

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' NOTICE IN SUPPORT OF
MOTION TO EXPEDITE AND REGARDING GRANT OF
CERTIORARI IN MOORE V. HARPER***

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

In response to this Court's request, the *Harper* and *North Carolina League of Conservation Voters* Plaintiffs-Appellants jointly submit this notice in support of Plaintiff-Intervenor-Appellant Common Cause's pending motion to expedite consideration of this appeal, and regarding the effect of the U.S. Supreme Court's grant of certiorari in *Moore v. Harper*, No. 21-1271, on this Court's timetable for the hearing and consideration of *Harper, et al. v Hall, et al.*, No. 413PA21-1.

The grant of certiorari in *Moore* makes prompt resolution of Legislative Defendants' appeal of the trial court's remedial congressional plan all the more critical. The question presented in *Moore* necessarily implicates important questions of North Carolina law that Legislative Defendants claim remain unresolved—including the meaning of North Carolina statutes that govern state judicial review of congressional-districting legislation and accompanying remedial procedures. This Court should act to eliminate any possible doubt about the proper resolution of those questions before the U.S. Supreme Court decides *Moore*—as, under basic principles of federalism, only this Court can do. Otherwise, the U.S. Supreme Court's decision in *Moore* could rest on an interpretation of North Carolina law that this Court later determines to be incorrect.

1. The question presented in *Moore* is whether this Court's invalidation of the General Assembly's 2021 congressional plan under provisions of the North Carolina Constitution and the trial court's adoption of a court-drawn interim remedial congressional plan violate the Elections Clause of the U.S. Constitution, art. I, § 4, cl. 1. In particular, the U.S. Supreme Court has granted certiorari to resolve the question—as formulated by

Legislative Defendants—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).

Resolving that question will require deciding important antecedent questions of *North Carolina* law.

For example, in *Moore*, Plaintiffs have argued that this Court’s decision did not violate the Elections Clause, even under Legislative Defendants’ theory, 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). Despite this Court’s opinions and orders applying these statutes, Legislative Defendants have argued to the U.S. Supreme Court 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). Legislative Defendants further have suggested that even if these North Carolina statutes did authorize state judicial review of

congressional-districting legislation, they would violate the state separation of powers under the North Carolina Constitution. Pet. for Writ of Cert., *supra*, at 32-33.

The U.S. Supreme Court is poised to rule on the meaning of these North Carolina statutes, and their consistency with the North Carolina Constitution, in deciding *Moore*. If North Carolina statutes authorize state judicial review of congressional-districting legislation and the remedial procedures employed by the trial court here, then there is no Elections Clause violation even under Legislative Defendants' theory. Put differently, the U.S. Supreme Court can rule for Legislative Defendants on their Elections Clause theory *only* by concluding that these North Carolina statutes *do not* constitute valid legislative authorizations allowing North Carolina courts to hear challenges to congressional-districting legislation under the state constitution. Conversely, if the statutes do constitute valid legislative authorizations, the U.S. Supreme Court can rule for Plaintiffs on that basis.

2. Adjudicating Legislative Defendants' appeal of the remedial congressional plan will provide this Court an opportunity to again confirm that the key North Carolina statutes are valid legislative authorizations that authorize substantive state judicial review of congressional-districting legislation as a matter of state law, and not statutes that merely govern "procedure." Legislative Defendants have 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."). Moreover, Legislative Defendants in this appeal have pressed the very Elections Clause

argument presented in *Moore*, regarding state courts' ability to adopt a compliant remedial congressional plan when the General Assembly fails to do so. *See* Legislative Defendants' Mot. Stay Pending Appeal at 19 (Feb. 23, 2022) ("In selecting its own remedial congressional map the trial court is likely violating federal law. The *federal* Constitution provides that the North Carolina General Assembly is responsible for establishing congressional districts."). Thus, in the course of addressing Legislative Defendants' appeal of the remedial congressional plan, this Court will have the opportunity to address the meaning of the North Carolina statutes governing redistricting challenges.

To be clear: Plaintiffs do not believe there is any reasonable dispute, based on this Court's holdings, 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. But Legislative Defendants do and will argue that point to the U.S. Supreme Court. By acting expeditiously, this Court can resolve what Legislative Defendants claim is an unresolved state-law question before the U.S. Supreme Court hears *Moore*. Questions of state law, after all, 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"). If the U.S. Supreme Court agrees with Legislative Defendants that there is 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 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). It is thus crucial that the U.S. Supreme Court have the full benefit of this Court’s definitive interpretation of the North Carolina statutes at issue.

3. Independently, the public interest and judicial economy warrant expedited consideration of Legislative Defendants’ appeal. The remedial congressional plan adopted by the trial court will be used only in the upcoming 2022 general election, R p 4887–88, thus requiring a new congressional map for 2024. As noted in Plaintiff-Intervenor-Appellant Common Cause’s pending motion to expedite consideration, resolving this matter swiftly will ensure that any additional redistricting this cycle will benefit from this Court’s definitive guidance on the requirements of North Carolina’s Constitution for remedial districting plans. Putting the appeal on pause until the U.S. Supreme Court’s decision in *Moore*, which likely will not be issued until mid-2023, could jeopardize this Court’s ability to decide the remedial appeal sufficiently in advance of the 2024 primaries.

4. Finally, Plaintiffs-Appellants note that the U.S. Supreme Court’s decision in *Moore*, which presents a question under the federal Elections Clause, has no possible relevance to the appeals taken by Plaintiffs-Appellants in this matter relating to the remedial *state legislative* maps. *See* R p 5147–59 (Plaintiffs’ Notices of Appeal). Plaintiffs-Appellants already have filed their opening briefs in those appeals, and those

appeals should continue to proceed expeditiously regardless of how the Court treats Legislative Defendants' appeal of the remedial congressional plan.

Respectfully submitted, this 8th day of July, 2022.

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N.C. R. App. P. 33(b) Certification:
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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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The undersigned hereby certifies that on the 8th 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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