No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellants, REBECCA HARPER, et al., Plaintiffs-Appellants, and COMMON CAUSE, et al., 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 500085

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RESPONSE TO PLAINTIFFS-APPELLANTS' CROSS-MOTIONS FOR SUMMARY AFFIRMANCE

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Defendants-Appellees President Pro Tempore Philip E. Berger, Senator Warren Daniel, Senator Ralph E. Hise, Senator Paul Newton, Representative Destin Hall, and Speaker Timothy K. Moore, each in their respective official capacities ("Legislative Defendants") through counsel, hereby submit this response in opposition to Plaintiffs-Appellants ("Plaintiffs") cross-motions for summary affirmance, and state as follows:

1. This Court should grant Legislative Defendants' Motion to Dismiss their cross appeal because doing so will reduce the risk of confusion and unnecessary taxpayer cost without causing any prejudice to Plaintiffs. Plaintiffs' arguments to the contrary, including their extraordinary request for summary affirmance, are without merit. Accordingly, this Court should deny Plaintiffs' cross-motions for summary affirmance.

I. Legislative Defendants' Motion to Dismiss Should Be Granted.

2. Legislative Defendants seek to dismiss their cross appeal because all parties recognize that regardless of the outcome of the appeal the remedial congressional map imposed by the Superior Court will only apply in the 2022 elections. Although Legislative Defendants believe the remedial congressional plan is unlawful for several, independent reasons, at this juncture, Legislative Defendants believe that the best interests of the State lie in dismissing their cross appeal. Each day the election nears is another day that further proceedings prior to the upcoming election will only serve to increase voter confusion. After all, the risk of "judicially created [voter] confusion" is highest in the lead up to an election. *Republican Nat'l*

Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam). And, since this Court's decision will have no effect on the 2022 elections, the risk of confusion cannot be justified by any on-the-ground benefit from this Court's review of Legislative Defendants' cross appeal arguments. Thus, for the reasons stated in their motion, Legislative Defendants respectfully submit that this Court should dismiss Legislative Defendants' cross appeal.

3. Plaintiffs counter by arguing that the motion to dismiss this cross appeal should be denied because of "prejudice" and "gamesmanship." Neither argument has any merit.

4. First, Plaintiffs make no serious argument for prejudice. Plaintiffs make no argument that they expended any resources that Legislative Defendants have not already offered to pay. Plaintiffs make no argument that proceedings in this court have advanced to a sufficient degree—such as briefing or argument—that they will be prejudiced. Plaintiffs make no argument that dismissing this cross appeal will deny Plaintiffs any relief that Plaintiffs have already secured. Plaintiffs point to no adverse consequences from dismissing Legislative Defendants' cross appeal. Instead, under the guise of a prejudice argument, Plaintiffs simply argue that they disagree with Legislative Defendants on the positions advanced in *a different court*, namely the U.S. Supreme Court.

5. Second, Plaintiffs' claims of "gamesmanship" ring hollow. If anything, Plaintiffs are the ones engaging in "gamesmanship" by using their responses to contort the issues presented in this cross appeal beyond recognition. It is thus

important to clarify what is at issue in Legislative Defendants' cross appeal and what is not.

6. This cross appeal concerns relatively narrow issues related to the Superior Court's entry of remedial maps that apply (and only apply) to the 2022 elections. In its February 4, 2022 order, this Court remanded to the Superior Court with instructions that, after subsequent map submissions by the parties, the Superior Court needed to "approve or adopt . . . congressional and state legislative districting plans" that were "compliant" with "criteria" set out by this Court. (R pp 3822–23). On February 14, 2022, this Court provided further elaboration on the "criteria" that the Superior Court needed to follow. (R p 3953). Purporting to follow this Court's instructions, the Superior Court imposed remedial congressional maps for the 2022 elections. (R p 4888). This cross appeal followed.

7. As this cross appeal concerns the Superior Court's post-remand imposition of remedial congressional maps for the 2022 elections, this cross appeal is *not* a rehearing or attempt to relitigate questions this Court has already decided. This cross appeal does not concern the General Assembly's 2021 enacted maps. After all, this Court in its February 4, 2022 order and February 14, 2022 opinion, has finally decided that these maps were unlawful and "enjoin[ed] the use of these maps *in any future elections*." R p 3820 (emphasis added). The General Assembly's 2021 enacted maps and the "issues" relating to them have been finally "adjudged." *Mkt. St. Ry. Co. v. R.R. Comm'n of State of Cal.*, 324 U.S. 548, 551 (1945). This cross appeal does not concern the imposition of its remedial maps for the 2022 primary elections. This

Court finally adjudged that these maps would be in effect for those primary elections by denying Legislative Defendants' stay pending appeal. *See* Order, *Harper v. Hall*, No. 413PA21 (Feb. 23, 2022). Thus, this cross appeal would have no bearing on those past decisions by this Court.

8. In exclusively challenging the 2022 congressional remedial map, Legislative Defendants intended to only raise a limited set of North Carolina state law issues, concerning, *inter alia*, the Superior Court's approach to the evidence presented on remand and the *application* of this Court's announced criteria. Plaintiffs' motions for summary affirmance seek to inject the antecedent issue of the Elections Clause of the U.S. Constitution into an appeal they did not bring. Appellate Rule 28(b)(2) sets out that it is the arguments brought forth in an appellant's brief, and not those proposed issues on appeal in the record, that ultimately define the scope of the appeal. Especially considering that this Court has already finally "adjudged" the Elections Clause issue, Plaintiffs' attempt to control the issues in Legislative Defendants' appeal (one that Legislative Defendants seek to dismiss) is suggestive of "strategic behavior" on their part. Why Plaintiffs seek to have this Court address the Elections Clause issue through summary affirmance is unclear, unless, of course, it is *Plaintiffs* that seek to use these proceedings to "engineer[]" an effect on the U.S. Supreme Court's impending review.

II. Plaintiffs' Requested Terms Of Dismissal Are Procedurally Improper And Substantively Meritless.

9. "After the record on appeal has been filed," Rule 37(e)(2) of the North Carolina Rules of Appellate Procedure permits an appellant to move for dismissal of

the appeal. N.C. R. App. P. 37(e)(2). In a Rule 37(e)(2) motion, the appellant must specify (1) the reasons for the dismissal; (2) "the positions of all parties on the motion to dismiss"; and (3) "the positions of all parties on the allocation of taxed costs." *Id.* When granting the motion, the Court may dismiss the appeal "by order upon such terms as agreed to by the parties or as fixed by the appellate court." *Id.*

10. Under the text of Rule 37, the "terms" that may be "fixed by the appellate court" are merely "taxed costs." That conclusion follows from the text of Rule 37(e)(2) itself, which requires the appellant to specify the parties' positions "on the allocation of taxed costs" and then permits the Court to dismiss the appeal on "such terms"—*i.e.*, *those* agreed-upon terms of allocating the taxed costs—or on the "terms" that are "fixed by the appellate court." Thus, under the plain text of the rule, the Court may adopt its own allocation of the taxed costs in place of the parties' agreement or if the parties were unable to reach an agreement.

11. Plaintiffs attempt to analogize Rule 37(e) with Rule 42(b)(2) of the Federal Rules of Appellate Procedure to reach federal caselaw they believe supports their "prejudice" and "gamesmanship" arguments. However, the federal and North Carolina appellate rules are not "materially identical" as Plaintiffs claim. Pls.' Br. in Opp. 3). Instead, the federal Rule 42(b)(2) is broader, providing that an appeal may be dismissed "by order on terms agreed to by the parties or fixed by the court." The modifier "such terms" creates a material difference and narrows the scope of North Carolina's Rule 37(e).

12. Even so, the caselaw cited by Plaintiffs in support of their public policy arguments are either inapplicable or nonbinding. For example, *Albers v. Eli Lilly & Co.*, 354 F.3d 644 (7th Cir. 2004) (per curiam) is inapplicable as *Albers* filed his motion to dismiss his appeal after oral argument and after the Court had drafted an opinion. Additionally, *Bynum v. Wilson Cty.*, 215 N.C. App. 389, 716 S.E.2d 90 (2011) (Mem.) is a wholly non-binding, unpublished opinion—a key fact intentionally omitted or ignored by Plaintiffs. This Court should not accept Plaintiffs' invitation to address unnecessary political arguments and dismiss Legislative Defendant's appeal of the remedial congressional plans. *See Hailey v. Tropic Leisure Corp.*, 275 N.C. App. 485, 488, 854 S.E.2d 132, 136 (2020) (granting the defendants motion to dismiss despite the parties' disagreement as to whether the Virgin Islands Supreme Court had "accomplishe[d] what Defendants have requested from [the North Carolina Court of Appeals] on appeal"). Plaintiffs-Appellants arguments to the contrary are without merit.

13. Plaintiffs also make the extraordinary argument that Rule 37(e) permits this Court to decide merits questions on a motion to withdraw the appeal. For example, Plaintiffs ask this Court to use this motion to interpret three statutes that, Plaintiffs say, are the center of not only this case, but also a case the Supreme Court has granted to review. *See* Pls.' Br. in Opp. 13. But Plaintiffs have not plead, challenged in the trial court, or preserved on appeal any arguments regarding those statutes. Any consideration of these claims would allow Plaintiffs to end run around Rules 10 and 28 of the North Carolina Rules of Appellate Procedure regarding issues

on appeal. They also ask the Court to hold that Defendants have "waived" their ability to challenge "any prior rulings in this case as violative of state or federal law." Pls.' Br. in Opp. 13. Plaintiffs assert that this Court has authority to issue these sweeping pronouncements under Rule 37(e)(2)'s authorization for the court to dismiss an appeal "upon such terms" it chooses. *See* Pls.' Br. in Opp. 12-13. On Plaintiffs' reading, then, hidden away in Rule 37(e)(2), unbeknownst to anyone until now, is a limitless judicial power for this Court to convert an appellant's motion to withdraw an appeal into some sort of super-writ for the purpose of addressing any legal question that might (or might not) have arisen in the course of the actual appeal had the appellant continued to press it. But that improbable interpretation is clearly foreclosed by the plain text and context of Rule 37(e)(2).

14. Next, Plaintiffs forgo any pretense of trying to ground their argument in the text of Rule 37. Instead, they ask this Court to not only *deny* the motion, but also outright *affirm* the trial court's decision with absolutely no merits briefing. *See* Pls.' Br. 9-11. Unsurprisingly, Plaintiffs provide no legal basis for this request—which effectively seeks summary affirmance without even filing a separate, formal motion requesting it. Instead, they cite *Albers v. Eli Lilly & Co.*, 354 F.3d 644 (7th Cir. 2004) (per curiam), for the proposition that "[w]hen dismissal of an appeal is improper and a court can resolve an appeal on the record before it, affirming the trial court's judgment is an appropriate remedy." Pls.' Br. in Opp. 9 (citing *Albers*, 354 F.3d at 646). But the motion to dismiss the appeal in *Albers* was not filed until after briefing, after oral argument, and even "[a]fter a draft of th[e] opinion had been written."

Albers, 354 F.3d at 646. Thus, the appeal was fully briefed and argued—and almost decided. Here, in contrast, the appellants have not even filed their opening brief yet. And nothing in *Albers* or the North Carolina Rules of Appellate Procedure permits Plaintiffs' attempt to short-circuit the appellate process.

15. In sum, Plaintiffs' requested terms of dismissal (or, really, summary affirmance) are procedurally improper and should be denied as such.

16. Moreover, to the extent Plaintiffs believe their requested terms of dismissal could potentially frustrate the U.S. Supreme Court's review in *Moore v. Harper*, they are mistaken. The U.S. Supreme Court's jurisdiction to review state-court decisions is governed by federal law, *see* 28 U.S.C. § 1257(a), and the Supreme Court has already granted review despite Plaintiffs' arguments that jurisdiction was lacking under federal law, *see, e.g.*, Brief in Opposition to Certiorari of Respondents North Carolina League of Conservation Voters, Inc., et al. at 17–19, *Moore v. Harper*, No. 21–1271 (U.S. May 20, 2022).

WHEREFORE, Legislative Defendants request that this Court grant Legislative-Defendants' Motion to Dismiss and deny Plaintiffs' Cross-Motions for Summary Affirmance.

Respectfully submitted this 21st day of July, 2022.

NELSON MULLINS RILEY & SCARBOROUGH LLP

Electronically Submitted
Phillip J. Strach
NC Bar No. 29456
4140 Parklake Avenue, Suite 200

Raleigh, NC 27612
Telephone: (919) 329-3800
Fax: (919) 329-3799
phillip.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.

Thomas A. Farr (NC Bar No. 10871)
tom.farr@nelsonmullins.com
Alyssa M. Riggins (NC Bar No. 52366)
Alyssa.riggins@nelsonmullins.com
4140 Parklane Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 329-3800

BAKER & HOSTETLER LLP

Katherine L. McKnight (VA Bar. No. 81482)*
kmcknight@bakerlaw.com
E. Mark Braden (DC Bar No. 419915)*
mbraden@bakerlaw.com
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
Telephone: 202.861.1500

Counsel for Legislative Defendants

**Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 21st day of July, 2022, served a copy of the foregoing on the following counsel for the parties at the following addresses by electronic mail:

Burton Craige
Narenda K. Ghosh
Paul E. Smith
Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Counsel for Plaintiffs Rebecca Harper, et al.

Abha Khanna
Elias Law Group LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
akhanna@elias.law

Counsel for Plaintiffs Rebecca Harper, et al.

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
Arnold and Porter Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
Elisabeth.theodore@arnoldporter.com

Counsel for Plaintiffs Rebecca Harper, et al.

Aria C. Branch
Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, DC 20002
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

Counsel for Plaintiffs Rebecca Harper, et al.

Terence Steed
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
tsteed@ncdoj.gov

Counsel for the North Carolina State Board of Elections; Damon Circosta, Stella Anderson, Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities with the State Board of Elections

Stephen D. Feldman
Robinson, Bradshaw & Hinson, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com
Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

David J. Bradford
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
dbradford@jenner.com
Counsel for Plaintiffs North Carolina League of Conservation of Voters, et al.

Sam Hirsch
Jessica Ring Amunson
Kali Bracey
Zachary C. Schauf
Karthik P. Reddy
Urja Mittal
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington,DC 20001
shirsch@jenner.com
zschauf@jenner.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Southern Coalition For Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
Mitchellbrown@scsj.org
Katelin@scsj.org

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com

Counsel for Intervenor Common Cause

Adam K. Doerr
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
Robinson, Bradshaw & Hinson, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
ezimmerman@robinsonbradshaw.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/electronically submitted
Phillip J. Strach, NCSB #29456