No. 24-1095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,

Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III, in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS IV, in his official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS, in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN, in her official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER, in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants-Appellees.

From the United States District Court for
the Eastern District of North Carolina
The Honorable James E. Dever III (No. 4:23-cv-193-D-RN)

OPPOSITION OF LEGISLATIVE DEFENDANTS-APPELLEES TO MOTION FOR LEAVE

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Neither the Federal Rules nor this Court's Rules provide a right of reply in support of an en banc petition. As Plaintiffs note, that is atypical for "the party seeking relief." Mot. 1. But this feature of the rules underscores that reply briefs are disallowed. *See Bittner v. United States*, 598 U.S. 85, 94 (2023) (discussing the familiar *expressio unius* canon).

This omission was purposeful. En banc proceedings are "not favored" and require either a "uniformity" need or "a question of exceptional importance." Fed. R. App. 35(a). When that standard is truly met, it should not take much explanation to show it. Accordingly, the rules afford only 3,900 words for an en banc petition and disallow reply briefs. This reflects a judgment both that those seeking en banc review must get their arguments right the first time and that their case should be clear enough to explain concisely. Plaintiffs' request for a reply in this Court's discretion is an admission that their petition does not make the case for en banc review. They have no right to a second chance, and this Court should not grant one for several reasons.

First, the proposed brief does not argue to the en banc standard, but simply asks the Court to "hear this appeal" because the denial of relief by the panel is "a travesty." Proposed Reply 1. Every losing litigant feels that way, and the Court *did* hear this appeal.

Second, the proposed brief raises arguments not presented in the petition, which—regardless of the merits of Plaintiffs' assertions—could not be resolved en banc. *See id.* at 2-3.

Third, Plaintiffs continue to make inexplicable claims, such as that "no one disputed" their expert analysis. *Compare id.* at 1 *with* JA889-93 (contending that credibility flaws undermined the expert's analysis), JA934 (finding "all of Dr. Barreto's conclusions" undermined), and Op. 28-29 (affirming). Respectful and vigorous disagreement is one thing; pretending the other side of an issue does not even exist is improper and should not be encouraged.

Fourth, Plaintiffs continue to mischaracterize the panel ruling, claiming among other things that "it says…elections may be ignored because the district court could properly consider the absence of a 'district effectiveness analysis'…." Proposed Reply 2. The panel actually held that Dr. Barreto's opinions were properly discredited because he changed his methodology midstream to rig the outcome and thus showed he could not be trusted. Op. 28 (finding "an inference that…Plaintiffs' expert could selectively change his predicted outcomes to suit the exigencies of the moment.").

The bottom line is that, if the panel opinion truly issued a sweeping ruling of broad importance meriting en banc review, that should be apparent from the ruling.[1] Plaintiffs' contortions confirm that en banc proceedings and a departure

[1] Plaintiffs' criticism of the district court for not having issued a scheduling order misses the impact of their own en banc petition, both in delaying the mandate and creating the possibility (however remote) that additional action from this Court is forthcoming. Plaintiffs cannot credibly continue to shoot their case in the foot procedurally and blame the district court.

from the general ban on reply briefs are both unwarranted. The motion, and the petition, should be denied.

May 24, 2024

Respectfully submitted,

/s/ Richard B. Raile

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CERTIFICATE OF COMPLIANCE

1. This opposition brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1) because it contains 532 words.

2. This opposition brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Calisto MT font.

Dated: May 24, 2024

/s/ Richard B. Raile

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2024, I electronically filed the foregoing response with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 24, 2024

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