

SUPREME COURT OF NORTH CAROLINA

REBECCA HARPER; AMY CLARE OSEROFF;)
DONALD RUMPH; JOHN ANTHONY BALLA;)
RICHARD R. CREWS; LILY NICOLE QUICK;)
GETTYS COHEN, JR.; SHAWN RUSH;)
JACKSON THOMAS DUNN, JR.; MARK S.)
PETERS; KATHLEEN BARNES; VIRGINIA)
WALTERS BRIEN; and DAVID DWIGHT)
BROWN)

v.)

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; SPEAKER OF THE NORTH)
CAROLINA HOUSE OF REPRESENTATIVES)
TIMOTHY K. MOORE; PRESIDENT PRO)
TEMPORE OF THE NORTH CAROLINA)
SENATE PHILIP E. BERGER; THE NORTH)
CAROLINA STATE BOARD OF ELECTIONS;)
and DAMON CIRCOSTA, in his official capacity)

Wake County

NORTH CAROLINA LEAGUE OF)
CONSERVATION VOTERS, INC.; HENRY M.)
MICHAUX, JR.; DANDRIELLE LEWIS;)
TIMOTHY CHARTIER; TALIA FERNÓS;)
KATHERINE NEWHALL; R. JASON PARSLEY;)
EDNA SCOTT; ROBERTA SCOTT; YVETTE)
ROBERTS; JEREANN KING JOHNSON;)
REVEREND REGINALD WELLS;)

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YARBROUGH WILLIAMS, JR.; REVEREND)
DELORIS L. JERMAN; VIOLA RYALS)
FIGUEROA; and COSMOS GEORGE)

v.)

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)
E. HISE, JR., 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;)
SENATOR PHILIP E. BERGER, in his official)
capacity as President Pro Tempore of the North)
Carolina Senate; THE STATE OF NORTH)
CAROLINA; THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; DAMON CIRCOSTA,)
in his official capacity as Chairman of the North)
Carolina State Board of Elections; STELLA)
ANDERSON, in her official capacity as Secretary)
of the North Carolina State Board of Elections;)
JEFF CARMON III, in his official capacity as)
Member of the North Carolina State Board of)
Elections; STACY EGGERS IV, in his official)
capacity as Member of the North Carolina State)
Board of Elections; TOMMY TUCKER, in his)
official capacity as Member of the North Carolina)
State Board of Elections; and KAREN BRINSON)
BELL, in her official capacity as Executive)
Director of the North Carolina State Board of)
Elections)

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ORDER

On 27 June 2022, Common Cause filed a Motion for Expedited Hearing and Consideration and the Court received responses from all parties. On 19 July 2022, Legislative Defendants filed a Motion for Extension of Time to File Brief, which was allowed by special order on 25 July 2022.

In light of the great public interest in the subject matter of this case, the importance of the issues to the constitutional jurisprudence of this State, and the need to reach a final resolution on the merits at the earliest possible opportunity, Common Cause's Motion for Expedited Hearing and Consideration is allowed as follows: Legislative Defendants' appellant brief shall be filed on or before 1 August 2022 pursuant to the 25 July special order. All other deadlines established by the rules of appellate procedure or prior orders of this Court remain in effect. This consolidated case shall be scheduled for oral argument as soon as practicable after all briefing, on a date to be determined during arguments scheduled the week of 3 October 2022, or by special setting no later than 18 October 2022.

This order does not address Legislative Defendants' Motion to Dismiss.

By order of the Court, this the 28th day of July 2022.

s/ Hudson, J.
For the Court

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WITNESS my hand and the seal of the Supreme Court of North Carolina, this
the 28th day of July 2022.



A handwritten signature in blue ink, which appears to read "Grant E. Buckner". The signature is written in a cursive style and is positioned above a horizontal line.

GRANT E. BUCKNER
Clerk of the Supreme Court

Copy to:

North Carolina Court of Appeals

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No. 413PA21 – Harper v. Hall

Justice BARRINGER dissenting.

Plaintiff Common Cause first requests that this Court expedite the hearing and consideration of this matter because it involves a “significant public issue implicating substantial rights.” However, resolution of this appeal will have no impact on the 2022 elections, and Common Cause fails to identify a single real world, negative consequence that will occur if this case proceeds in customary fashion. In fact, it is very likely that our consideration of this case in October 2022—the expedited scenario imposed by the majority—will instead result in considerable voter confusion since early voting for the November 2022 general elections starts on 20 October 2022. Nonetheless, for no discernible jurisprudential reason, four Justices on this Court have chosen, without explanation, to allow Common Cause’s motion.

In addition, the four Justices are not, at this time, allowing Legislative Defendants to withdraw their own appeal. Legislative Defendants’ pursuit of their appeal will have no effect on the upcoming election but will cost significant taxpayer resources while squandering limited court resources to no purpose. The predecessor case to Legislative Defendants’ appeal is also currently under review by the Supreme Court of the United States. It is unprecedented for this Court to not allow a withdrawal under these circumstances.

Simply put, the majority’s decision to allow Common Cause’s motion to expedite while not allowing Legislative Defendants’ motion to withdraw their appeal

cannot be explained by reason, practice, or precedent. Common Cause’s motion to expedite is meritless. Legislative Defendants’ request to withdraw is more than warranted. Given the absence of any identifiable jurisprudential reason, the majority’s decision today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law.

I. The Motion to Expedite

Two separate appeals are at issue in this case: (1) plaintiffs’ appeal of the trial court’s decision regarding the state legislative maps, and (2) Legislative Defendants’ appeal of the trial court’s decision regarding the federal congressional map. Common Cause moved for expedited hearing and consideration of both appeals.

A. The Legislative Maps Appeal

Unlike previous motions that this Court has recently allowed, Common Cause’s motion to expedite the legislative maps appeal is striking in its failure to identify even one negative consequence that would occur should this matter proceed according to a normal schedule. For instance, in *Hoke County Board of Education v. State*, the State argued that an expedited decision was necessary because otherwise the State would not be able to implement funding for the Year 3 plan which was due at “the start of the[] fiscal year on July 1, 2022.”¹ Similarly, in the plaintiffs’ petition to bypass the Court of Appeals in *Community Success Initiative v. Moore*, the

¹ Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals at 29, *Hoke County Board of Education v. State*, No. 425A21-2 (N.C. Feb. 14, 2022).

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plaintiffs argued that delaying a final adjudication for the case to proceed through the Court of Appeals would deny affected individuals “the franchise for yet another election cycle.”² Likewise, in the plaintiffs’ petition to bypass the Court of Appeals in *Holmes v. Moore*, the plaintiffs argued that delaying final adjudication by waiting for the case to proceed through the Court of Appeals would risk the reinstatement of the contested legislation, requiring election officials “to immediately begin implementing the law’s requirements and educating voters,” which would ultimately be a “waste” and require additional efforts to correct if this Court then overruled the Court of Appeals decision.³ Even in *McKinney v. Goins*, plaintiffs argued that an accelerated decision was necessary to prevent numerous federal and state courts from deciding potentially unnecessary issues that were currently pending, as well as to avoid a potential split in authority.⁴

Compare those at least plausible arguments to the reasons Common Cause offers in the present motion. First, plaintiff argues that the legislative maps appeal should be expedited for the same reasons as our previous ruling in this case—“the need for urgency in reaching a final resolution on the merits at the earliest possible opportunity.” Yet this Court’s previous reason for urgency was the need to render a

² Petition for Discretionary Review Prior to Determination by the Court of Appeals and Motion to Suspend Appellate Rules at 33, *Community Success Initiative v. Moore*, No. 331PA21 (N.C. Apr. 4, 2022).

³ Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals at 18–19, No. 342PA19-2 (N.C. Jan. 14, 2022).

⁴ Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals at 23–24, *McKinney v. Goins*, No. 109PA22-1 (N.C. Apr. 12, 2022).

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final decision early enough that if necessary the legislature could draw new maps and the Board of Elections could implement them prior to the upcoming November elections. *See Harper v. Hall*, 380 N.C. 302, 306–07 (2022) (order prior to opinion). In contrast, at this point, the districts for the upcoming November elections are fixed. This Court’s decision in this case will have no effect on those elections regardless of whether or not we decide that the legislative districts comply with the State Constitution. Accordingly, there is no similar need for urgency in the present matter.

Next, Common Cause argues that “[w]hile this appeal remains pending, the meaning and effect of [redistricting in conformity with the State Constitution] hangs in the balance, leaving North Carolina’s voters with continued uncertainty regarding the status of their right to elect representatives pursuant to maps that comport with state constitutional requirements.” Yet plaintiffs do not identify any actual negative consequence of this “uncertainty.” Instead, an accelerated decision in this case, particularly one that decides this case prior to the conclusion of the 2022 elections, is actually more likely to produce uncertainty rather than clarity. Voters might reasonably be confused, or even dissuaded from voting, if they learn that this Court just ruled that the districts in which they were set to vote were unconstitutional. *See Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.”). Given that, according to Common Cause, briefing on the legislative maps appeal will likely not conclude until two days prior

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to the start of absentee voting, an accelerated decision in this case will only ensure that the decision is released in the middle of an election, maximizing voter confusion.

Finally, Common Cause alleges that “expedited consideration of this matter is warranted to ensure that any additional redistricting this cycle can be completed in an orderly fashion” and “before any future redistricting, avoiding the rushed timeline for future redistricting.” Common Cause does not identify any “additional redistricting” needed for the imminent elections. Indeed, any more changes to the maps, this close to the commencement of voting, would appear to be a clear violation of the Supreme Court of the United States’ “repeated[] emphasi[s]” that “courts ordinarily should not alter state election laws in the period close to an election.” *See Democratic Nat’l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Kavanaugh, J., concurring) (collecting cases). As for future redistricting, according to State Defendants, candidate filing for the 2024 elections is currently set to begin on 4 December 2023. Common Cause fails to explain how an expedited decision from this Court will make any meaningful difference on the legislature’s ability to comply with a deadline that is more than sixteen months away. Indeed, State Defendants take no position on Common Cause’s motion, indicating that they do not perceive that ordinary disposition of this appeal will prevent them from administering future elections on time.

In short, Common Cause fails to identify a single practical, negative consequence that would occur if we allowed the legislative maps appeal to proceed on

a normal schedule. Plaintiffs Harper and the North Carolina League of Conservation Voters (NCLCV), filing in support of Common Cause’s motion to expedite, likewise do not identify any new dangers but merely repeat Common Cause’s unpersuasive arguments. Yet despite the lack of any credible argument or reason supporting this decision, the majority inexplicably has allowed the motion to expedite the legislative maps appeal.

B. The Congressional Map Appeal

As for the congressional map appeal, plaintiffs Common Cause, Harper, and NCLCV all assert that this Court should expedite its decision on that matter because the Supreme Court of the United States granted certiorari to review it. In other words, plaintiffs request that this Court rush to reach a decision based on case law that may very well be reversed only a few short months from now. *See Angie Gou et al., STAT Pack for the Supreme Court’s 2021–22 Term 24* (2022) (reflecting the high percentage of cases that the Supreme Court of the United States reversed last term).

Still, plaintiffs submit that this Court should address the appeal of the congressional map that is currently before the Supreme Court of the United States because it allegedly involves questions of state law. Specifically, Harper and NCLCV plaintiffs argue that the Supreme Court of the United States cannot decide this case without interpreting state law. Likewise, Common Cause submits that a final decision by this Court would fully inform, and thereby “assist,” the Supreme Court of the United States in understanding North Carolina law, thus avoiding a decision

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based on an “incomplete or inaccurate understanding of state law and the scope of this Court’s exercise of remedial power.”

Harper and NCLCV plaintiffs’ argument that this Court must decide this case in order for the Supreme Court of the United States to reach a decision is misguided. Legislative Defendants’ appeal to the Supreme Court of the United States hinges not on whether this Court complied with the requirements of the North Carolina statutes authorizing judicial review of congressional-districting legislation but instead on whether this Court’s actions and interpretations of those statutes were of such a nature that this Court usurped the legislature’s authority to prescribe districts pursuant to the United States Constitution.⁵ Regardless of how this Court interprets the North Carolina statutes allegedly at issue, it cannot eliminate the federal question of whether its previous decision in this case violated the Constitution of the United States. Only the Supreme Court of the United States can answer that question with finality. Furthermore, given that the validity of our previous redistricting decision is presently under review, expediting this case might well result in the Court wasting time and resources resolving an appeal that in a few short months is rendered unconstitutional by the Supreme Court of the United States’ forthcoming decision.

⁵ See Applicants’ Reply in Supp. of Their Emergency Appl. for Stay Pending Pet. for Writ of Cert. at 2–3, *Moore v. Harper*, No. 21-1271 (U.S. Mar. 3, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1271/217666/20220303162705813_2022-03-03%20Moore%20Reply%20Brief.pdf#page=7.

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Additionally, it is worth noting that this Court is not the first forum in which plaintiffs have presented their state law arguments. Rather, in requesting the Supreme Court of the United States deny certiorari of Legislative Defendants' appeal, Common Cause argued that "this case is really about state law,"⁶ and NCLCV argued that it "raise[d] only . . . state-law disputes on issues state courts have not addressed."⁷ Despite plaintiffs' presentation of these arguments, the Supreme Court of the United States still allowed certiorari, *see Moore v. Harper*, No. 21-1271, 2022 WL 2347621, at *1 (U.S. June 30, 2022), indicating its view that it could fully decide the issues presented without gratuitous edification from this Court.

Yet the majority, apparently, disagrees. By expediting this particular appeal, the majority effectively asserts that it knows better than the Supreme Court of the United States and that this Court must move quickly to ensure our nation's highest court is not left without the benefit of our guidance. I, on the other hand, have found no instance, nor have the parties offered any, in which this Court has refused to stay a proceeding once the Supreme Court of the United States granted certiorari, so as to allow our nation's highest court a full review. Given the analysis above, I do not share the majority's unexplained confidence that this case should be the exception.

⁶ Br. in Opp'n of Resp't Common Cause at 30, *Moore*, No. 21-1271 (U.S. May 20, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1271/225937/20220520150719842_2022.05.20%20Common%20Cause%20BIO.pdf#page=43.

⁷ Br. in Opp'n of Resp'ts N.C. League of Conservation Voters, Inc., et al. at 2–3, *Moore*, No. 21-1271 (U.S. May 20, 2022), https://www.supremecourt.gov/DocketPDF/21/21-1271/225909/20220520133247549_21-1271%20BIO%20NCLCV.pdf#page=13.

II. The Motion to Dismiss the Congressional Map Appeal

The need to expedite a decision regarding the congressional map appeal is further lessened by Legislative Defendants' voluntary abandonment of that appeal. After the record was settled on appeal, but prior to the completion of briefing, Legislative Defendants moved to dismiss their congressional map appeal. Explaining that "the remedial Congressional Map ordered by the trial court will apply in 2022" and that "2022 is the only election to which the remedial Congressional Map will apply," Legislative Defendants requested to withdraw the appeal since pursuing it would only cause "further cost and confusion to the taxpayers and voters of North Carolina." In addition, to remedy any loss to the opposing parties, Legislative Defendants offered to pay their taxable appellate costs related to the congressional map appeal.

In response, plaintiff Common Cause took no position on Legislative Defendants' motion to dismiss the appeal. Plaintiffs Harper and NCLCV, however, argue that this Court should not dismiss the appeal, alleging that the motion is a "transparent effort to prevent this Court from addressing important questions" and "pure gamesmanship." Harper and NCLCV plaintiffs further contend that Legislative Defendants are attempting to procure the Supreme Court of the United States' interpretation of certain North Carolina statutes, instead of allowing this Court to interpret those statutes.

As explained above, plaintiffs' fear of the Supreme Court of the United States

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interpreting North Carolina law is unpersuasive. Moreover, the Supreme Court of the United States has long recognized that “state courts are the ultimate expositors of state law.” *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). It is unreasonable to expect the Supreme Court of the United States to suddenly forget or ignore this principle.

More concerningly, neither plaintiffs nor the majority can point to any instance where this Court required an appellant to present oral argument as to why the Court should allow its motion to withdraw the appeal, rather than simply allowing the appellant’s motion to withdraw.⁸ Rather, as a leading North Carolina appellate treatise recognized, the appellate courts of this State “generally grant a motion to dismiss an appeal filed unilaterally by an appellant, provided that the other parties do not show that they will be prejudiced by the dismissal.” Elizabeth Brooks Scherer & Matthew Nis Leerberg, *North Carolina Appellate Practice and Procedure* § 32.02 (2022).

Here, plaintiffs cannot possibly show prejudice. By not appealing the trial court’s decision on the congressional map, plaintiffs have indicated that the congressional map imposed by the trial court is acceptable to them. The congressional

⁸ Indeed, neither plaintiffs nor the majority have identified a case where this Court denied a party’s motion to withdraw its own appeal. At best, plaintiffs proffer a case out of the United States Court of Appeals for the Seventh Circuit where a party filed a motion to dismiss an appeal after the completion of briefing, oral argument, and a draft of the opinion. *See Albers v. Eli Lilly & Co.*, 354 F.3d 644, 646 (7th Cir. 2004). In that case, the movant “decided to dismiss the appeal” only after “oral argument had not gone well.” *Id.* Clearly, *Albers* is distinguishable from the instant case where the first brief has yet to even be filed.

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map will be used in the 2022 elections regardless of this Court's decision on Legislative Defendants' appeal. Further, by offering to cover the appellate costs that plaintiffs have expended in defending this appeal, Legislative Defendants alleviate any economic harm plaintiffs' might otherwise have borne. At the same time, Legislative Defendants are withdrawing their appeal to avoid incurring significant and unnecessary taxpayer expenditures and wasting court resources given that the map at issue will not be changed before the upcoming elections and thereafter may be discarded. The majority's decision to not allow a motion to withdraw in this instance is entirely without precedent in the history of this Court.

By forcing Legislative Defendants to argue not only whether they should be allowed to withdraw their appeal, but also the underlying merits of it, the majority is, at this point, foreclosing a party's ability to craft its own appeal by forcing it to make arguments that they have expressly indicated they do not wish to make. This Court has long recognized that "it is not the role of the appellate courts to create an appeal for an appellant." *In re A.M.O.*, 375 N.C. 717, 721 (2020) (cleaned up). Yet here, the majority is not simply creating an appeal, it is outright forcing one on Legislative Defendants. This extraordinary and unprecedented disposition cannot be ignored. Accordingly, the motion to dismiss should be allowed now.

III. Conclusion

It is admittedly quite unusual for a Justice to dissent from an order that on its surface simply resolves a motion to expedite, and does not address a related motion

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to withdraw. Yet, given the extraordinary way the majority resolves these motions, I cannot remain silent. What is happening in this case cannot go unnoticed. An alliance of special interest groups, unable to convince a majority of the people's representatives to pass certain desired legislation, has now resorted to asking this Court to simply write that legislation into our State's sacred charter—the North Carolina Constitution. It is a feckless attempt to enable a thin majority of our State's highest court to supersede the will of the millions of citizens who participate in our political and legislative processes.

Despite the absence of a single meritorious justification for expediting the legislative maps appeal, the majority has agreed to do so. Furthermore, the majority declines to address the Legislative Defendants' request to withdraw their appeal of the congressional map, forcing the Legislative Defendants to pursue a meaningless appeal. The majority's decision on both of these motions lacks any jurisprudential support. It reeks of judicial activism and should deeply trouble every citizen of this state. Therefore, I emphatically dissent.

Chief Justice NEWBY and Justice BERGER join in this dissent.