SUPREME COURT OF NORTH CAROLINA

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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; 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; DAMON CIRCOSTA, in his official capacity

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNOS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v.

From N.C. Court of Appeals
P21-525

From Wake
21CVS015426
21CVS500085

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

This matter comes before the Court pursuant to a petition for rehearing filed by legislative-defendants and a corresponding motion to dismiss petition for rehearing filed by plaintiff-intervenor Common Cause.

The Rules of Appellate Procedure provide that a petition for rehearing "shall state with particularity the points of fact or law that, in the opinion of the petitioner,

the court has overlooked or misapprehended . . . ." N.C. R. App. P. 31(a). Further, the Rules provide that "[a] determination to grant or deny [the petition] will be made solely upon the written petition; no written response will be received from the opposing party . . . ." N.C. R. App. P. 31(c).

Plaintiff-intervenor's filing responds substantively to legislative-defendants' petition for rehearing. Such a filing is expressly not permitted by the Rules of Appellate Procedure and plainly violates Rule 31(c) and Rule 37(a). Accordingly, we dismiss as frivolous plaintiff-intervenor's motion to dismiss, and the filing is hereby stricken because it grossly violates appellate rules.

In exercising our duty and authority to address alleged errors of law, this Court has granted rehearing of cases under both Rule 31 and its historical predecessor, former Rule 44. In *Nowell v. Neal*, this Court provided guidance on when a litigant has satisfied the criteria for rehearing under Rule 31. 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). In addressing rehearing under a predecessor version of Rule 31 with nearly identical operative language, the Court observed that a recently issued opinion appropriately is reheard if the petitioner makes a satisfactory showing that the opinion may be erroneous: "No petition to rehear was filed. That is the appropriate method of obtaining redress from errors committed by this Court." *Id*.

This Court has consistently allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*. *See*, *e.g.*, *Bailey v. Meadows Co.*, 154 N.C. 71, 69 S.E. 746 (1910) (modifying prior opinion upon grant of rehearing);

Clary v. Alexander Cty. Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975) (withdrawing prior opinion upon grant of rehearing); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 237 S.E.2d 21 (1977) (same); *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985) (affirming prior opinion upon grant of rehearing); *Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987) (withdrawing prior opinion upon grant of rehearing); *Wilson v. State Farm Mut. Auto. Ins. Co.*, 329 N.C. 262, 404 S.E.2d 852 (1991) (withdrawing in part and affirming in part prior opinion upon grant of rehearing); *Swanson v. State*, 330 N.C. 390, 410 S.E.2d 490 (1991) (affirming prior opinion upon grant of rehearing), *vacated and remanded*, 509 U.S. 916 (1993); and *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999) (superseding prior opinion upon grant of rehearing).

Upon consideration of legislative-defendants' petition and the arguments therein, this Court allows the petition for rehearing. The parties are hereby directed as follows:

(1) Legislative-defendants shall file supplemental briefs with this Court on or before 17 February 2023.

(2) All plaintiffs and shall file supplemental briefs with this Court on or before 3 March 2023.

(3) In addition to the issues raised in the petition for rehearing, the parties shall also brief the following issues:

(a) Whether congressional and legislative maps utilized for the 2022 election, which were drawn at the direction of this Court, are effective for future elections;

(b) What impact, if any, the following provisions of the North Carolina Constitution have on our analysis: Article II, Section 3(4) and Article II, Section (5)(4); and

(c) What remedies, if any, may be appropriate.

This matter shall be placed on the 14 March 2023 calendar for rehearing.

By order of the Court in Conference, this the 3rd day of February 2023.

/s/ Allen, J.
For the Court

Justices Morgan and Earls dissent as set out in the attached statement.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of February 2023.

Grant E. Buckner
Clerk of the Supreme Court

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Justice EARLS dissenting.

The majority's order fails to acknowledge the radical break with 205 years of history that the decision to rehear this case represents. It has long been the practice of this Court to respect precedent and the principle that once the Court has ruled, that ruling will not be disturbed merely because of a change in the Court's composition. Indeed, data from the Supreme Court's electronic filing system indicate that, since January 1993, a total of 214 petitions for rehearing have been filed, but rehearing has been allowed in only two cases.[1]

It has been the understood practice of this Court that rehearing is not allowed solely because a Justice may have had a change of heart after the opinion in the case has been issued or because an opinion was controversial. Moreover, this Court has respected the idea that "even if judges have ideological preferences and methodological differences . . . partisan loyalties [should] fade away after investiture to reveal a judiciary of men and women bound together by collegiality norms and the rule of law." Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1373, 1375 (2021). For these reasons, rehearing under our rules is meant to be

[1] The Court most recently granted rehearing in *Jones v. City of Durham*, 361 N.C. 144 (2006). There, the Court granted rehearing for the limited purpose of reconsidering specific evidence in a negligence action that involved a single plaintiff, rather than to consider abolishing a constitutional right that belongs to millions of voters. There was no dissent to the per curiam final opinion of the Court, indicating the absence of any partisan divide over the issue. The other case in which the Court permitted rehearing was *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). That case similarly did not involve a fundamental issue central to the structure of our democracy and had no impact whatsoever on elections.

limited to the rare occasions when the Court was initially unaware of material evidence already in the record or makes an obvious and indisputable error.

To be clear, whether one considers the entire 205 years that this Court has been in existence or the most recent thirty years, there has been no shortage of politically controversial cases, and it is not unusual for the partisan balance of the court to shift. Respect for the institution and the integrity of its processes kept opportunities for rehearing narrow in scope and exceedingly rare. Today, that tradition is abandoned.

Nothing has changed since we rendered our opinion in this case on 16 December 2022: The legal issues are the same; the evidence is the same; and the controlling law is the same. The only thing that has changed is the political composition of the Court. Now, approximately one month since this shift, the Court has taken an extraordinary action: It is allowing rehearing without justification.

More troubling still, today this Court grants not one but two petitions for rehearing. *See Holmes v. Moore*, 2022-NCSC-122 (Feb. 3, 2023) (order on motion for rehearing) [hereinafter *Holmes* Order]. This means that in a single day, the majority has granted more petitions for rehearing than it has over the past twenty years. There is nothing constitutionally conservative about the Court's decisions to allow rehearing in these cases. Going down this path is a radical departure from the way this Court has operated, and these orders represent a rejection of the guardrails that

have historically protected the legitimacy of the Court. Not only does today's display of raw partisanship call into question the impartiality of the courts, but it erodes the notion that the judicial branch has the institutional capacity to be a principled check on legislation that violates constitutional and human rights.

Despite its brevity, the Court's order is riddled with inaccuracies. It misleadingly states, for example, that this Court's previous decision in *Nowell v. Neal*, 249 N.C. 516 (1959), "provide[s] guidance on when a litigant has satisfied the criteria for rehearing." *Harper v. Hall*, No. 13P19, at 3 (Feb. 3, 2023) (order on motion for rehearing) [hereinafter Order] (emphasis added). Notably, the granting or denial of a petition for rehearing was not at issue in *Nowell*—none of the parties there requested rehearing nor did the Court consider granting as much. Rather than defining the showing a petitioner must make before a petition for rehearing is properly granted, *Nowell* simply pointed out the unremarkable fact that such a petition is "the appropriate method of obtaining redress from errors committed by this Court." *Nowell*, 249 N.C. at 521.

The Court's order then makes the bold claim that "[t]his Court has *consistently* allowed a petition for rehearing when the petitioner has made the showing required by *Nowell*."[2] Order at 3. The Court cites eight cases in support of its assertion, none

[2] To repeat, *Nowell* did not define any "showing" that must be made, and the only "guidance" it provides is its recognition that Rule 31—what was then Rule 44—is the means by which a party asks one of this State's appellate courts to review one of its own decisions. 249 N.C. at 521.

of which were decided in this millennium and none of which mention *Nowell* or its fictitious standard.

The first of those cases, *Bailey v. Meadows Co.*, 154 N.C. 71 (1910), was decided in 1910—forty-nine years before *Nowell* defined the "showing" that *Bailey* supposedly applied. Moreover, *Bailey* was decided 113 years ago, highlighting the scarcity of cases from which the majority can draw in attempting to downplay the radical action it has taken today. Finally, the *Bailey* Court granted reconsideration for the narrow purpose of reviewing evidence that it failed to consider initially. By contrast, today's order does not constrain review to limited evidentiary questions but instead grants in full a motion that seeks to reverse the *entirety of two separate decisions* of this Court. *See Harper v. Hall*, 380 N.C. 317, *cert. granted sub nom.*, *Moore v. Harper*, 142 S. Ct. 2901 (2022); *Harper v. Hall*, ___ N.C. ___, 2022 N.C. LEXIS 1100 (Dec. 16, 2022).

The other cases the majority cites are similarly unavailing. For example, the Court permitted rehearing in *Clary v. Alexander County Board of Education*, 286 N.C. 525 (1975), after the plaintiffs brought to light evidence to which the parties had stipulated and agreed "would be considered as having been introduced in evidence without the necessity of putting [it] in 'one by one.' " *Id.* at 529. Despite the stipulation, the evidence was overlooked. *Id.* But these facts were "prerequisite to recovery by plaintiff[s]. In the absence thereof," the defendant's motions for directed

verdicts were granted. *Id.* Reconsideration was therefore necessary to consider the stipulated evidence. *Id.* In *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 181 (1977), the Court granted rehearing and withdrew its first opinion because it did not apply the controlling legal statute. The defendant in *Wilson v. State Farm Mutual Automobile Ins. Co.*, 329 N.C. 262 (1991) (per curiam), "petitioned for a rehearing 'for the purpose of correcting a very specific and limited error of fact and law, rather than for the purpose of affecting the Court's ultimate conclusion.' " *Id.* at 263. And in *Alford v. Shaw*, 320 N.C. 465 (1987), the Court granted rehearing because it originally misunderstood the pertinent legal issue.

Rather than supporting the majority's position, these cases demonstrate that rehearing in this Court is used cautiously; it is rarely permitted, and when allowed, it is limited in scope. Legislative Defendants' motion, by contrast, seeks to upend the constitutional guarantee that voters in the State will enjoy "substantially equal voting power," regardless of their political affiliations. *See Harper*, 380 N.C. at 376. Such a change would fundamentally alter the political rights of every voter in North Carolina.

The consequences of this Court's orders are grave. The judiciary's "authority . . . depends in large measure on the public's willingness to respect and follow its decisions." *Williams-Yulee v. Florida. Bar*, 575 U.S. 433, 446 (2015). The public's trust in this Court, in turn, depends on the fragile confidence that our jurisprudence will

not change with the tide of each election. Yet it took this Court just one month to send a smoke signal to the public that our decisions are fleeting, and our precedent is only as enduring as the terms of the justices who sit on the bench. The majority has cloaked its power grab with a thin veil of mischaracterized legal authorities. I write to make clear that the emperor has no clothes. Because this Court's decision today is an affront to the jurisprudence of this State and to the citizens it has sworn an oath to serve "impartially," "without favoritism to anyone or to the State," I dissent. *See* N.C.G.S. § 11-11 (2022).

Justice MORGAN joins in this dissenting opinion.