

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.,
Defendants-Appellants.

LEGISLATIVE DEFENDANTS’ RESPONSE TO PETITION FOR WRIT OF
SUPERSEDEAS OR PORHIBITION AND MOTION FOR TEMPORARY STAY

The NCLCV Petitioners do not make a “modest” request, *see* Petition at 5, and it should be denied out of hand. The NCLCV Petitioners submitted a nearly 1,000 page filing on this Court at about 9:00am and demand a “stay” before 12:00pm *the same day*. That does not even afford this Court sufficient time to read their filing, much less any other party time to respond in an informative way. And the NCLCV Petitioners appear to dramatically understate their burden in making this exceptional and unreasonable demand. First, their request is not for a “stay” at all; they want an *injunction* from this Court. Second, the bipartisan three-judge panel below unanimously rejected all their arguments—on the law, the facts, and the equities. This is not a case presenting a clean legal question of whether a challenge to an acknowledged partisan gerrymander is justiciable. The three-judge panel unanimously found that the NCLCV Petitioners ***are unlikely to show that the plans they challenged were enacted with partisan intent at all.*** This Court

cannot reverse that factual finding—entered after a lengthy in-person hearing—in a mere three hours.

The NCLCV Petitioners’ demand affects the rights of 10.4 million North Carolina residents, and there is no fairness to their insistence on changing the filing period for all persons involved on this abrupt timeline and after having failed to convince a single judge below that their assertions are supportable. These Respondents (the “Legislative Respondents”) will provide a thorough refutation of the NCLCV Petitioners’ lengthy filing after having had appropriate time to review the filing and through an appropriately thorough opposition filing. However, given the NCLCV Petitioners’ request for an affirmative injunction in a mere three hours from filing, when all parties are represented by Counsel, Legislative Defendants provide this brief statement showing the Court why this extraordinary request has no merit and should be denied.

1. After each decennial census, “States must redistrict to account for any changes or shifts in population.” *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). The 2021 redistricting was uniquely difficult because of a five-month delay in the release of the census results due to the global Covid-19 pandemic. North Carolina did not receive the census data necessary to redistrict until 12 August 2021. And because that data did not come in a “ready to draw” package, it took several additional weeks for legislative staff to load data and configure software for terminals that legislators and the public could use.

2. The 2021 redistricting was the most transparent and non-partisan legislative redistricting in North Carolina history. The criteria used by the General Assembly also included the following directive:

Election Data. Partisan considerations and election results data shall not be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

All of the district lines were drawn in public in recorded sessions. The NCLCV Petitioners have no competent evidence that the General Assembly did not adhere to this criterion.

3. After the legislative and congressional plans were enacted (the “2021 Plans”), the NCLCV Petitioners brought suit contending that the General Assembly’s purported partisan motive renders the 2021 Plans unconstitutional. A separate set of litigants (the “Harper Plaintiffs”) brought a similar suit only against the 2021 Congressional Plan. Their respective preliminary injunction motions were afforded expedited consideration by a three-judge panel of the Superior Court (“the Panel”), *see* N.C.G.S. § 1-267.1, which held a lengthy hearing on 3 December 2021.

4. The Panel found against the NCLCV Petitioners (and the Harper Plaintiffs) on all counts. In a written order, the Panel held that Plaintiffs’ claim is non-justiciable under the political-question doctrine (a holding that implicates appellate jurisdiction). It also found that the NCLCV Petitioners (and the Harper Plaintiffs) are unlikely to establish standing; that their requested relief improperly seeks to alter the status quo, rather than preserve it; and that they have not established irreparable harm or that any harm outweighs the harm of an injunction. Perhaps most importantly, the Superior Court found that the NCLCV Petitioners

(and the Harper Plaintiffs) are unlikely to establish discriminatory intent—an essential element to any arguably cognizable claim of so-called “partisan gerrymandering”—because “the evidence presented shows that the General Assembly did not use any partisan data in the creation of these congressional and state legislative districts, suggesting a lack of intent.”

5. Today is the beginning of the candidate filing period, and the NCLCV Petitioners served a 943-page filing on this Court and the other parties at 9:00am, demanding relief by noon. They characterize their request as one for a “stay,” but that is inaccurate: the Superior Court did not issue an injunction, so there is nothing to “stay.” The NCLCV Petitioners actually want the Court to enter the injunctive relief the Superior Court rejected. The standard for an injunction pending appeal is the same as for a preliminary injunction. *See N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 78–79, 674 S.E.2d 436, 443 (2009). The standard of review in assessing the Superior Court’s denial of an injunction pending appeal—which the NCLCV Petitioners did not even afford the Superior Court the opportunity to do—is “abuse of discretion.” *Id.* The NCLCV Petitioners must show that the Superior Court’s “ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (citation omitted).

6. The NCLCV Petitioners’ have not made the required showing that the Panel’s decision “could not have been the result of a reasoned decision.” *Id.*

7. First, the Superior Court’s determination that the NCLCV Petitioners are unlikely to succeed is obviously supportable—and it is correct. The North

Carolina Supreme Court has held that “[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions.” *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 390 (2002). But never mind that binding holding: the Superior Court found that the General Assembly *did not actually consider partisan data in the 2021 redistricting*. The NCLCV Petitioners ask the Court to infer that the General Assembly did consider partisan advantage because that was theoretically *possible*, but “[t]he good faith of [public] officers is presumed and the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies.” *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971). The NCLCV Petitioners also ask the Court to infer unconstitutional intent and effect from their allegation that a majority share of the vote would not afford the Democratic Party a majority of the seats, but evidence below showed that the major parties’ respective constituents ***are not evenly distributed throughout the states***. The NCLCV Petitioners are asking for proportional representation, but even those jurists who believe that claims of partisan redistricting are justiciable have rejected the idea that plaintiffs are entitled to proportional representation. According to these jurists, courts must “not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, [the correct standard] takes as its baseline a State’s *own* criteria of fairness, apart from partisan gain.” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (Kagan, J., dissenting). The *Common Cause* panel that the NCLCV Petitioners cite agreed. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128

(N.C.Super. Sep. 03, 2019) (rejecting the view that courts may “engage in policy-making by comparing the enacted maps with others that might be ‘ideally fair’ under some judicially-envisioned criteria.”). The NCLCV Petitioners do not even pretend to satisfy this standard.

8. The equities are also decidedly against the NCLCV Petitioners. They are asking for exceptional relief that would change the status quo and throw the 2022 election cycle into chaos. The NCLCV Petitioners have not even shown a likelihood of standing and therefore cannot establish that any harm to them would outweigh the harm to the entire State.

For all these reasons, the exceptional request should be rejected out of hand.

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 have authorized me to list their names on this document as if they had personally signed it.

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