICE

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

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**Pro Hac Vice* filed
contemporaneously with this Motion
pursuant to N.C.R. App. P. 33(d).

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed to the electronic-filing site at <https://www.ncappellatecourt.org> and served upon all parties by electronic mail and, if requested, by United States Mail, addressed to the following:

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This, the 6th day of December, 2021

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