App. Nos. 16A1202, 16A1203; Case Nos. 16-649; 16-1023

IN THE
Supreme Court of the United States

NORTH CAROLINA, ET AL.,
Appellants,

v.

SANDRA LITTLE COVINGTON, ET AL.,
Appellees.

REPLY ON APPELLEES' APPLICATION FOR ISSUANCE OF MANDATES FORTHWITH

TO THE HONORABLE JOHN G. ROBERTS JR., CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT COURT OF APPEALS:

1. The State of North Carolina consents to Appellees' Application for Issuance of the Mandates Forthwith in Case Nos. 16-649 and 16-1023. State Resp. ¶ 6. The Legislative Appellants (Philip E. Berger, David R. Lewis, Timothy K. Moore, and Robert A. Rucho) oppose the Application, but do not state that they intend to seek rehearing in either Case No. 16-649 or No. 16-1023. Legis. Resp. at 1, 7. As the Legislative Appellants concede, "[r]ehearing is seldom sought and even more rarely granted." *Id.* at 7.

2. Under this Court's Rules, the only reason to hold the mandate for 25 days is to allow a party to seek rehearing under Rule 44.1, but no party has indicated that it intends to seek rehearing. Indeed, were the Legislative Defendants to seek rehearing after admitting to this Court that they "will comply" with the order to draw new districts

to remedy their racial gerrymander, (Legis. Resp. at 2), it is hard to imagine how counsel could certify that any rehearing petition would be "presented in good faith and not for delay" as required under Rule 44.1. Because no party has indicated an intent to seek rehearing and because that is the only purpose for withholding the mandate for 25 days, Appellants respectfully submit that the Court should issue the mandates in Case Nos. 16-649 and 16-1023 forthwith.

3. Rather than offering any real reason the Court should hold the mandates for 25 days, Legislative Appellants spend most of their response arguing the merits of whether a special election can or should take place as a remedy for their racial gerrymandering. Those are arguments that should be directed to the trial court in the first instance. Indeed, that is exactly what this Court contemplated in remanding to the trial court and directing the trial court to undertake an "'equitable weighing process' to select a fitting remedy for the legal violations it has identified ... taking account of 'what is necessary, what is fair, and what is workable.'" *North Carolina, et al. v. Covington, et al.*, 581 U.S. ___ (2017) (slip op. at 2) (citations omitted).

4. Although Legislative Appellants now seem surprised that the trial court intends to do just what this Court ordered, the trial court has stated that "upon obtaining jurisdiction from the Supreme Court," it will conduct this equitable weighing process. *Covington v. North Carolina*, No. 1:15-cv-399, slip. op. at 3 (M.D.N.C. June 9, 2017) [ECF No. 153]. Given the time-sensitive nature of the relief sought, the trial court has advised the parties that it intends to act promptly upon obtaining jurisdiction from this Court, and it has invited the parties to file statements "[a]ddressing, in addition to any other

relevant considerations: (1) the 'severity and nature' of the constitutional violation; (2) 'the extent of the likely disruption to the ordinary processes of governance if early elections are imposed;' (3) and 'the need to act with proper judicial restraint when intruding on state sovereignty.'" *Id.* at 3-4.[1]

5. Appellees' position—which they intend to press in the trial court as soon as the trial court regains jurisdiction[2]—is that special elections are necessary, fair, and workable as a remedy for the constitutional violations at issue. Unsurprisingly, the Legislative Defendants do not agree with that position. But this is a debate that should occur in the trial court in the first instance, and there is no reason the mandates should not issue forthwith so that the trial court can begin to evaluate the parties' arguments about the need for and feasibility of special elections as soon as possible.[3] The Legislative Appellants' opposition to the Application is simply another attempt to run out the clock

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[1] The trial court has also invited the parties to file statements "[a]ddressing which Defendant, or group of Defendants, has authority under state law to speak on behalf of the State with regard to the various equitable considerations relevant to the drawing of new districts, the ordering of a special election, and any additional remedies necessary to address the constitutional violations identified in the August 15, 2016, Memorandum Opinion." *Covington v. North Carolina*, No. 1:15-cv-399, slip op. at 4 (M.D.N.C. June 9, 2017) [ECF No. 153].

[2] The Legislative Appellants' accusation that Appellees are "taking inconsistent positions in this Court and the district court (or at least engaging in selective disclosure)" with respect to the trial court's jurisdiction is flatly false. In their filings in the trial court, Appellees "request[ed] that the Court expeditiously consider and order the relief requested herein *upon receipt of the Supreme Court's certified judgment or mandate in this case.*" *Covington v. North Carolina*, No. 1:15-cv-399, Mot. at 1 (M.D.N.C. June 8, 2017) [ECF No. 150, ECF No. 151] (emphasis added).

[3] Appellees do not intend to respond herein to Legislative Appellants' arguments about the feasibility of special election because these are arguments for the trial court. But Appellants' protest that they might be allowed only a "whopping 14 days to complete the delicate process of redistricting," (Legis. Resp. at 5) is curious given that North Carolina law expressly provides that two weeks is sufficient for the legislature to remedy defects in a redistricting plan. *See* N.C. Gen. Stat. § 120-2.4 (granting legislature two week period to remedy defects in redistricting plans before courts may impose new maps).

on the possibility of a special election remedy, even though it is a possibility this Court explicitly contemplated the district court would weigh upon remand. This Court should reject the Legislative Appellants' transparent ploy for further delay.

6. This Court has recognized the need for the expeditious issuance of its judgments in other redistricting cases. *See, e.g., Perry, et al. v. Perez, et al.*, 565 U.S. 388, 399 (2012) (issuing judgment forthwith for district court to reevaluate its remedial redistricting plan). It should do the same here.

WHEREFORE, Appellees respectfully request an order specially directing that formal mandates issue forthwith in Case Nos. 16-649 and 16-1023.

June 14, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jessica Ring Amunson, a member of the Bar of this Court, hereby certify that on June 14, 2017 a copy of this Reply on Application for Issuance of the Mandates Forthwith was sent via email and overnight mail, postage prepaid, to:

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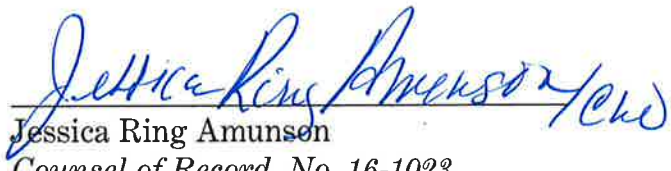

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