

NORTH CAROLINA COURT OF APPEALS

BEVERLY BARD; RICHARD LEVY; SUSAN KING COPE; ALLEN WELLONS; LINDA MINOR; THOMAS W. ROSS, SR.; MARIE GORDON; SARAH KATHERINE SCHULTZ; JOSEPH J. COCCIA; TIMOTHY S. EMERY; and JAMES G. ROWE;

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of elections; JEFF CARMON III, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY "FOUR" EGGERS, in his official capacity as a Member of the North Carolina State Board of Elections; SIOBHAN O'DUFFY MILLEN, in her official capacity as a Member of the North Carolina State Board of Elections; KEVIN N. LEWIS, in his official capacity as a Member of the North Carolina State Board of Elections; PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and DESTIN HALL, in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

From Wake County
No. 24CV003534-910

**LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR ORAL ARGUMENT**

Legislative Defendant Appellees/Cross-Appellants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin Hall,¹ in his official capacity as Speaker of the North Carolina House of Representatives (collectively, “Legislative Defendants”), file this response in opposition to Plaintiffs’ Motion for Oral Argument.

INTRODUCTION

Plaintiffs’ Motion for Oral Argument (the “Motion”) is a vague recitation of what nearly every appellant says about their appeal: this case is important. But Plaintiffs’ procedurally improper Motion cannot undo the assigned panel’s unanimous decision on July 3, 2025 that oral argument will not be of assistance to the Court. Plaintiffs do not, and cannot, point to any real reason why oral argument would be of assistance when all of the core issues have been amply addressed in the parties’ briefing. Self-proclaimed importance is not, and cannot, be the standard to reverse a panel’s decision to decide an appeal on the briefs and record. Plaintiffs’ Motion should be denied.

ARGUMENT

Plaintiffs’ Motion is improper, untimely, and should be denied for several substantive reasons.

First, Plaintiffs cannot move for oral argument after a three-judge Court of Appeals panel already determined that oral argument would not be helpful to the

¹ Pursuant to N.C. R. Civ. P. 25(f)(1), Destin Hall is substituted for former Speaker Moore, who was named in his official capacity as Speaker of the North Carolina House of Representatives.

Court. N.C. R. App. P. 30(f)(2) governs an appellate panel's right to decide appeals without oral argument. In pertinent part, it provides that "[i]f all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs." The panel assigned to this pending appeal correctly, and unanimously, determined that oral argument would not assist the Court. The proper procedural avenue would have been a motion for reconsideration or an invocation of Rule 2.² Plaintiffs did neither, and their Motion should be denied as procedurally improper.

Second, Plaintiffs' Motion suffers from untimely delay. The parties received notice that this case was not selected for oral argument on July 3, 2025. Plaintiffs waited twenty-one days to move for oral argument. But again, a decision has already been made, and puzzlingly Plaintiffs do not ask for reconsideration of that decision. Nevertheless, waiting twenty-one days to file, in and of itself, warrants denial of the motion, as North Carolina courts do not reward those that sit on their rights. *Thomas v. Ray*, 69 N.C. App. 412, 419, 317 S.E.2d 53, 56 (1984).

² "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." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (quoting *Steingress v. Steingress*, 350 N.C. 64, 66, 511 S.E.2d 298, 299–300 (1999)). Plaintiffs likely did not invoke Rule 2 because this is not one of the extreme circumstances where a last resort suspension of the Rules of Appellate Procedure is necessary to prevent manifest injustice. *See* N.C. R. App. P. 2. The Court need not take such extreme action given the clear precedent from *Harper III* that Plaintiffs' claim is a nonjusticiable political question.

Third, Plaintiffs' Motion is substantively deficient for several reasons. The most obvious is because their Motion does not state with particularity the grounds on which it is based. N.C. R. App. P. 37 contains the general rules for motions in North Carolina appellate courts. Rule 37(a) requires that motions "contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought." Plaintiffs' Motion fails to state with particularity any rule, law, or principle supporting a Court of Appeals panel overturning its unanimous decision to decide this case on the briefs and the record. For this reason alone, Plaintiffs' Motion should be denied.

Even if Plaintiffs' Motion complied with N.C. R. App. P. 37, which it does not, Plaintiffs' vague statements about the purported complexity of their case is not sufficient to establish that oral argument will actually help the Court. Each of Plaintiffs' reasons for oral argument fail under the lightest scrutiny.

For example, Plaintiffs complain that "there is minimal law on the scope and application of [the doctrine of nonjusticiable political questions] and how it is to be applied to cases in North Carolina." [Mot. at ¶3]. Not so. In fact, *Harper v. Hall*, 384 N.C. 292, 326-50, 886 S.E.2d 393, 416-31 (2023) (*Harper III*) contains a detailed breakdown of the scope of the political question doctrine in North Carolina and explains how it is to be applied in districting cases. This rationale is misleading at best, contrary to well-settled precedent, and should be disregarded.

Similarly, Plaintiffs claim that this case presents issues on the scope of judicial authority to decide critical constitutional questions. [Mot. at ¶4]. Again, not true. Once more, *Harper III* answered those questions unequivocally, providing a detailed section on separation of powers principles in North Carolina. *Id.* at 321-23, 413-14.

Additionally, each of the “core issues” identified in paragraph 5 of the Motion is overstated and have been fully briefed in this appeal:

- First, “the scope and application of unenumerated rights under the North Carolina State Constitution” is an incredibly overstated issue. As explained in briefing, Plaintiffs are limited on appeal to the unenumerated voting right they alleged exists at the trial court. *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836, 838 (1934). Asking the Court for oral argument on such a broad topic is not an accurate reflection of the issues properly before this Court. Even so, Plaintiffs took full advantage of arguing unpreserved issues in their appellate briefing.
- Similarly, Plaintiffs “core issues” of whether there is a state constitutional “right to fair elections” and whether the facts alleged here “implicate[] a right to ‘fair elections’” are also directly addressed in the appellate briefings. Indeed, the vast majority of the arguments in Plaintiff-Appellants’ Brief is dedicated to these issues, and Plaintiffs have not provided an unbiased rationale for what oral argument could possibly add to the briefs already before the Court. [Plts App. Br. at 13-21].

- Plaintiffs’ last “core issue” is a fanciful way of speculating whether *Harper III* controls the issue in this case. Again, this issue is well briefed—both on appeal and at the trial court.

Plaintiffs fail to articulate how oral argument could aid the Court in deciding issues Plaintiffs themselves fully briefed. Furthermore, Plaintiffs admit in their Motion that the record contains several hours of argument by counsel on these very issues. [Mot. at ¶6]. That transcript, along with the briefs and record on appeal, are more than sufficient for this Court to decide this case. Plaintiffs make no persuasive argument to the contrary.

CONCLUSION

For these reasons, Plaintiffs’ Motion for Oral Argument should be denied.

Respectfully submitted, this the 29th day of July, 2025.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/ Electronically Submitted

Phillip J. Strach (NC Bar No. 29456)

301 Hillsborough Street, Suite 1400

Raleigh, NC 27603

Telephone: (919) 329-3800

Facsimile: (919) 329-3799

phil.strach@nelsonmullins.com

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.

Alyssa M. Riggins (NC Bar No. 52366)

alyssa.riggins@nelsonmullins.com

Cassie A. Holt (NC Bar No. 56505)

cassie.holt@nelsonmullins.com
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 329-3800

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

It is hereby certified that on this the 29th day of July, 2025, the foregoing was served on the individuals below via email and electronic submission:

Robert F. Orr
3434 Edwards Mill Road, Suite 112-372
Raleigh, NC 27612
orr@orrlaw.com

Thomas R. Wilson
Greene Wilson Crow & Smith, P.A.
401 Middle Street
New Bern, NC 28563
twilson@nctrilallawyer.com

Andrew M. Simpson
107 Lavender Street
Carrboro, NC 27514
andrew.simpson.ch@gmail.com

Ann H. Smith
Jackson Lewis P.C.
3737 Glenwood Ave., Suite 450
Raleigh, NC 27612
Ann.Smith@jacksonlewis.com

Counsel for Plaintiffs-Appellants

Terence Steed
Ryan Glover
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602
tsteed@ncdoj.gov
rgrover@ncdoj.gov

Counsel for the State Board Defendant-Appellees

Jeff Warren
Ellis & Winters LLP
413i Parklake Ave., Suite 400
Raleigh, NC 27612
Jeff.warren@elliswinters.com

Counsel for Amici

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/ Electronically Submitted
Phillip J. Strach (NC Bar No. 29456)
phil.strach@nelsonmullins.com