

**IN THE UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

**DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE,
in his individual and official capacity as State Representative,
KWAMI ABDUL-BEY, CLARICE ABDUL-BEY, and
PAULA WITHERS,**

PLAINTIFFS

vs.

Case No. 4:22-cv-00368-KGB

**JOHN THURSTON, in his official capacity
as the Secretary of State of Arkansas and in his official capacity
as the Chairman of the Arkansas State Board of Election Commissioners;
and SHARON BROOKS, BILENDA
HARRIS-RITTER, WILLIAM LUTHER,
CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and
JAMES HARMON SMITH III, in their official capacities
as members of the Arkansas State Board of
Election Commissioners,**

DEFENDANTS

Defendants' Brief in Support of Motion for Stay Pending *Moore v. Harper*

This morning the Supreme Court granted certiorari in *Moore v. Harper*, No. 21-1271.

The outcome of *Moore* will resolve questions regarding one of Defendants' two bases for removal of this case: Whether the Elections Clause bars the relief sought by Plaintiffs. The Court should therefore stay this case pending the Supreme Court's decision in *Moore*.

BACKGROUND

This case involves challenges to modest revisions to Arkansas's four congressional districts. The federal Constitution's Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations" U.S. Const. art. I, sec 4, cl. 1. Consistent with that federal requirement,

Arkansas law provides that the Arkansas General Assembly is responsible for reapportioning congressional districts after the Census. *See* Ark. Code Ann. 7-2-101 *et seq.*

Plaintiffs sued in Pulaski County Circuit Court, claiming that the congressional map adopted by the General Assembly violates the Arkansas Constitution’s “Free and Equal Elections” clause contained in Article 3 section 2, and three equal-protection provisions contained in Article 2. (*See* Compl. ¶¶ 85-102.) They argue that these state constitutional provisions should be interpreted in line with hyper-partisan decisions of the Pennsylvania and North Carolina Supreme Courts, in which those courts claimed near plenary authority to override state election laws, notwithstanding the Elections Clause’s clear grant of exclusive authority to state legislatures. (Compl. ¶ 87 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), and *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022)).)

Defendants timely removed the case to federal court. (Doc. 1.) Removal is proper for two independent reasons. First, because Plaintiffs are challenging Defendants’ refusal to use a race-based congressional map and Section 1443(2) provides for removal by state officers where they refuse to violate federal equal-protection guarantees. Second—and pertinent to this Motion—because Plaintiffs’ state-law claims necessarily implicate the contours and limits of the General Assembly’s power to regulate federal elections under the Elections Clause and thus present a federal question under Section 1441. Plaintiffs seek remand, arguing that the Court lacks jurisdiction over this case. (Doc. 9.)

The parties have agreed that the deadlines in this case should be stayed until the Court decides Plaintiffs’ remand motion. (*See* Doc. 11 (stay motion); Doc. 19 at 14 (agreeing that the Court should “hold all deadlines in abeyance pending the Court’s decision on the Motion for Remand”).) That request remains pending. Defendants believe the Court should stay the entire

case pending the outcome of *Simpson v. Hutchinson*, No. 4:22-cv00213-JM-DRS-DPM. (Doc. 19 at 14). Plaintiffs oppose that request. (Doc. 22 at 7-9.)

There is now an additional reason to stay this case, including Plaintiffs' motion to remand. This morning, the Supreme Court granted certiorari review of the North Carolina Supreme Court's decision in *Harper v. Hall*. See June 30, 2022 Order list, 2022 WL 2347621. Plaintiffs' complaint relies upon that erroneous decision. (See Compl. ¶ 87.) In that case, the North Carolina Supreme Court struck down the congressional map adopted by the North Carolina General Assembly. 868 S.E.2d 499, 514 (N.C. 2022). On remand, the trial court rejected the legislature's proposed remedial map and adopted its own with the assistance of a group of special masters. *Id.* at 527. The North Carolina Supreme Court upheld that decision and reserved for its state judiciary the plenary authority to review election regulations under the North Carolina Constitution's "free" elections clause and equal-protection provisions. *Id.* at 559.

The Supreme Court granted the North Carolina legislators' petition for certiorari, which presents the following question:

Whether a State's judicial branch may nullify the regulations governing the "Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof," U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a "fair" or "free" election.

Pet. at ii, Case No. 21-1271. Resolution of this question in the petitioners' favor would decide the jurisdictional issue presented in Plaintiffs' remand motion. If the Supreme Court holds that the Elections Clause prohibits a State's judicial branch from subverting the election regulations adopted by its legislature based on overbroad interpretations of the sort of constitutional provisions cited by the North Carolina plaintiffs and Plaintiffs here, then this Court has

jurisdiction to consider whether the relief requested by Plaintiffs would run afoul of that principle. This case should therefore be stayed pending the Supreme Court's decision.

ARGUMENT

The Court “has inherent power to grant a stay in order to control its docket, conserve judicial resources, and provide for a just determination of the cases pending before it.” *Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803, 808 (8th Cir. 1986). It should do so here.

As Defendants explain in their brief opposing Plaintiffs' motion for remand, removal in this case is proper under 28 U.S.C. 1441 because Plaintiffs' claims, though couched in terms of state constitutional law, raise a federal issue. Justice Alito previously identified that issue as “an exceptionally important and recurring question of constitutional law, namely, the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections.” *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Alito, J., dissenting from denial of application for stay). The Court has now granted certiorari to decide that important question. This Court should stay its decision on Plaintiffs' motion for remand pending resolution of *Moore*.

Plaintiffs raise similar state constitutional challenges as the plaintiffs in the *Moore* litigation, argue for a similarly novel and overbroad reading of similarly worded constitutional provisions in pursuing their claims, and seek similar relief in violation of the federal Elections Clause. The North Carolina Supreme Court endorsed the claim that a state's judiciary has plenary authority to dispense with state legislative decisions concerning federal elections, and Plaintiffs argue the Arkansas courts ought to do the same. The Supreme Court is poised to decide whether that entire enterprise is barred by the federal constitution. If so, Plaintiffs' suit necessarily raises a federal issue.

To decide whether removal is proper under Section 1441, the Court must determine whether the federal issue presented by Plaintiffs’ state-law claims is (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 568 U.S. 251, 258 (2013). The Supreme Court’s decision in *Harper* will shed light on these questions. For example, if the relief sought by plaintiffs would violate the federal constitution, as the Court may decide in *Moore*, that would be a federal issue “necessarily raised” by Plaintiffs’ Complaint. *Id.* This Court should thus wait for its guidance before deciding Plaintiffs’ motion for remand.

Defendants will suffer prejudice should the court grant remand before the Supreme Court decides *Moore*. At that point, even if the Supreme Court determines that the North Carolina Supreme Court’s decision runs afoul of the federal constitution, Defendants will have been deprived of their right to have that federal issue decided by a federal court. If this Court has jurisdiction to decide the issues raised in this case, it has an obligation to exercise it. Defendants should not be shortchanged due to Plaintiffs’ desire for a speedy remand so they can seek relief from a state court—relief which the Supreme Court may soon determine is unconstitutional. And on the other side of the equation, Plaintiffs cannot plausibly claim any prejudice from such a stay given that they are not seeking—and could not obtain—injunctive relief for this election cycle. A stay pending *Moore* is therefore necessary and appropriate.

CONCLUSION

For the foregoing reasons, the Court should stay this case pending the Supreme Court's decision in *Moore v. Harper*, No. 21-1271.

Respectfully submitted,

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