Nos. 16-1270 and 16-1271

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RALEIGH WAKE CITIZENS ASSOCIATION; JANNET B. BARNES; BEVERLEY S. CLARK; WILLIAM B. CLIFFORD; BRIAN FITZSIMMONS; GREG FLYNN; DUSTIN MATTHEW INGALLS; AMY T. LEE; ERVIN PORTMAN; SUSAN PORTMAN; JANE C. ROGERS; BARBARA D. VANDENBERGH; JOHN G. VANDENBERGH; AMY WOMBLE; PERRY WOODS,

Plaintiffs-Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant-Appellee.

CALLA WRIGHT; WILLIE J. BETHEL; AMY T. LEE; AMYGAYLE L. WOMBLE; BARBARA VANDENBERGH; JOHN G. VANDENBERGH; AJAMU G. DILLAHUNT; ELAINE E. DILLAHUNT; LUCINDA H. MACKETHAN; WILLIAM B. CLIFFORD; ANN LONG CAMPBELL; GREG FLYNN; BEVERLEY S. CLARK; CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, d/b/a Coalition of Concerned Citizens for African-American Children; RALEIGH WAKE CITIZENS ASSOCIATION,

Plaintiffs-Appellants,

v.

WAKE COUNTY BOARD OF ELECTIONS,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina

APPELLANTS' MOTION TO ISSUE MANDATE

APPELLANTS Raleigh Wake Citizens Association, *et al.*, and APPELLANTS Calla Wright, *et al.*, by and through their undersigned counsel, respectfully move this Court, pursuant to Rules 27, 40 and 41 of the Federal Rules of Appellate Procedure, to issue its mandate immediately so that its judgment in this matter may be enforced.

In support of this Motion, Appellants show the Court the following:

1. Appellee Wake County Board of Elections today filed herein a Petition for Rehearing En Banc which automatically stays the issuance of the mandate "unless the court orders otherwise." Fed. R. App. P. 41(d)(1).

2. Following this Court's decision on July 1, 2016, the trial court, even before the mandate issued, issued an order on July 8, 2016 directing the Defendant to inform the court of election deadlines including when ballots must be printed and overseas ballots mailed. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 5:15-cv-156, ECF No. 78, at 5 (E.D.N.C. July 8, 2016) (order) (attached as Exhibit A). The July 8, 2016 Order also requests that legislative

leaders "notify the court whether the General Assembly will devise a new redistricting plan . . . ." *Id.*

3. It is in the public interest for the mandate to issue forthwith so that a constitutional system of electing the Wake County School Board and Wake County Board of County Commissioners can be implemented in 2016.

4. This Court has the authority to direct that its mandate be issued immediately, and good cause exists to exercise that authority here. Under Federal Rule of Appellate Procedure 41, the Court has broad authority to "shorten or extend the time" for issuance of its mandate. Fed. Rule App. Pro. 41(b). The filing of a petition for rehearing en banc does not abridge the Court's broad authority to order that the mandate issue forthwith. Fed. Rule App. Pro. 41(d)(1) (filing of a petition for rehearing stays the mandate "unless the court orders otherwise"). This Court routinely directs that its mandates issue immediately in cases where further briefing or argument would not aid the court, and has done so in cases where the possibility of rehearing and further appeal remains. *See, e.g.*, *United States v. Tate*, 582 Fed. App'x 173 (4th Cir. 2014) (unpublished) (stating that further "argument would not aid the decisional process," and directing that the mandate issue forthwith and that counsel inform the defendant in writing of his right to petition the Supreme Court for further review).

5. Because this Court's judgment cannot be given full effect until the mandate issues, and because this case involves an upcoming election, it is critical for the fair and judicious administration of the upcoming election that the mandate issue immediately, notwithstanding the pending Petition for Rehearing En Banc. As explained below, Plaintiffs contend that no new districts need to be drawn in order to hold elections in 2016. Because both bodies redrew their district lines in 2011 in fully constitutional plans that comply with the one-person, one-vote requirement, those prior districts can be used again, as they have been for at least four elections this decade. However, time is running out for the implementation of the Court's judgment.

6. If elections are held in 2016 using the districts that the Court has ruled are unconstitutional under a proper application of the Supreme Court's decision in *Larios v. Cox*, 542 U.S. 947 (2004) and *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301 (2016), it will be the first time that public officials will be elected from those districts and it will make it much more difficult, and more confusing to voters, to ultimately implement a remedy that changes those districts. Indeed, Plaintiffs' request that the mandate issue notwithstanding the Petition for Rehearing En Banc is similar to seeking a preliminary injunction to preserve the status quo. Plaintiffs have proven after trial and after this Court has now ruled, that the new, malapportioned districts enacted by the General Assembly violate their

right to cast a ballot that counts equally to every other Wake County voter. They should not be forced to participate in elections using those unconstitutional districts at this point.

7. Indeed, in its decision entered on July 1, 2016, striking down the redistricting plans for the Wake County Board of Education and Board of County Commissioners, this Court instructed that it saw "no reason why the November 2016 elections should proceed under the unconstitutional plans we strike down today." *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, No. 16-1270, ECF No. 51 (4th Cir. July 1, 2016) (slip op., at 44 n.13).

8. Moreover, if the mandate is stayed pending a decision on the Petition for Rehearing En Banc, rather than issued immediately, there is substantial risk that Plaintiffs may be deprived on *Purcell* grounds of the constitutional remedy to which they are entitled. In its July 8 order, the District Court stated:

> The court will have to address the propriety of such a remedy and address whether footnote 13 in the Fourth Circuit's opinion mandates such a remedy. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam); *Ely*, 403 U.S. at 114-15; *Reynolds*, 377 U.S. at 585-86; *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914,919 (9th Cir. 2003) (en banc) (per curiam)

Raleigh Wake Citizens Ass'n, No. 5:15-cv-156, ECF No. 78, at 7. Thus, this Court should grant this motion in order to avoid raising any potential *Purcell* concerns and to clarify for the District Court its intention that a remedy be established immediately.

9. With respect to the remedy, upon information and belief, Plaintiffs believe that Wake County election officials will begin the process of preparing ballots for the November 8, 2016, election on August 10, 2016, and will mail absentee ballots on September 9, 2016.

10. Plaintiffs believe that there exists a simple and easily-implemented remedy—reinstitution of the constitutional prior plans for election of members of both boards—and immediate issuance of the mandate will facilitate the implementation of that remedy.

11. With regard to implementing this Court's Judgment, the District Court only has the authority to issue a permanent injunction prohibiting the use of the districts that this Court found unconstitutional. Because neither Session Law 2013-110 nor Session Law 2015-4 contains a severability clause, *see* 2013 N.C. Sess. Laws 110; 2015 N.C. Sess. Laws 4, and neither scheme can be implemented absent the unconstitutional elements, both statutes are now unconstitutional. *See I.N.S. v. Chadha*, 462 U.S. 919, 934 (1983) (a provision of an unconstitutional law that lacks a severability clause is severable only where what remains would be, standing alone, "fully operative as a law.") This means that the method of election for the Board of County Commissioners and the Board of Education should revert back to the last constitutional, legally enforceable method of election, which would be the districts and the election methods in use for each Board prior to the change.

See, e.g., Dillard v. Baldwin Cnty. Comm'n, 222 F. Supp. 2d 1283, 1287 (M.D. Ala. 2002) (ordering that "the Baldwin County Commission shall return to the system of four members elected at-large used before the court's 1988 injunction"). *Cf. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 224) (granting preliminary injunctive relief restoring prior status quo in a voting rights case).

12. The Court of Appeals briefly addressed remedy issues in its first opinion in this case, *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015). There the Court explained:

> State law also provides, for example, that the State Board of Elections can make reasonable interim rules with respect to pending elections. N.C. Gen. Stat. § 163-22.2 ("In the event . . . any State election law . . . is held unconstitutional or invalid by a State or federal court or is unenforceable . . ., the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election."). Without question, then, a valid election could take place if Plaintiffs succeed on the merits and successfully enjoin the Session Law.

13. Therefore, unless and until the North Carolina General Assembly makes any other provision, the authority lies with the State Board of Elections to make reasonable interim rules to return both Boards to the election methods previously in place

14. To revert back to the prior, fully constitutional election methods, the adjustments required in 2016 for the Wake County Board of County

Commissioners are minimal. In order to return that Board to the structure and system in place before Session Law 2015-4, the elections for super-districts A and B are void, and this year's at-large elections for the three commission seats from residency districts should proceed, electing those members to four-year terms. There is no need to reopen the filing period for the at-large elections from existing residency district seats for the Board of Commissioners because those seats were up for election under the prior system.

15. For the Wake County School Board, the State Board of Elections needs to direct the local board to take steps to return to the prior constitutionally permissible system, which included odd-year elections with staggered terms, using the single-member districts enacted in 2011. To accomplish this, the five school board seats elected in 2011 should be open for election in November 2016 for three-year terms to prevent those members from holding over even longer and to prevent the entire board from being up for election at the same time. The four seats elected in 2013 can be open for election in the fall of 2017 according to the normal schedule that they would have had before Session Law 2013-110. This would return the Board to a 5-4 stagger of four-year terms each. The November 2016 election would allow for an August filing period, and would require non-partisan election by plurality rather than a run-off.

16. The procedure outlined above provides the most efficient return to the prior systems with the least disruption possible. Immediate issuance of the mandate will dispel any *Purcell* concerns and best facilitate the implementation of a remedy for the constitutional violations identified by this Court.

17. Pursuant to 4th Cir. R. 27(a), Plaintiffs have consulted with Counsel for the Defendant, who indicated that he was not able to respond in time for inclusion of Defendant's statement in this motion.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that this Court grant this motion for early issuance of the mandate.

Respectfully submitted this 14th day of July, 2016.

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CERTIFICATE OF SERVICE

I certify that on July 14, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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