No. 413PA21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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REBECCA HARPER, et al.,

Plaintiffs,

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

From Wake County

****

SUPPLEMENTAL BRIEF OF PLAINTIFFS AND PLAINTIFF-INTERVENOR ON REHEARING

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INTRODUCTION

Legislative Defendants' rehearing petition and supplemental brief seek extraordinary and unprecedented relief from this Court.

To be clear, had Legislative Defendants simply acceded to this Court's ruling in *Harper II*, the General Assembly would have had the opportunity to enact an entirely new congressional districting plan and to draw a new, modified state Senate districting plan in 2023. But, absent this rehearing, the General Assembly could not jettison the state House of Representatives districting plan that it enacted last year, because the North Carolina Constitution expressly bars the legislature from altering established House districts until after the next decennial census in 2030.

So Legislative Defendants ask this Court to "permit" the General Assembly (LD Br. 17–18, 65; Pet. 25) to redraw not only the State's congressional and Senate districts, but also its House districts—and to do so unconstrained by four North Carolina constitutional provisions that promote fair elections and thwart partisan gerrymandering.

Legislative Defendants ask this Court not only to inflict great damage on the fundamental principle of stare decisis but also to ignore the plain language of the North Carolina Constitution's bar against mid-decade legislative redistricting. This Court should reject Legislative Defendants' requests for relief in their entirety.

STATEMENT OF THE CASE

A. Trial-Court Liability-Phase Proceedings

On 16 November 2021, Plaintiffs North Carolina League of Conservation Voters, Inc., et al. ("*NCLCV* Plaintiffs") filed an action challenging the General Assembly's 2021 congressional, Senate, and House redistricting plans ("2021 Enacted Plans"), along with a motion for a preliminary injunction. (R pp 30–127) Two days later, Plaintiffs Rebecca Harper et al. ("*Harper* Plaintiffs") filed a challenge to the 2021 Enacted Congressional Plan and also sought preliminary injunctive relief. (R pp 128–76, 208) On 19 November 2021, the Chief Justice assigned Judges A. Graham Shirley, Nathaniel J. Poovey, and Dawn M. Layton to serve on a "Three-Judge Panel for Redistricting Challenges, as defined in N.C.G.S. § 1-267.1." (R p 177) The three-judge panel consolidated the two actions and denied Plaintiffs' request for injunctive relief. (R pp 867–69, 883)

On 8 December 2021, this Court reversed the three-judge panel's ruling, issued a preliminary injunction barring the General Assembly from using the 2021 Enacted Plans, and ordered the panel to issue a final judgment on Plaintiffs' claims by 11 January 2022. (R pp 893–95) On remand, *Harper* Plaintiffs amended their complaint to challenge the 2021 Enacted Senate and House Plans. (R pp 897–964) Plaintiff-Intervenor Common Cause intervened in the consolidated actions. (R pp 965, 1237)

From 3 January to 6 January 2022, the three-judge panel held a bench trial and heard testimony from expert and fact witnesses. (R p 3523) On 11 January 2022, the panel issued its liability ruling. (R p 3769) The panel found that the 2021 Enacted Plans "resiliently safeguard electoral advantage for Republican[s]" and ensure that Republicans will retain majorities in North Carolina's congressional delegation and the General Assembly even "when voters clearly prefer the other party." (R pp 3577, 3579–80) The panel also found that the 2021 Enacted Plans were among the most "extreme" gerrymanders possible and were more "carefully crafted for Republican advantage" than 99.9999% of possible congressional maps, 99.9% of possible Senate maps, and 99.9999% of possible House maps. (R pp 3574–75, 3577) Nonetheless, the panel entered judgment for Defendants, holding that partisan-gerrymandering claims are not justiciable under the North Carolina Constitution. (R pp 3753, 3769)

B. Liability-Phase Appeal

All Plaintiffs appealed, and this Court reversed on 4 February 2022. R pp 3772, 3776, 3780; *Harper v. Hall*, 380 N.C. 302, 867 S.E.2d 554 (2022) (mem.). Pursuant to N.C. Gen. Stat. § 120-2.3, this Court held that the 2021 Enacted Plans were unconstitutional partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and

Free Speech and Assembly Clauses. 380 N.C. at 304. The Court explained that these constitutional provisions prohibit the General Assembly from "diminish[ing] or dilut[ing] any individual's vote on the basis of partisan affiliation" because the "fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.'" *Id.* at 305 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002) (*Stephenson I*)). "Based on the trial court's factual findings," this Court "conclude[d] that the congressional and legislative maps enacted" by the General Assembly were "unconstitutional beyond a reasonable doubt." *Id.* at 304.

While the Court identified several methods and metrics that could indicate unconstitutional gerrymandering, the Court expressly declined to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 163, 868 S.E.2d 499 (*Harper I*), *cert. granted*, 142 S. Ct. 2901 (2022).[1] Instead, the Court explained, the ultimate inquiry is always whether a plan treats voters equally, *id.* ¶ 169, such that voters of any political party have "substantially equal opportunity to translate votes into seats across the

[1] Counsel has used universal citation to refer to the Court's 2022 opinions in this matter. *See* LD Br. 1 n.3.

plan," *id.* ¶ 163. A "meaningful partisan skew" is tolerable only if it "necessarily results from North Carolina's unique political geography." *Id.*

Finally, the Court rejected the Legislative Defendants' separation-of-powers arguments, explaining that under longstanding precedent "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," *id.* ¶ 118 (quoting *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)), and that the legislature's "power to apportion legislative and congressional districts is subject to other 'constitutional limitations,' including the Declaration of Rights," *id.* ¶ 119.

Consistent with its duty under North Carolina law, and in accordance with the procedures set forth by the General Assembly for the judicial review of redistricting plans in N.C. Gen. Stat. §§ 120-2.3 and 120-2.4, this Court's Order and Opinion identified the defects in the 2021 Enacted Plans and directed the three-judge panel to conduct remedial proceedings. *Harper v. Hall*, 380 N.C. at 304–07; *Harper I*, 2022-NCSC-17, ¶¶ 27–72, 178–216. The Court ordered that, "[i]n accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution" and the "trial court will approve or adopt compliant congressional and state legislative districting

plans" by 23 February 2022. *Harper v. Hall*, 380 N.C. at 306–07; *see Harper I*, 2022-NCSC-17, ¶ 223.

C. Trial-Court Remedial Proceedings

On 17 February 2022, the General Assembly enacted new congressional, Senate, and House plans. R pp 4185, 4868; N.C. SESS. LAWS 2022-3 (congressional plan); N.C. SESS. LAWS 2022-2 (Senate plan); N.C. SESS. LAWS 2022-4 (House plan). While the Remedial House Plan (RHP) was enacted with overwhelming bipartisan support, the Remedial Congressional and Senate Plans (RCP and RSP, respectively) were passed on strict party lines, with only Republican lawmakers voting in support. (R pp 4876, 4878, 4881)

The trial court appointed Justice Robert H. Edmunds, Jr. (ret.), Justice Robert F. Orr (ret.), and Judge Thomas W. Ross (ret.) to serve as Special Masters to assist with assessing and potentially developing remedial plans. (R pp 4179–80) Consistent with this Court's order, the Special Masters engaged four expert advisors—including Dr. Bernard Grofman of the University of California, Irvine, a leading redistricting scholar whose work the U.S. Supreme Court has repeatedly cited. (R p 4871)

The parties submitted comments, along with expert reports, addressing whether the proposed remedial plans complied with the standard that this Court had set forth in its liability-phase ruling. (R pp 4618–54, 4678–857)

Plaintiffs explained that the RCP and the RSP failed to do so (R pp 4445–607, 4738–857), that the failure could not be attributed to North Carolina's political geography, and that Plaintiffs' alternative maps treated both parties fairly while excelling on traditional districting principles such as compactness and respect for counties. (R pp 4445–607, 4757, 4808, 4813, 4819)

On 23 February 2022, the Special Masters issued a report on the proposed remedial plans. (R pp 4890–95) The Special Masters' expert advisors also submitted individual reports with their findings. (R pp 5027–136) Pursuant to the reports' recommendations, the trial court rejected the General Assembly's RCP. (R pp 4876–77, 4885–88) Rather than accepting any of Plaintiffs' proposed remedial congressional plans, the Special Masters and their expert advisor Dr. Grofman modified the General Assembly's RCP to achieve constitutional compliance. (R pp 4884–85) The trial court, however, approved both the bipartisan RHP and, over Plaintiffs' unanimous objection, the RSP. (R pp 4878–80)

D. Remedial Appeal

Later that day, all parties filed notices of appeal and motions to stay, with Legislative Defendants seeking to stay the modified RCP (R p 5143), *NCLCV* and *Harper* Plaintiffs seeking to stay the RSP (R pp 5152, 5147), and Common Cause seeking to stay both the RSP and the RHP. (R p 5156) This

Court denied the stay motions. *Harper v. Hall*, 380 N.C. 686, 868 S.E.2d 95, 97 (2022) (mem.); *Harper v. Hall*, 380 N.C. 686, 868 S.E.2d 100, 102 (2022) (mem.); *Harper v. Hall*, 380 N.C. 686, 868 S.E.2d 97, 100 (2022) (mem.); *Harper v. Hall*, 380 N.C. 685, 868 S.E.2d 90, 92 (2022) (mem.).

The May 2022 and November 2022 primary and general elections therefore were conducted under the congressional, Senate, and House plans that had been unanimously adopted or approved by the three-judge panel of the Wake County Superior Court. *See* N.C. State Bd. of Elections, *Election Results Dashboard*, https://er.ncsbe.gov (providing detailed election returns).

On 16 December 2022, this Court affirmed the Superior Court's remedial order in part, reversed in part, and remanded the case for further proceedings. *Harper v. Hall*, ___ N.C. ___, 2022-NCSC-121, ¶¶ 6–7, 881 S.E.2d 156 (*Harper II*). As to the congressional map, the Court affirmed the trial court's rejection of the RCP and adoption of the modified RCP drawn by the Special Masters and Dr. Grofman. *Id.* ¶¶ 6, 111. As to the House map, the Court affirmed the trial court's approval of the bipartisan RHP, *id.* ¶¶ 6, 112; and held that the RHP was "now 'established' under law and therefore 'shall remain unaltered until the return of [the 2030] census of population,'" *id.* ¶ 94 (quoting N.C. CONST. art. II, § 5(4)); *see id.* ¶ 112. And as to the Senate map, the Court held that the trial court's conclusion of law approving the RSP "lacked adequate

factual findings supported by competent evidence," *id.* ¶ 6; reversed the trial court's approval of the RSP, *id.* ¶ 113; and remanded the case to that court to oversee the creation and adoption of a Senate plan modifying the RSP "only to the extent necessary to achieve constitutional compliance," *id.* ¶¶ 7, 103, 114 (citing N.C. Gen. Stat. § 120-2.4(a1)).

On 20 January 2023, Legislative Defendants filed a petition for rehearing asking this Court to withdraw its opinion in *Harper II*, overrule *Harper I*'s holding that partisan-gerrymandering claims are justiciable under the North Carolina Constitution, and "declare that the General Assembly is now able to exercise its redistricting power" and thus enact new Senate and House districts notwithstanding the Constitution's express prohibition against altering established legislative districts mid-decade. Pet. 3, 21, 25. On 3 February 2023, the Court issued an Order allowing the petition, directing the parties to file supplemental briefs on the issues raised in the petition and three additional issues, and placing the matter on the 14 March 2023 calendar for rehearing. *Harper v. Hall*, 882 S.E.2d 548, 550 (N.C. 2023).

STANDARD OF REVIEW

Rule 31 authorizes this Court to rehear a civil action on the rare occasion when it "has overlooked or misapprehended" a "specifically and concisely identified" factual or legal point, N.C. R. App. P. 31(a), ordinarily because the

Court was initially unaware of material evidence in the record or made an obvious and indisputable error. *See, e.g.*, *Clary v. Alexander Cnty. Bd. of Educ.*, 286 N.C. 525, 529, 212 S.E.2d 160, 163 (1975) (Court had overlooked stipulated evidence); *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 180–81, 237 S.E.2d 21, 31 (1977) (Court had failed to apply the controlling statute). When rehearing petitioners raise arguments resting on essentially the "same line of argument" and the "same authorities" previously raised in, and rejected by, this Court, they must again be rejected. *See Haywood v. Daves*, 81 N.C. 8, 8–10 (1879) (affirming prior decision upon rehearing).

ARGUMENT

I. *Harper I* Was Correctly Decided and Legislative Defendants Have Failed to Offer This Court a Valid Basis to Overrule It.

Stare decisis requires that this Court not overrule *Harper I* barely a year after its issuance. This Court correctly decided that partisan-gerrymandering claims are justiciable and that extreme partisan gerrymandering violates the North Carolina Constitution's Declaration of Rights. And as for Legislative Defendants' federal Elections Clause argument, it was not raised at all in *Harper II*, and accordingly is not a proper subject of rehearing. Moreover, it too was correctly decided in *Harper I*, as Legislative Defendants' position contravenes nearly a century of U.S. Supreme Court precedent.

A. Stare decisis requires leaving *Harper I* undisturbed.

Since at least 1875, this Court has been clear: "The weightiest considerations make it the duty of the Courts to adhere to their decisions. No case ought to be reversed upon a petition to re-hear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court." *Watson v. Dodd*, 72 N.C. 240, 240 (1875). None of these rare exceptions to the rule of stare decisis applies here. Legislative Defendants do not suggest that *Harper I* was decided too quickly or that they had failed to bring some argument or authority to the Court's attention. They have not discovered additional historical materials elucidating the application of the contested constitutional provisions. Nor have they identified any argument that the Court failed to consider—and refute—in its 223-paragraph *Harper I* opinion.

There is no exception to the rule of stare decisis when a court changes composition. Indeed, if anything, the rule applies even more strongly in such situations. *See, e.g.*, *Devereux v. Devereux*, 81 N.C. 12, 17 (1879) (rejecting efforts "operating to induce a different legal construction in the same court, on a change of its members, that the court should reverse the former opinion of the court when differently constituted"); *State v. Davidson*, 495 P.3d 9, 14 (Kan. 2021) (Standridge, J., concurring) (warning that "reversing a decision solely because of a change in composition of the court would cause the people

we serve to raise legitimate concerns about the court's integrity and the rule of law"); *State v. Peeler*, 140 A.3d 811, 833 (Conn. 2016) (Robinson, J., concurring) (rejecting call to overturn precedent "because it would imperil our state's commitment to the rule of law for it to appear that a change in the composition of the court resulted in the immediate retraction of a landmark state constitutional pronouncement"); *Johnson Controls, Inc. v. Emps. Ins. of Wausau*, 665 N.W.2d 257, 286 (Wis. 2003) ("The decision to overturn a prior case must not be undertaken merely because the composition of the court has changed.").

Legislative Defendants offer only two reasons unrelated to the change in the Court's composition for overruling *Harper I*, both of which fail. First, Legislative Defendants propose that *Harper I* should be overturned because the opinion was not unanimous. *See* LD Br. 31 (citing *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949)). But this Court has held that "the existence of a dissenting opinion in our decisions does not undermine the decision's status as binding precedent." *Lanvale Props., LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 157, 731 S.E.2d 800, 811 (2012); *see Hill v. Atl. & N.C. R.R. Co.*, 143 N.C. 539, 570, 55 S.E. 854, 865 (1906) ("There was a dissenting opinion, and, too, a very able one, as were all of the opinions of the eminent judge who wrote it, but this does not affect the authority of the decision as a judicial precedent, or take it out of the rule of stare decisis, but really

emphasizes the fact that the case was well considered."); *see also People v. Hobson*, 348 N.E.2d 894, 902 (N.Y. 1976) ("The closeness of a vote in a precedential case is hardly determinative. It certainly should not be. Otherwise, every precedent decided by a bare majority is a nonprecedent—one to be followed if a later court likes it, and not to be followed if it does not like it." (internal citation omitted)).

Second, Legislative Defendants propose that stare decisis is inapplicable here because there are "conflicting decisions," citing without discussion *Dickson v. Rucho*, 368 N.C. 481, 534, 781 S.E.2d 404, 440 (2015), *summarily vacated*, 137 S. Ct. 2186 (2017), and *Howell v. Howell*, 151 N.C. 575, 578–79, 66 S.E. 571, 573 (1909). LD Br. 31. But these cases have nothing to do with Plaintiffs' constitutional claims. *Dickson* included a solitary sentence remarking that the "Good of the Whole" Clause found in Article I, Section 2 of the North Carolina Constitution does not supply a justiciable standard for redistricting litigation. 368 N.C. at 534, 781 S.E.2d at 440. No plaintiff in this litigation has brought a claim under the Good of the Whole Clause, and *Harper I* explicitly regarded *Dickson*'s pronouncement "as a valid proposition of state law." *Harper I*, 2022-NCSC-17, ¶ 131.

Howell, meanwhile, rejected plaintiffs' challenge to the compactness of special-tax school districts under "certain provisions in section 4129 of the Revisal" that instructed the county board of education to divide townships into

compact school districts. 151 N.C. at 577, 66 S.E. at 572. *Howell* cannot possibly conflict with *Harper I* because *Harper I* adjudicated different claims—*Harper I* never mentioned, let alone newly interpreted, section 4129. Far from being on point, *Howell* is not even analogous. Because *Howell* adjudicated claims brought under provisions that vested the county board with authority to draw school-district boundaries, the decision might have been persuasive authority (at best) only if Plaintiffs in this litigation had brought claims under provisions of North Carolina law that authorize the General Assembly to enact new maps in the first instance. Instead, Plaintiffs challenged the maps under provisions in North Carolina's Declaration of Rights, which necessarily *constrain* legislative discretion.[2]

B. Partisan-gerrymandering claims are justiciable.

Legislative Defendants' real argument is the exact same one they pressed before, that partisan-gerrymandering claims are nonjusticiable. But this Court rejected these same arguments just a year ago in a lengthy decision.

The legal basis for justiciability remains unchanged. When governmental action is challenged as unconstitutional, it is the duty of the

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[2] *See* John L. Sanders, *Our Constitutions: An Historical Perspective*, https://www.sosnc.gov/static_forms/publications/nc_manual/2011_2012/Our_Constitutions.pdf (recognizing the Declaration of Rights "secured the rights of the citizen from government interference"); *see also State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[I]t is firmly established that our State Constitution is not a grant of power.").

courts to construe and apply the Constitution. And "issues concerning the proper construction and application of . . . the Constitution of North Carolina can . . . be answered with finality [only] by this Court." *Stephenson I,* 355 N.C. at 362, 562 S.E.2d at 384 (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)).

Only in rare situations may courts categorically refuse to adjudicate constitutional claims. The political-question doctrine "excludes from judicial review" the limited controversies that (1) are "constitutionally committed for resolution to the legislative or executive branches of government" and (2) "revolve around policy choices and value determinations." *Cooper v. Berger*, 370 N.C. 392, 407–08, 809 S.E.2d 98, 107 (2018) (internal quotation marks omitted). The "dominant considerations" in determining whether the political-question doctrine applies are "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Id.* at 408, 809 S.E.2d at 107 (citation omitted).

1. The North Carolina Constitution constrains the General Assembly's exercise of its redistricting authority.

While the General Assembly has the power to enact redistricting plans in the first instance, *e.g.*, N.C. CONST. art. II, §§ 3, 5, North Carolina courts have the power and duty to determine whether those plans comply with the

Constitution. Legislative Defendants' argument that redistricting is entirely immune from judicial review because it involves some political choices, *see, e.g.*, LD Br. 32–33, fundamentally misunderstands the judiciary's role and the separation of powers under the Constitution. Because North Carolina's Constitution is the State's fundamental law, the General Assembly may not exercise its legislative power in a manner that violates the Constitution's Declaration of Rights. *See Bayard v. Singleton,* 1 N.C. (Mart.) 5, 7 (1787). And longstanding precedents of this Court make clear that "within the context of state redistricting and reapportionment disputes, it is well within the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Stephenson I*, 355 N.C. at 362, 562 S.E.2d at 384 (citation omitted). As this Court correctly explained in *Harper I*, "[a]lthough the task of redistricting is primarily delegated to the legislature, it must be performed 'in conformity with the State Constitution.'" *Harper I*, 2022-NCSC-17, ¶ 6 (quoting *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390).

This Court has repeatedly interpreted and applied constitutional provisions in the context of apportionment. For example, in *Stephenson v. Bartlett*, this Court reviewed whether the General Assembly's exercise of the apportionment power complied with the State's Equal Protection Clause. 355 N.C. at 370–71, 378–81, 562 S.E.2d at 388–90, 393–96. In *Blankenship v. Bartlett*, this Court held that the General Assembly's exercise of its power

under Article IV, Section 9 to establish the judicial districts must comport with the State's Equal Protection Clause. 363 N.C. 518, 525–26, 681 S.E.2d 759, 765 (2009). And in *State ex rel. Martin v. Preston*, this Court reviewed whether the General Assembly's apportionment of judicial districts complied with Article IV, Section 9's requirements. 325 N.C. at 460–61, 385 S.E.2d at 485.

Simply put, there is no redistricting exception to the long-accepted principle that "it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997). Courts must "interpret[] the laws and, through [the] power of judicial review, determine[] whether they comply with the constitution." *State v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016); *see also Cooper v. Berger*, 370 N.C. at 410–11, 809 S.E.2d at 109 (explaining that even the General Assembly's (and the Governor's) specifically enumerated constitutional powers are "constrained by the limits placed upon that authority by other constitutional provisions," including the State's Equal Protection Clause, as interpreted and enforced by North Carolina courts).

Legislative Defendants cite inapplicable cases for the erroneous proposition that the General Assembly has "unreviewable" authority to revise districts. LD Br. 33–34. Several of these cases analyze claims brought under statutes and laws not at issue here. *See Dickson v. Rucho*, 367 N.C. 542, 574–75, 766 S.E.2d 238, 260 (2014) (discussing the Good of the Whole provision in

Article I, Section 2, which Plaintiffs have not invoked), *summarily vacated*, 575 U.S. 959 (2015); *Pender Cnty. v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (analyzing claims under Section 2 of the federal Voting Rights Act), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009); *Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909) (rejecting a statutory claim); *see also supra* 13–14 (discussing *Dickson* and *Howell*). None of these cases stands for Legislative Defendants' proposition that the General Assembly is ordained with unreviewable authority to violate the constitutional rights of North Carolinians.

Other cases Legislative Defendants rely on examine a hodgepodge of legislative powers other than reapportionment.[3] And nearly all the cases predate the U.S. Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), which established that claims challenging districting under the federal Equal Protection Clause are justiciable. Pre-*Baker* cases are not persuasive

[3] *See Town of Boone v. State*, 369 N.C. 126, 127, 794 S.E.2d 710, 712 (2016) (considering the Constitution's division of power between the General Assembly and local governments with regard to extension of a town's jurisdiction); *Norfolk & S. R.R. Co. v. Washington Cnty.*, 154 N.C. 333, 335, 70 S.E. 634, 635 (1911) (discussing the General Assembly's power "not to change, but to declare and establish" county boundaries); *Carolina-Va. Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62, 74 S.E.2d 310, 317 (1953) (discussing the "power to create or establish municipal corporations"); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) (same); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) (considering "[a]nnexation by a municipal corporation"); *see Raleigh & G.R. Co. v. Davis*, 19 N.C. 451, 465 (1837) (eminent domain).

with respect to the justiciability of districting-related claims because they were predicated on a view of judicial authority that has been repudiated.

Legislative Defendants observe that "[t]his Court has always taken care in distinguishing *aspects* of governmental powers that are and are not reviewable." LD Br. 35. But none of the cases Legislative Defendants cite held *any* aspect of reapportionment to be immune from standard judicial review for constitutional compliance. In contrast, cases where this Court has applied the political-question doctrine involve constitutional provisions that the Court found confer exclusive authority to other state actors. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) (rejecting a challenge to a statute setting the proper age for children to attend public school because the Constitution placed "the determination of the proper age for school children" in "the exclusive province of the General Assembly"); *see also Bacon v. Lee*, 353 N.C. 696, 698, 717, 549 S.E.2d 840, 843, 854 (2001) (rejecting clemency-application challenge because the Constitution "expressly commits the substance of the clemency power to the sole discretion of the Governor"). This is plainly not the case for redistricting—this Court has reviewed redistricting plans for decades under numerous constitutional provisions and has never held that any aspect of redistricting poses an unreviewable political question.

2. Partisan-gerrymandering claims under the North Carolina Constitution are governed by judicially manageable standards.

Harper I announced clear, judicially manageable standards to govern partisan-gerrymandering claims under North Carolina's Constitution. In *Harper I*, this Court held that "the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote." 2022-NCSC-17, ¶ 160. Contrary to Legislative Defendants' false claim that *Harper I* left a legal standard to be discerned in "future cases," LD Br. 36, *Harper I* articulated a familiar burden-shifting standard: "Once a plaintiff shows that a map infringes on their fundamental right to equal voting power under the free elections clause and equal protection clause or that it imposes a burden on that right based on their views such that it is a form of viewpoint discrimination and retaliation based on protected political activity under the free speech clause and the freedom of assembly clause, the map is subject to strict scrutiny and is presumptively unconstitutional and 'the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.'" *Harper I*, 2022-NCSC-17, ¶ 170 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990)). "[P]artisan advantage—that is, achieving a political party's advantage across a map incommensurate with its level of statewide

voter support—is neither a compelling nor a legitimate governmental interest[.]" *Id.*

Courts have successfully used standards like *Harper I*'s to adjudicate partisan-gerrymandering challenges to redistricting plans in North Carolina and elsewhere. *See, e.g.*, *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *46 (Md. Cir. Ct. Mar. 25, 2022) (Maryland's 2021 congressional plan); *Harper v. Lewis*, 19 CVS 12667, 2019 N.C. Super. LEXIS 122, at *22 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019) (three-judge panel) (North Carolina's 2016 congressional plan); *Common Cause v. Lewis*, No. 18CVS 014001, 2019 WL 4569584, at *1–2 (N.C. Super. Ct., Wake Cnty. Sept. 3, 2019) (North Carolina's 2017 state legislative plans); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (Pennsylvania's 2011 congressional plan). Contrary to Legislative Defendants' suggestion, LD Br. 36, the fact that other States have evaluated partisan-gerrymandering claims in line with their unique state constitutional provisions does not affect the justiciability of partisan gerrymandering under North Carolina's Constitution. Nor is any "initial policy determination" required, *id*. at 36—the only question is whether North Carolina's Constitution prohibits extreme partisan gerrymandering, which this Court correctly answered in the affirmative in *Harper I*.

A claim based on invidious intent and discriminatory effect is not rendered nonjusticiable simply because a court did not identify bright-line

numerical cutoffs that are dispositive in all cases. Courts are inherently in the business of developing and refining standards through the adjudication of particular cases, just as it did here in *Harper II*. Take, for example, the principle of "one person, one vote." The U.S. Supreme Court initially held that malapportionment claims were justiciable without articulating any standard for resolving them, *Baker v. Carr*, 369 U.S. at 209, then announced the principle of "one person, one vote" in broad terms two years later, *Reynolds v. Sims*, 377 U.S. 533, 578 (1964), and further allowed courts to refine the "one person, one vote" standard in subsequent litigation, *see, e.g.*, *Brown v. Thomson*, 462 U.S. 835 (1983); *Karcher v. Daggett*, 462 U.S. 725 (1983); *White v. Weiser*, 412 U.S. 783 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968). As *Harper I* observed, "[t]he development of [partisan-gerrymandering] metrics in this and future cases is precisely the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context." *Harper I*, 2022-NCSC-17, ¶ 168.

Nor is an issue made nonjusticiable because the Constitution does not identify what specific data should be used in evaluating such claims. *See* LD Br. 37. By this logic almost *any* constitutional claim would be nonjusticiable. The Constitution protects fundamental rights using broad terms like "free" and "equal"; it is the role of the judiciary to develop and refine standards that

properly vindicate those rights. North Carolina's Equal Protection Clause, for example, does not expressly specify how malapportioned a judicial district must be to violate the Clause's requirement of equality. This Court nonetheless held that the Clause requires "population proportionality" and developed a balancing test for the showing plaintiffs must make to demonstrate unconstitutional population disparities. *Blankenship*, 363 N.C. at 521, 681 S.E.2d at 762.[4] Courts routinely consider different kinds of evidence, including new types of mathematical or statistical models that are developed over time, in assessing whether plaintiffs have satisfied legal tests set forth by higher courts. For example, employment-discrimination cases are not rendered nonjusticiable just because the U.S. Supreme Court has declined to pick a precise statistical threshold, applicable in all cases, for establishing that a challenged policy has discriminatory intent or a disparate impact on a particular group of people.

Here, it was well within the judicial capabilities of the trial court to find that the General Assembly's plans were extreme partisan gerrymanders using

[4] Legislative Defendants claim *Harper I*'s and *Harper II*'s reliance on statewide election data to measure partisanship constituted a "policy choice." LD Br. 37. To the contrary, the question of what data sources are most reliable is a classic evidentiary issue that courts are well-equipped to handle, as demonstrated by the trial court's analysis of the issue. *See N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at *64–65 (N.C. Super. Ct., Wake Cnty. Jan. 11, 2022) (three-judge panel), *rev'd sub nom. Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499.

the peer-reviewed statistical methodologies that *Harper I* identified as within the "variety of direct and circumstantial evidence" available. 2022-NCSC-17, ¶ 180. Based on analyses by Plaintiffs' experts, the trial court found that all the challenged plans exhibited a degree of partisan bias so extreme that it could have resulted only from an "intentional" effort to secure Republican partisan advantage. *N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at *29, *35, *63 (N.C. Super. Ct., Wake Cnty. Jan. 11, 2022) (three-judge panel), *rev'd sub nom. Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499.

3. Legislative Defendants' remaining arguments regarding justiciability are meritless.

None of Legislative Defendants' remaining arguments about *Harper I* have merit.

First, Legislative Defendants misrepresent *Harper I*'s constitutional analysis, claiming that the Court "arrogat[ed] redistricting power" and decided to "correct" rather than "interpret" the Constitution." LD Br. 38 (citing *Harper I*, 2022-NCSC-17, ¶ 4). Not so. The Court's exercise of judicial review in *Harper I* followed ordinary methodologies of judicial interpretation—analysis of the text, the Framers' intent, history, and precedents—and flowed directly from its obligation to interpret the Constitution. *See Bayard v. Singleton*, 1 N.C. (Mart.)

5, 6 (1787); *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 782–83, 413 S.E.2d 276, 289–90 (1992).

Second, Legislative Defendants argue that *Harper I* gave short shrift to the U.S. Supreme Court's analysis of the justiciability of partisan-gerrymandering claims. *See* LD Br. 38. This is untrue: *Harper I* analyzed federal case law at length, *see* 2022-NCSC-17, ¶¶ 100–111, and correctly found that "because the Supreme Court has concluded partisan-gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts," *id.* ¶ 110. Indeed, *Harper I*'s conclusion that state-law challenges to partisan gerrymandering are justiciable flows directly from *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that the unavailability of federal review "does not condone excessive partisan gerrymandering" or "condemn complaints about districting to echo into a void" because "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507. *Harper I* also explained that *Rucho* was informed by "a prudential evaluation of the role of federal courts in the constitutional system," and the fact that federal courts are not suited to the task of adjudicating gerrymandering claims against multiple maps for all 50 States, every ten years. 2022-NCSC-17, ¶ 108. *Harper I* also described how North Carolina's

Constitution differs from the U.S. Constitution in text, history, structure, and emphasis. *See id.* ¶¶ 121–125, 133–138, 142–147, 151–154.

Third, Legislative Defendants complain that *Harper I* did not consider the possible harms of recognizing partisan-gerrymandering claims. *See* LD Br. 39. But there is no requirement that a court articulate or address every possible effect of each of its decisions. And Legislative Defendants' parade of horribles has not come to fruition. For example, Legislative Defendants claim *Harper I* will grant "members of every identifiable group that possesses distinctive interests . . . the ability to bring similar claims," LD Br. 39–40 (citation omitted), but nothing of the sort has happened in the 13 months since *Harper I* was issued. Nor has it resulted in the Court's "unlimited immersion in partisan politics," *id.* at 40, as the facts of this case disprove. The bipartisan trial-court panel was duly appointed by the Chief Justice and unanimously found that the 2021 Plans were intentional and effective partisan gerrymanders that exhibit more partisan bias than trillions of possible nonpartisan maps that could have been drawn using the General Assembly's formal adopted redistricting criteria.

This Court already considered and conclusively rejected the same arguments that Legislative Defendants make again here. They have failed to provide any legitimate basis for this Court to overrule that decision.

C. Partisan gerrymandering violates multiple provisions of the North Carolina Constitution's Declaration of Rights.

This Court correctly held that partisan gerrymandering violates rights protected by the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. *Harper I* "examine[d] the text and structure of the Declaration of Rights as well as the intent and history of these constitutional provisions" to conclude that they protect "the individual rights of voters to cast votes that matter equally[.]" 2022-NCSC-17, ¶¶ 9, 121. Legislative Defendants rehash the same arguments this Court already considered and rejected when deciding *Harper I*.

1. Partisan gerrymandering violates the North Carolina Constitution's Free Elections Clause.

The Free Elections Clause mandates that "All elections shall be free." N.C. CONST. art. I, § 10. Under the Free Elections Clause, "[o]ur government is founded on the consent of the governed," and free elections "must be held inviolable to preserve our democracy." *Swaringen v. Poplin*, 211 N.C. 700, 702, 191 S.E. 746, 747 (1937); *see State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897) ("the will of the people … must govern"). *Harper I* correctly concluded that elections are not "free" where "the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control." 2022-NCSC-17, ¶¶ 140–141.

Legislative Defendants' arguments that the Free Elections Clause does not prohibit extreme partisan manipulation of district boundaries are unpersuasive. First, they suggest partisan gerrymandering does not violate the Free Elections Clause so long as voters can cast ballots that are counted. LD Br. 41. Under this exceedingly narrow view of the clause's protections, the ruling party could openly announce it was manipulating every district boundary to predetermine the outcome of every individual race and to guarantee continued control of government in perpetuity, and elections would still be "free."

Next, they claim there is no "historical argument" that the Free Elections Clause prohibits partisan gerrymandering. *See* LD Br. 41–42. But *Harper I* provided a thorough historical grounding. The Free Elections Clause's English precursor was enacted specifically to prevent the manipulation of legislative elections through changes to the composition of the electorate in individual districts. *Harper I*, 2022-NCSC-17, ¶ 134 (citing, *inter alia*, J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 148 (1972); GARY S. DE KREY, RESTORATION AND REVOLUTION IN BRITAIN: A POLITICAL HISTORY OF THE ERA OF CHARLES II AND THE GLORIOUS REVOLUTION 241, 247–48, 250 (2007)). North Carolina's Clause followed the enactment of similar clauses like Pennsylvania's, which also arose in response to laws that manipulated legislative elections to deny

representation to voters from certain geographic areas. *League of Women Voters*, 178 A.3d at 804–06.

Legislative Defendants likewise reiterate that malapportioned "rotten boroughs" persisted in England for many decades after enactment of the 1689 English Bill of Rights, so the Free Elections Clause could not have been meant to prevent vote dilution. LD Br. 42. But malapportioned districts persisted in this country for nearly a century after ratification of the Fourteenth Amendment, yet that did not prevent the U.S. Supreme Court from holding that such districts violate the amendment's Equal Protection Clause. *Reynolds v. Sims*, 377 U.S. 533 (1964). Malapportioned judicial districts existed in this State until this Court held in 2009 that they violated North Carolina's Equal Protection Clause. *Blankenship*, 363 N.C. at 518–20, 681 S.E.2d at 761. While the Framers of these constitutional provisions may not have envisioned every possible application, they chose broad, flexible terms that courts have properly read to prohibit these practices. The Constitution's direct command that "[a]ll elections shall be free" cannot be subverted any time electoral threats emerge in more pernicious forms than were contemplated centuries ago. *See Harper I*, 2022-NCSC-17, ¶ 140 ("Although our understanding of what is required to maintain free elections has evolved over time, there is no doubt these fundamental principles establish that elections are not free if voters are denied equal voting power in the democratic processes[.]"). Where the General

Assembly manipulates district boundaries in an effort to preordain political control, elections are not "free."

Harper I carefully traces the development of constitutional law supporting its holding. *See id.* ¶¶ 121–141 (examining changes to the wording of the Free Elections Clause), 142–150 (discussing caselaw relevant to the right to have one's vote matter equally). The cases cited by Legislative Defendants prove nothing to the contrary. *See* LD Br. 44; *see also supra* 13–14, 16–18 (discussing each case). Neither does Legislative Defendants' reference to efforts to amend the state Constitution to address gerrymandering (LD Br.44), as the existing protections of the North Carolina Constitution are not affected by the fact that some may have sought to add to or elaborate on them.

2. Partisan gerrymandering violates the North Carolina Constitution's Equal Protection Clause.

The North Carolina Constitution's Equal Protection Clause declares that "[n]o person shall be denied the equal protection of the laws." N.C. CONST. art. I, § 19. Under this provision, individuals have "a fundamental right" "to substantially equal voting power." *Harper I*, 2022-NCSC-17, ¶ 145 (quoting *Stephenson I*, 355 N.C. at 379, 562 S.E.2d at 393–94). Strict scrutiny applies to government classifications that "impermissibly interfere[] with the exercise of a fundamental right." *Id.* ¶ 144 (quoting *Northampton Cnty.*, 326 N.C. at 746, 392 S.E.2d at 355). Thus, "[c]lassifying voters on the basis of partisan

affiliation so as to dilute their votes . . . is subject to strict scrutiny because it burdens a fundamental right[.]" *Id.* ¶ 150.

Legislative Defendants claim *Harper I* failed to "identify any distinction drawn on the basis of a suspect classification," LD Br. 45–46, but this misapprehends North Carolina's equal-protection law.[5] The State's Equal Protection Clause requires strict scrutiny where a government classification *either* "create[s] a suspect class" *or* "interfere[s] with a fundamental right." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990). *Harper I* addresses the latter scenario. *See* 2022-NCSC-17, ¶¶ 142–150. And as *Stephenson I* makes clear, "[i]t is well settled in this State that 'the right to vote on equal terms is a fundamental right.'" 355 N.C. at 378, 562 S.E.2d at 393 (quoting *Northampton Cnty.*, 326 N.C. at 747, 392 S.E.2d at 356).

[5] In making this argument, Legislative Defendants point out that North Carolina courts "use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis." LD Br. 46 (quoting *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996)). But North Carolina's guarantee of equal protection is more expansive than its federal counterpart. *See Stephenson I*, 355 N.C. at 380–81 n.6, 562 S.E.2d at 395 n.6; *see also Tully v. City of Wilmington*, 370 N.C. 527, 533, 810 S.E.2d 208, 214 (2018) ("[W]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." (quoting *Corum*, 330 N.C. at 783, 413 S.E.2d at 290)).

Legislative Defendants finally argue that *Harper I* does not follow from *Stephenson* because the latter case involved the "individual right to vote." LD Br. 46–47 (quoting *Harper I*, 2022-NCSC-17, ¶ 148) (emphasis omitted). But so does *Harper I*. Both cases hold that an individual's right to substantially equal voting power is harmed by a districting scheme that diminishes his or her "representational influence." *Harper I*, 2022-NCSC-17, ¶ 148 (quoting *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393). And *Stephenson* emphasized that North Carolina's Equal Protection Clause focuses on practical consequences, not formalities: It barred districting plans that contained both multimember and single-member districts because, as a practical matter, voters in single-member districts "may not enjoy the same representational influence or 'clout' as voters" in multimember districts. 355 N.C. at 377, 562 S.E.2d at 393.

3. Partisan gerrymandering violates the North Carolina Constitution's Free Speech and Assembly Clauses.

The Free Speech and Assembly Clauses provide respectively that "[f]reedom of speech and of the press . . . shall never be restrained," N.C. CONST. art. I, § 14,[6] and "[t]he people have a right to assemble together to consult for

[6] The provision reads in full: "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. CONST. art. I, § 14. Puzzlingly, Legislative Defendants fault *Harper I* for its "discourse on free

their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances," *id.* art. I, § 12. Partisan gerrymandering violates these clauses because it impermissibly discriminates against the protected expression and association of voters affiliated with one political party or viewpoint. A gerrymandered plan "identifies certain preferred speakers" (here, Republican voters) and targets certain "disfavored speakers" (here, Democratic voters) for disfavored treatment because of disagreement with the political beliefs the latter individuals express through their speech and association. *Citizens United v. FEC*, 558 U.S. 310, 340–41 (2010); *see also Common Cause*, 2019 WL 4569584, at *120. The Free Speech and Assembly Clauses "also bar *retaliation* based on protected speech" or conduct. *Common Cause*, 2019 WL 4569584, at *123; *see also McLaughlin v. Bailey*, 240 N.C. App. 159, 172–73, 771 S.E.2d 570, 579–80 (2015), *aff'd*, 368 N.C. 618, 781 S.E.2d 23 (2016); *Elrod v. Burns*, 427 U.S. 347, 356–57 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 73–76 (1990). *Harper I* accordingly held that "[w]hen the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint

speech as the 'great bulwark of liberty' and so forth," LD Br. 47—that is, for invoking the text of the constitutional provision itself.

discrimination and retaliation that triggers strict scrutiny." 2022-NCSC-17, ¶ 157 (citing *State v. Petersilie*, 334 N.C. 169, 182, 432 S.E.2d 832, 840 (1993)).

Each of Legislative Defendants' arguments that partisan gerrymandering does not implicate the Free Speech and Assembly Clauses fails. First, Legislative Defendants claim partisan gerrymandering does not "restrain[] speech or den[y] anyone's right to consult." LD Br. 47 (emphasis omitted). As an initial matter, this characterization ignores the Constitution's guarantee of North Carolinians' right to assemble to "instruct their representatives" and "to apply to the General Assembly for redress of grievances," N.C. CONST. art. I, § 12, both of which are relevant to redistricting. Moreover, a restriction on speech or assembly need not be absolute to violate the Constitution. The fact that Democratic voters can still cast ballots under gerrymandered maps, and can still speak to their fellow Democrats, does not change the outcome of the constitutional analysis. "The government unconstitutionally burdens speech where it renders disfavored speech *less effective*"—as the General Assembly has done here—"even if it does not ban such speech outright." *Common Cause*, 2019 WL 4569584, at *121. "[T]he 'distinction between laws burdening and laws banning speech is but a matter of degree,'" and thus "the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.'" *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011) (quoting *United States v. Playboy Ent. Grp.,*

Inc., 529 U.S. 803, 812 (2000)). It is "no answer to say that petitioners can still be 'seen and heard'" if the burdens placed on their speech "have effectively stifled petitioners' message." *McCullen v. Coakley*, 573 U.S. 464, 489–90 (2014).

Legislative Defendants likewise claim that redistricting plans do not involve "restrictions . . . on the espousal of a particular viewpoint." LD Br. 47 (quoting *Persilie*, 334 N.C. at 183, 432 S.E.2d at 840). But plans gerrymandered on the basis of partisanship do burden the expression of one viewpoint as compared to another. And the government may not burden the "speech of some elements of our society in order to enhance the relative voice of others" in electing officials. *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976)); *see also Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 451, 253 S.E.2d 473, 486 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980).

Legislative Defendants also contend that this Court's "analogy to free-speech 'retaliation'" is inapplicable because the Court did not cite evidence that voters' expression had been chilled by partisan gerrymandering. LD Br. 48. To prevail on a retaliation theory, a plaintiff must show that "(1) the [challenged plan] take[s] adverse action against them, (2) the [plan] w[as] created with an intent to retaliate against their protected speech or conduct, and (3) the [plan] would not have taken the adverse action but for that retaliatory intent."

Common Cause, 2019 WL 4569584, at *123 (citing *McLaughlin*, 240 N.C. App. at 172, 771 S.E.2d at 579–80). The plans challenged here met all three elements. As to adverse action, "[i]n *relative* terms, Democratic voters under the [2021] Plans are far less able to succeed in electing candidates of their choice than they would be under plans that were not so carefully crafted to dilute their votes. And in *absolute* terms, Plaintiffs are significantly foreclosed from succeeding in electing preferred candidates[.]" *Id.* As to intent, the trial court made numerous findings—both qualitative and quantitative—that the 2021 Plans "intentionally targeted Democratic voters based on their voting histories." *Id.* at *124. And as to causation, the analyses of Plaintiffs' experts uniformly showed, and the trial court agreed, that only intentional retaliation and discrimination could explain the discriminatory results. *Id.*; *see N.C. League of Conservation Voters*, 2022 WL 124616, at *31, *35, *70.

Finally, Legislative Defendants argue that the Free Speech and Assembly Clauses do not require the government "to listen, to respond, or to recognize each association and facilitate its speech." LD Br. 48–49 (internal citations and quotation marks omitted). But *Harper I* demands no such thing. It simply prohibits the General Assembly from intentionally burdening voters "based on their prior political expression." 2022-NCSC-17, ¶ 157.

D. Legislative Defendants' federal Elections Clause theory is baseless.

Harper I does not run afoul of the federal Elections Clause, as binding U.S. Supreme Court precedent and North Carolina statutes make clear. And in any event, Legislative Defendants have waived any argument to the contrary.

As an initial matter, the argument is not properly before this Court. Legislative Defendants *intentionally* raised no Elections Clause argument in *Harper II*, and accordingly this Court's decision in *Harper II* did not address the Elections Clause. Legislative Defendants cannot now use a petition for rehearing that is timely only as to *Harper II* to seek reconsideration of *Harper I*'s Elections Clause holding, which was not in any way incorporated into or necessary to the outcome in *Harper II*.

In any event, Legislative Defendants have waived any argument for reconsideration of *Harper I*'s Elections Clause holding because their supplemental brief raises the issue only in passing. LD Br. 49. Legislative Defendants "cite[d] no authority and ma[de] no argument" in support of their contention. *State v. Larrimore*, 340 N.C. 119, 167, 456 S.E.2d 789, 815 (1995). In circumstances like these, the Court declines to consider such arguments and "deem[s] the issue abandoned." *Id.*

Even if the Court did consider this argument, binding U.S. Supreme Court precedent confirms that the federal Elections Clause neither empowers state legislatures to act in defiance of state constitutions nor disables state courts from enforcing those constitutions. As this Court correctly found in *Harper I*, an unbroken line of U.S. Supreme Court decisions dating back a century confirms that "state courts may review state laws governing federal elections to determine whether they comply with the state constitution." 2022-NCSC-17, ¶¶ 174–177; *see, e.g.*, *Smiley v. Holm,* 285 U.S. 355, 368 (1932) (Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided"); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."). Those precedents bind this Court and require rejection of Legislative Defendants' Elections Clause argument.[7]

[7] While Legislative Defendants correctly note that the U.S. Supreme Court granted certiorari and heard argument on the Elections Clause issue presented in *Harper I* in December 2022, LD Br. 49, that Court's existing Elections Clause precedents continue to bind this Court.

II. *Harper II* Was Correctly Decided and Should Be Reaffirmed.

A. *Harper II* fully comports with *Harper I*.

Although Legislative Defendants' rehearing petition purports to seek rehearing of *Harper II*, what they really seek here is a rehearing of this Court's February 2022 decision in *Harper I*. But the time to petition for that relief has long expired. *See* N.C. R. App. P. 31(a) (requiring rehearing petitions to be filed within 15 days after issuance of the Court's mandate). Given their failure to timely seek rehearing of *Harper I*, Legislative Defendants' request is couched instead as seeking the "withdrawal" of the Court's opinion in *Harper II* on the ground that "the Remedial Phase Was Unwarranted." LD Br. 19. But if the remedial phase had been "[u]nwarranted," that would speak to purported error in *Harper I*, not *Harper II*.

Attempting to avoid this conclusion, Legislative Defendants contend that rehearing is warranted because "*Harper II* announced in effect that *Harper I* was wrongly decided." LD Br. 19–20. But the opposite is true. *Harper II* was a straightforward application of the principles articulated in *Harper I*. Indeed, the majority opinion in *Harper II* cited *Harper I* no fewer than 76 times and never once suggested that the Court was unable to apply—let alone was expressly or impliedly overruling—any aspect of its former opinion. *See* 2022-NCSC-121, ¶¶ 1–115.

B. *Harper II*, like *Harper I*, rests on this Court's established precedents.

Furthermore, the principles articulated and applied in *Harper I* and *Harper II* were by no means "new" (Pet. 10) or "novel" to North Carolina jurisprudence (LD Br. 25, 45, 63). In suits brought in the previous decade by several of the Plaintiffs in this case, a separate bipartisan three-judge panel of the Wake County Superior Court, following the same precedents cited in *Harper I* and *Harper II*, invalidated North Carolina's legislative and congressional maps as partisan gerrymanders that violated the Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses. *Harper v. Lewis*, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122, at *7–14, *22 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019) (three-judge panel); *Common Cause*, 2019 WL 4569584, at *2–3 (three-judge panel). Tellingly, in those two cases the legislative defendants lacked the confidence in their legal position to appeal the rulings and thus allowed North Carolina's elections to proceed under the resulting remedial maps.

Over the last two redistricting cycles, multiple bipartisan courts have applied this Court's longstanding precedents to strike down multiple redistricting plans as partisan gerrymanders. This is hardly the story of a Court announcing that its precedents were "wrongly decided." LD Br. 19–20.

C. Legislative Defendants' arguments about the presumption of constitutionality and discriminatory intent erroneously ignore *Harper II*'s remedial posture.

Central to Legislative Defendants' critique of *Harper II* are two points that ignore the remedial nature of that decision. First, Legislative Defendants argue that *Harper II* erroneously abandoned the presumption of constitutionality. LD Br. 22–24. Second, Legislative Defendants fault *Harper II* for supposedly failing to demand proof of discriminatory intent. LD Br. 24–25. Both complaints miss the mark.

Harper I expressly acknowledged the principle that "legislative acts . . . [are] presumed constitutional." *Harper I*, 2022-NCSC-17, ¶ 7. And in reviewing the legislative acts containing the remedial Senate and House plans, *Harper II* stayed true to that principle. However, when a legislature enacts a remedial districting plan in the wake of a ruling that its prior plan was unlawful, the legislature's charge is not simply to adopt any plan, but to "enact a constitutionally acceptable plan." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). And the court is charged with "assess[ing] the legality of a new apportionment statute" and "prepar[ing] its own plan . . . if the [legislature's] version proves insufficient." *Ely v. Klahr*, 403 U.S. 108, 115 (1971); *see also League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371 (Fla. 2015) (reversing "the trial court's order upholding the Legislature's remedial redistricting plan" because "[o]nce a direct violation of the Florida Constitution's prohibition on partisan

intent in redistricting was found . . . the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines"), *cited favorably in Rucho*, 139 S. Ct. at 2507.

In *Stephenson II*, this Court upheld a stringent standard when assessing remedial plans, to ensure that the constitutional harm has been fully cured. *See Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003) (*Stephenson II*) (affirming trial-court holding that "the 2002 revised redistricting plans are constitutionally deficient" because the plans "fail to attain 'strict compliance with the legal requirements set forth' in *Stephenson I*" (citation omitted)). Legislative Defendants' argument that *Harper II* "erroneously abandoned the presumption of constitutionality" (LD Br. 22; initial capitals cleaned up) is therefore misplaced.

For similar reasons, Legislative Defendants also err when criticizing *Harper II*'s supposed failure to demand proof of discriminatory intent. LD Br. 24–25. As an initial matter, Legislative Defendants implicitly concede that there is no requirement under the Free Elections Clause to prove discriminatory intent. *See id.* at 24 (stating that "settled precedent requires [proof of intentional, purposeful discrimination] in cases alleging violations [of the] equal-protection and free-speech and -assembly guarantees"); *id.* (describing a Free Elections Clause violation solely by reference to its effects on voters).

Moreover, even when plaintiffs must prove discriminatory intent at the liability phase, there is no freestanding requirement for them to re-prove discriminatory intent at the remedial phase. *See North Carolina v. Covington*, 138 S. Ct. 2548, 2253–54 (2018) (holding that district court properly concluded that remedial districts enacted by General Assembly continued to discriminate on the basis of race even though General Assembly did not use racial data in enacting remedial districts).

This flows, again, from the fact that the remedial phase of litigation is not akin to an entirely new case: "[T]he remedy for an unconstitutional law must completely cure the harm wrought by the prior law[.]" *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016); *see also United States v. Virginia*, 518 U.S. 515, 547 (1996) ("Having violated the Constitution's equal protection requirement" by maintaining a male-only military college, "Virginia was obliged to show that its remedial proposal 'directly address[ed] and relate[d] to' the violation" (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977))); *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) (after determining that the Florida Legislature's "plan had been drawn with improper intent," the court "shifted the burden to the Legislature to justify its decisions in drawing the congressional district lines"). So, at the remedial phase of a districting case, what matters is whether the remedy fully cures the violation.

D. *Harper II* shows that this Court's standard for assessing partisan-gerrymandering claims is manageable by courts and legislators alike.

Legislative Defendants' final argument against *Harper II* is that it proves that there are no judicially manageable standards for evaluating partisan-gerrymandering claims. LD Br. 25–28. This too is simply an attack on *Harper I* using *Harper II* as a vehicle. And in any event, it lacks merit.

First, as demonstrated in great depth in the briefs that Plaintiffs filed in this Court last year in *Harper II* (as well as in *Harper I*)—which this Supplemental Brief fully incorporates by reference—the quantitative evidence supporting this Court's judgment was overwhelming. And in reviewing whether that evidence sufficed to support the trial court's factual findings, this Court applies a deferential standard. *See Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) ("When a trial court sits without a jury, findings of fact are conclusive on appeal if supported by any substantial evidence." (internal quotation marks and citation omitted)). This Court properly applied that standard here. *See Harper II*, 2022-NCSC-121, ¶ 68.

All told, seven maps containing 382 districts were evaluated: congressional, Senate, and House maps enacted by the General Assembly in November 2021; congressional, Senate, and House remedial maps enacted by the General Assembly in February 2022; and the modified congressional

remedial map created by the Special Masters and Dr. Grofman and adopted unanimously by the trial court later in February 2022. In the decade preceding the creation of these maps there were no fewer than 52 statewide general elections in North Carolina where Democratic candidates ran against Republican candidates, and each party won a significant number of those contests. These recent elections provide abundant evidence for analyzing the partisan patterns in the 382 districts within these seven maps.

It was not hard to see which of these maps were not like the others. Of the seven maps, only the February 2022 remedial House map and the February 2022 remedial congressional map modified by the Special Masters and Dr. Grofman faithfully guaranteed that North Carolina's voters would enjoy "substantially equal voting power," regardless of their political affiliations. *Harper II*, 2022-NCSC-121, ¶¶ 35–38, 48, 54, 75–76, 85–94. By contrast, the other five maps reflected pro-Republican partisan redistricting and constituted "extreme partisan outliers" that would safeguard Republican majorities even when Democratic candidates attract significantly more votes statewide. *See id.* ¶¶ 14, 22, 31–34, 39–42, 80–84, 95–102. Those results could not be explained by North Carolina's "political geography" because Plaintiffs presented alternative maps that lacked extreme partisan skew while better complying with traditional districting principles such as compactness and respect for counties. *Id.* ¶¶ 35–36, 63–64, 83, 100.

Finally, Legislative Defendants argue that *Harper II* erred by highlighting the bipartisan roots of the two valid maps and the "strict party-line vote[s]" on the other five maps. LD Br. 27 (quoting *Harper II*, 2022-NCSC-121, ¶ 82). But that distinction provides powerful evidence when adjudicating partisan-gerrymandering claims.

The General Assembly passed the remedial House plan with "sweeping" bipartisan support (*Harper II*, ¶ 92), by a vote of 115 to 5 in the House and 41 to 3 in the Senate. *See House Bill 980 / SL 2022-4*, N.C. Gen. Assemb., 2021–2022 Session, https://www.ncleg.gov/BillLookup/2021/H980 (last visited Mar. 2, 2023). And the modified congressional remedial plan was created by one of the nation's leading redistricting scholars (Dr. Grofman) and a unanimous, bipartisan panel of three retired North Carolina jurists, and then adopted by the unanimous, bipartisan panel of three active North Carolina judges who had heard a week's worth of testimony from both sides' expert and lay witnesses. By contrast, the five invalid maps were each enacted with no bipartisan support in either chamber.

Legislative Defendants are correct in reporting that the *Harper II* Court "was not shy in relying on this difference." LD Br. 27. But this difference is significant. Accordingly, what Legislative Defendants call "unfounded judicial interference," *id*. at 18, was actually principled appellate review of a trial court's factual findings.

Indeed, the ability of 115 state Representatives, 41 state Senators, four Justices, three trial-court judges, three Special Masters, and the Masters' expert advisor to all reach identical conclusions as to the 2022 remedial House plan provides strong evidence that the partisan-gerrymandering standard articulated in *Harper I* and reaffirmed in *Harper II* is sufficiently clear and manageable for courts and legislators alike.

III. The North Carolina Constitution Prohibits the General Assembly from Altering Established Legislative Districts Before the Next Decennial Census.

In its 3 February 2023 Order, the Court directed the parties to brief four questions as to elections in 2024 and beyond:

1. As raised in the Petition for Rehearing, whether the Court should "declare that the General Assembly is now able to exercise its redistricting power" and thus enact new Senate and House redistricting plans for upcoming elections. Pet. 3; *see Harper v. Hall*, 882 S.E.2d at 550.

2. "Whether congressional and legislative maps utilized for the 2022 election, which were drawn at the direction of this Court, are effective for future elections." *Harper v. Hall*, 882 S.E.2d at 550.

3. "What impact, if any," Sections 3(4) and 5(4) of Article II of the North Carolina Constitution "have on [the Court's] analysis." *Id.*

4. "What remedies, if any, may be appropriate." *Id.*

As set forth below, the answers to those four questions are as follows:

1. Until after the 2030 Census, the Constitution prohibits the General Assembly from replacing valid, established legislative districts with newly enacted districts.

2. If the Court withdraws *Harper II*'s holding rejecting the 2022 Senate map, the legislative maps (but not the congressional map) utilized in the 2022 elections are effective for future elections.

3. Sections 3(4) and 5(4) of Article II make clear that the only legislative districts that can be used in upcoming elections are those enacted by the General Assembly "at the first regular session convening after the return of [the] decennial census."

4. No remedy is needed for the congressional districting plan, which the General Assembly is free to revise prior to the 2024 elections. The appropriate remedies for the legislative districting plans are set forth in this Court's opinion in

> *Harper II*: The Constitution mandates that the 2022 House districts shall remain unaltered until after the 2030 Census; and the 2022 Senate districts shall be modified only to the extent necessary to achieve constitutional compliance. If, however, the Court withdraws its opinion in *Harper II* as requested by Legislative Defendants, the Constitution mandates that House and Senate districts that the General Assembly enacted in its first regular session after the 2020 Census must remain unaltered until after the 2030 Census.

The plain text of the North Carolina Constitution vests the General Assembly with the duty to "revise" the districts for the state Senate and the state House of Representatives after each federal decennial census. N.C. CONST. art. II, §§ 3, 5. It also places strict temporal limits on the General Assembly's authority to do so, requiring that the districts be revised "at the first regular session convening after the return of [the] decennial census of population taken by order of Congress." *Id.* Importantly, North Carolina's Constitution commands that, "[w]hen established," the districts "shall remain unaltered until the return of another decennial census of population taken by order of Congress." *Id.* §§ 3(4), 5(4).

By mandating that redistricting be undertaken with dispatch and afforded finality, the Constitution promotes accountability and stability in

North Carolina's electoral process. That is why this Court has explained that these constitutional provisions must "be adhered to by the General Assembly to *the maximum extent possible*." *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391 (emphasis added). And that is why this Court has declared legislative efforts to alter valid legislative districts before the next census void. *See Comm'rs of Granville Cnty. v. Ballard*, 69 N.C. 18, 20–21 (1873); *see also Covington v. North Carolina*, 283 F. Supp. 3d 410, 443 (M.D.N.C.) (three-judge court) ("[T]he plain and unambiguous language of Sections 3(4) and 5(4) prohibits the General Assembly from engaging in mid-decade redistricting."), *aff'd in part, rev'd in part on other grounds*, 138 S. Ct. 2548 (2018).[8]

As this Court correctly held in *Harper II*, the Senate plan enacted by the General Assembly in February 2022 is an invalid partisan gerrymander. 2022-NCSC-121, ¶¶ 95–102. A new Senate plan must therefore be created, and that plan—provided it comports with federal and state law—will govern until the next Senate plan is enacted following the 2030 Census. Similarly, because this Court held in *Harper II* that the February 2022 House plan is valid under federal and state law, that plan must be used in all House elections until after

[8] The North Carolina Constitution places no corresponding limits on congressional districting plans. It is therefore undisputed that the General Assembly is free to revise the congressional districting plan prior to the 2024 elections. Unless otherwise noted, this brief's subsequent references to districting plans are to the state legislative plans.

the 2030 Census. *See id.* ¶ 94 (because the 2022 House plan is valid, "[i]n accordance with article II section 5(4) of our Constitution, [it] is now 'established' under law and therefore 'shall remain unaltered until the return of another decennial census of population taken by order of Congress'" (quoting N.C. CONST. art. II, § 5(4))).

But even if this Court were to now hold that the 2022 Senate plan is valid (*i.e.*, to withdraw *Harper II*) and to further hold that the challenges to the 2021 plans should have been nonjusticiable (*i.e.*, to overrule *Harper I*), there would be no basis for the General Assembly to create new Senate and House plans. The existing legislative districts are "established" for purposes of Article II, Sections 3(4) and 5(4), because they not only represent valid enactments of the General Assembly at its first regular session following the 2020 Census, but they were *actually used* in the 2022 primary and general elections. And while the constitutional text prevents redrawing in any event, the bill establishing the House plan makes clear that the legislature in fact *intended* that the map would be used throughout the entire decade: It states that the plan will be used to "elect[] members of the North Carolina House of Representatives in 2022 *and periodically thereafter*." N.C. SESS. LAW 2022-4 (emphasis added).

Finally, even if the 2022 plans could somehow be discarded, there would then be no reason to discard the initial plans that the General Assembly enacted during its first regular session in November 2021—prior to the filing

of this case. Legislative Defendants' arguments as to why they should be permitted to return to the drawing board are contrary to the plain meaning of the North Carolina Constitution and to the Framers' sound rationale for prohibiting mid-decade redistricting.

A. If the Court withdraws *Harper II*, the General Assembly's 2022 Senate and House plans must be used until the next decennial census.

1. The North Carolina Constitution expressly prohibits mid-decade legislative redistricting.

The bar on mid-decade legislative redistricting has been enshrined in the North Carolina Constitution since the nineteenth century. The State's 1868 Constitution provided that the General Assembly should oversee a decennial "enumeration of the inhabitants of the State," after which it was to "alter" the existing Senate districts at its first subsequent session. N.C. CONST. OF 1868 art. II, § 5.[9] Following that alteration of the Senate districts, the 1868 Constitution provided that the newly revised districts "shall remain unaltered until the return of another enumeration." *Id.* Accordingly, this Court held shortly after ratification that a mid-decade redrawing of the border between Franklin and Granville Counties could not alter the Senate districts containing

[9] There was no analogous provision for the House of Representatives, as each county was its own House district and thus no redistricting process was necessary. The method for apportioning Representatives to the counties was also set forth in the Constitution, with no discretion vested in the General Assembly. *See* N.C. CONST. OF 1868 art. II, §§ 6–8.

those counties. *See Ballard*, 69 N.C. at 20–21. That was so even though maintaining the old Senate districts violated the constitutional requirement that "no county shall be divided in the formation of a Senate district." N.C. CONST. OF 1868 art. II, § 5. Thus, in its only pre-*Harper* decision interpreting the provision, this Court held that Article II's prohibition against mid-decade redistricting took precedence over other constitutional districting criteria. *See Ballard*, 69 N.C. at 20–21.[10]

North Carolina's 1971 Constitution carried this prohibition forward, providing that "[w]hen established," Senate and House districts "shall remain unaltered" until the next federal decennial census. N.C. CONST. art. II, §§ 3(4), 5(4). By their plain terms, these provisions bar legislative efforts to alter lawful districts more than once during the ten-year period between censuses. *See Ballard*, 69 N.C. at 20–21; *Covington*, 283 F. Supp. 3d at 443.

2. The constitutional prohibition on mid-decade redistricting applies, at a minimum, after valid legislative plans have been used in an election.

All parties agree that the 2022 plans were timely enacted by the General Assembly at its first regular legislative session following the 2020 Census. *See*

[10] Numerous other state supreme courts have likewise given precedence to mid-decade redistricting prohibitions in similar circumstances. *See, e.g.*, *In re Right of Representation on the Div. of a Town*, 60 Mass. (6 Cush.) 575, 576–78 (1839); *see also Legislature of Cal. v. Deukmejian*, 669 P.2d 17, 23 (Cal. 1983) (collecting more than a dozen cases).

LD Br. 12, 15, 50. All parties also agree that enacted districts may be "'established' for purposes of Article II, Sections 3 and 5" once the State's voters have "use[d]" the districts in elections and legislators have been "elected from them." LD Br. 57–58. Because the 2022 plans satisfy the Constitution's commands[11] and Legislative Defendants' own criteria, they govern future elections.

To declare otherwise would contravene the text and purpose of the North Carolina Constitution. As described above, the Constitution imposes a detailed schedule for decennial redistricting—a schedule the General Assembly adhered to after the 2020 Census. The General Assembly enacted the 2022 plans pursuant to its constitutionally imposed duty to "revise" legislative districts. N.C. CONST. art. II, §§ 3, 5; *see* N.C. SESS. LAWS 2022-2 (Senate plan) and 2022-4 (House plan). And it did so during the constitutionally prescribed period: "the first regular session convening after the return of [the] decennial census of population taken by order of Congress." N.C. CONST. art. II, §§ 3, 5; *see* N.C. SESS. LAWS 2022-2 and 2022-4 (both enacted on 17 February 2022, following the 2020 Census). And as a practical matter, it is difficult to imagine how districts could be more "established"—that is, "settle[d] or fix[ed]"—than

[11] Of course, Plaintiffs do not agree that the 2022 Senate plan satisfies constitutional commands, but this whole section of their Supplemental Brief assumes that the Court has concluded that it does and has withdrawn *Harper II*.

by having the citizens of North Carolina actually choose a representative from each district. *Establish*, *Webster's Third New International Dictionary* 778 (1986) (def. 2a).

Moreover, Legislative Defendants do not dispute that the enacted plans comply with the U.S. Constitution, the Voting Rights Act, and the North Carolina Constitution's requirements that districts contain "an equal number of inhabitants," "consist of contiguous territory," and do not excessively "divide[]" counties, N.C. CONST. art. II, §§ 3(1)–(3), 5(1)–(3). There is thus no basis in law to revise these districts.[12]

Legislative Defendants themselves assert that actual use in an election is essential before deeming districts "established" under the Constitution. LD Br. 57–58; Pet. 23. In fact, every reason that Legislative Defendants assert for why the 2021 plans are *not* established demonstrates conclusively that the 2022 plans *are*. The State "use[d] them in the 2022 elections." LD Br. 57–58. Legislators were "elected from them." *Id.* at 58. And to maintain them now

[12] Of course, if the General Assembly's enactments are later declared invalid for failure to comport with federal or state law, the General Assembly can enact new redistricting plans without running afoul of the bar in Sections 3(4) and 5(4). That is because an invalid enactment "is not a law; it confers no rights; it imposes no duties; it affords no protection; . . . it is, in legal contemplation, as inoperative as though it had never been passed." *Idol v. Street*, 233 N.C. 730, 734, 65 S.E.2d 313, 316 (1951) (quoting *Norton v. Shelby County*, 118 U.S. 425, 442 (1886)).

would not "double-bunk" any incumbent Senators or Representatives from either political party. *Id.*

Legislative Defendants are right to focus on the stability the Constitution seeks to provide, for it was this very concern that prompted the insertion of the decennial-redistricting restriction. The Framers of the North Carolina Constitution understood that redistricting is inherently disruptive to the voters who are forced into new districts where they will no longer be served by the legislators they have come to know. But that disruption is necessary, once a decade, to guarantee equal representation for equal numbers of people, as mandated by Article II's one-person, one-vote rule. N.C. CONST. art. II, §§ 3(1), 5(1) (requiring each legislator to "represent, as nearly as may be, an equal number of inhabitants").

But once new, valid, equally populated districts have been used in an election, absent a finding that they violate voters' rights, they must "remain unaltered" until they are made obsolete by the next census. *Id.* §§ 3(4), 5(4). More frequent reshuffling of constituents among districts would have all the drawbacks of normal redistricting without the offsetting benefit of leveling the unequal populations revealed by the latest census. By setting a mandatory decennial schedule for redistricting, the Framers established a regular ten-year cycle in which constituencies would be altered only every fifth election. *Compare id.* §§ 3, 5 (requiring redistricting "after the return of every decennial

census"), *with id.* §§ 2, 4 (requiring that Senators and Representatives be "biennially chosen by ballot"), *and* § 8 ("The election for members of the General Assembly shall be held for the respective districts in 1972 and every two years thereafter . . . .").

Freezing districts for four of every five elections serves an important function in our constitutional order. As Justice Story explained, "a fundamental axiom of republican governments [provides] that there must be a dependence on, and responsibility to, the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 586 (1833). If North Carolina's legislative districts were redrawn before each biennial election, this link would be cut, as elections would then routinely place incumbent legislators before voters who had never been represented by them. A legislator who had served his constituents well could be effectively knocked out of office by shifting his district to an overwhelmingly new set of constituents, while an ineffective and unrepresentative legislator could be saved by excising from his district his most dissatisfied constituents.

The Constitution tolerates such changes when they result from eliminating population disparities in the wake of a new decennial census. But in the middle of the decade, with no intervening census data to justify

redrawing districts, such changes are an affront to the republican form of government that the Framers bequeathed to us—and a usurpation of the power that our Declaration of Rights reserves to "the people" of North Carolina. N.C. CONST. art. I, § 2 ("*Sovereignty of the people*. All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.").

Declaring that vacatur of the judgment in *Harper II* would dis-"establish" the districts that were timely enacted by the General Assembly and actually used in the 2022 elections would therefore violate this Court's "fundamental" principle of constitutional interpretation: "to give effect to the intent of the framers of the organic law and of the people adopting it." *Stephenson I*, 355 N.C. at 370, 562 S.E.2d at 389 (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)). Viewed against this backdrop, the relief that Legislative Defendants seek is far broader than a ruling that partisan-gerrymandering claims are nonjusticiable. Authorizing the General Assembly to redraw valid districts that have already been used in elections would undermine North Carolina voters' ability to hold their elected representatives accountable and thereby exercise their sovereignty.

3. North Carolina's prohibition on mid-decade redistricting comports with the practice in other States.

For these same reasons, other state supreme courts applying similar constitutional provisions have forbidden the legislature from redrawing districts more than once following a federal census—even absent an express prohibition such as the one in the North Carolina Constitution. Indeed, "[i]t is the general rule that once a valid apportionment law is enacted no future act may be passed by the legislature until after the next regular apportionment period prescribed by the Constitution." *Emery v. Hunt (In re Certification of a Question of Law)*, 615 N.W.2d 590, 595 (S.D. 2000) (quoting *Harris v. Shanahan*, 387 P.2d 771, 779–80 (Kan. 1963)); *id.* (holding that the legislature "lacked constitutional authority to make another apportionment until after the next federal census," and collecting cases); *see Legislature of Cal. v. Deukmejian*, 669 P.2d 17, 18, 23, 24 n.12, 25 (Cal. 1983) (reaffirming a long line of decisions holding that "the constitutional limitation to a single, valid decennial redistricting precludes a further change in district boundaries by the Legislature," and observing that other state supreme courts have reached the same conclusion); *State ex rel. Smith v. Zimmerman*, 63 N.W.2d 52, 56 (Wis. 1954) ("[N]o more than one legislative apportionment may be made in the interval between two federal enumerations").

In prohibiting mid-decade redistricting even without an express constitutional bar, state supreme courts have emphasized the important objectives underlying the decennial-redistricting limitation. First and foremost, the limitation achieves accountability by promoting "stability in representation," which creates, in turn, "a dependence on, and a responsibility to, the people, on the part of the representative." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242 (Colo. 2003); *see Deukmejian*, 669 P.2d at 27 (explaining that the once-per-decade restriction "promotes stability in districts and minimizes political battles"). When districts remain unaltered, constituencies remain intact, and officeholders can be held "accountable for promises made or broken." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 441 (2006) (*LULAC*) (plurality opinion); *see also Smith v. Mayor of Saginaw*, 45 N.W. 964, 966–67 (Mich. 1890) (noting that when "legislative districts are preserved intact," "no possible difficulty, doubt, or confusion can arise among the electors either as to time, place, manner, or right to vote, and no elector is or can be disfranchised").

By contrast, if districts can be "rearranged and readjusted to suit legislative whims, the power might be subject to abuse, and the real purpose of the [redistricting] restrictions defeated." *Zimmerman*, 63 N.W.2d at 59 (quoting *State ex rel. Hicks v. Stevens*, 88 N.W. 48, 51 (Wis. 1901)). For example, "a politically dominant party could redistrict at will to suit its own

self-serving ends," *Bone Shirt v. Hazeltine*, 700 N.W.2d 746, 756 (S.D. 2005) (Konenkamp, J., concurring specially)—such as entrenching itself in power by "excluding some voters from the district simply because they are likely to vote against the [incumbent] officeholder," *LULAC*, 548 U.S. at 441 (plurality opinion).

Taken to the extreme over a period of decades, however, stability undermines equal representation, producing "imbalance in the population of districts" and "resistance to change on the part of some incumbent legislators." *Reynolds*, 377 U.S. at 583.

States resolve this fundamental tension "by both requiring and limiting redistricting to once per decade." *Salazar*, 79 P.3d at 1242–43; *see Deukmejian*, 669 P.2d at 27. That nine States (including North Carolina) explicitly bar mid-decade redistricting in their constitutions,[13] and many other States do so even absent an express constitutional prohibition, *see supra*, illustrates widespread recognition of the problems with this practice. Indeed, Legislative Defendants themselves emphasize the "many practical problems with erratic changes in redistricting plans." LD Br. 56.

[13] *See* ALA. CONST. art. IX, §§ 198, 200; ALASKA CONST. art. VI, § 10; CONN. CONST. art. III, § 6; N.J. CONST. art. IV, § 3; N.M. CONST. art. IV, § 3(D); N.Y. CONST. art. III, § 4 ("unless modified pursuant to court order"); PA. CONST. art. II, § 17; W. VA. CONST. art. VI, § 10.

4. Legislative Defendants offer no principled basis for discarding the 2022 plans.

Legislative Defendants acknowledge that the 2022 districting plans were "enacted by the General Assembly" and "used in the 2022 election." LD Br. 50; *see id.* at 12, 15. Their principal argument (*id.* at 50–53) for why the plans' districts are nevertheless not "established" within the meaning of Article II, Sections 3(4) and 5(4) is that the General Assembly "expressly stated that the [2022] Plans would take effect only upon approval of those plans by the superior court panel," thereby evincing an "intent and purpose" to "conclusively establish that the 2022 plans would not exist but for the erroneous ruling and mandate in *Harper I*." LD Br. 50. This argument fails.

As an initial matter, the 2022 Senate and House districting plans *were* approved by the Superior Court, thus fulfilling the contingency within the 2022 enactments and enabling those plans to be used in the 2022 primary and general elections. Nothing this Court could do now would change the fact that those plans are valid enactments of the General Assembly's first regular session. Legislative Defendants' rehearing petition does not even ask this Court to hold that the Superior Court should *not* have approved the 2022

Senate and House plans. By Legislative Defendants' own terms, therefore, these plans are now "established."[14]

Legislative Defendants next argue (LD Br. 54–55) that the 2022 districts are not "established" because the General Assembly was, at the time, operating under a misconception about whether partisan-gerrymandering claims are justiciable. Nothing in the text, structure, history, or purpose of the Constitution's mid-decade redistricting bar suggests that it applies only when the General Assembly operates under accurate predictions of the turn of the law over the coming decade. Nor does anything suggest that unexpected *changes* in the law justify a do-over of the decennial redistricting process. To the contrary, Sections 3 and 5 state that redistricting is to occur in the "first regular session" following the census and that the "established" districts from that session "shall remain unaltered." N.C. CONST. art. II, §§ 3, 5.

[14] Indeed, under either the legal standards adopted in *Harper I* or the standards proposed by the *Harper II* dissent, the legislative plans used in the 2022 elections are constitutionally permissible. In *Harper II*, all seven Justices and the unanimous three-judge panel agreed that the 2022 House plan satisfies *Harper I*'s standard. *Harper II*, 2022-NCSC-121, ¶ 90; *id.* ¶ 181 (Newby, C.J., dissenting); *N.C. League of Conservation Voters, Inc. v. Rep. Destin Hall*, No. 21 CVS 015426, 2022 WL 2610499, at *7, *9 (N.C. Super. Ct., Wake Cnty. Feb. 23, 2022), *aff'd in part, rev'd in part sub nom. Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499. And the *Harper II* dissent agreed with the trial court that the 2022 Senate plan should have been upheld. *See Harper II*, 2022-NCSC-121, ¶¶ 196–197 (Newby, C.J., dissenting); *N.C. League of Conservation Voters, Inc. v. Rep. Destin Hall*, 2022 WL 2610499, at *5–6, *9.

A hypothetical makes the point clearer still. Suppose, for instance, that the General Assembly enacted districting plans following the 2030 Census and those plans were used in the 2032 and 2034 election cycles. Suppose further that in 2035, Congress repealed the Voting Rights Act or the U.S. Supreme Court invalidated it. Such a change in the legal landscape governing redistricting, though significant come 2040, would not warrant redrawing North Carolina's districting plans before the next census. Moreover, Article II, Sections 3(4) and 5(4) would prohibit redrawing the plans under those circumstances even if the post-2030-Census enactments had included language purporting to tie the plans to the continued vitality of the Voting Rights Act. Those plans—validly enacted and used in elections—would be firmly "established," N.C. CONST. art. II, §§ 3(4), 5(4), and the General Assembly would be precluded from altering them. It would not matter that those plans were enacted in the shadow of a now-invalid or repealed "legal framework." Pet. 23 n.3. So too here.[15]

[15] Likewise, in *Ballard*, the plaintiff argued that a mid-decade legal development—specifically, a statute shifting the Franklin/Granville County border—would render the Senate map, if unaltered to account for that shift, in violation of the Constitution's whole-county provision. *See* 69 N.C. at 20. This Court disagreed, explaining that the whole-county provision "only applies to the original laying off of the districts, and not to a change in the line of a county subsequently made." *Id.*

Legislative Defendants also argue (LD Br. 54–55) that the mid-decade redistricting bar in Article II, Sections 3(4) and 5(4) does not apply because the 2022 districting plans "were established by the superior court panel and this Court, not the General Assembly." LD Br. 54. That is incorrect: Those plans were drawn and enacted by the General Assembly. *See* N.C. SESS. LAWS 2022-2 (Senate plan); N.C. SESS. LAWS 2022-4 (House plan). But it is telling in any event that Legislative Defendants describe the 2022 plans, at least in a colloquial sense, as "established." LD Br. 54. And even if Legislative Defendants were correct about *who* "established" those plans, the Constitution does not say that plans become inalterably fixed upon being "established *by the General Assembly*." The Framers of the 1971 Constitution were surely aware that courts play a significant role in the redistricting process, but they nonetheless used the term "established" *simpliciter*. *See Salazar*, 79 P.3d at 1237 (observing that "since *Baker v. Carr*, [369 U.S. 186 (1962),] court involvement in redistricting has become more common" and today "courts are heavily involved"). This Court "ha[s] no power to add to or subtract from the language" chosen by the Framers. *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525, 528 (1950).[16]

[16] Relatedly, Legislative Defendants invoke the fact that *court*-drawn remedial plans sometimes do not become "established." LD Br. 53 (citing *Stephenson v. Bartlett*, 358 N.C. 219, 229–30, 595 S.E.2d 112, 119 (2004)). But

Finally, the General Assembly made clear its *own* intent and understanding that it was establishing the 2022 House plan to govern all elections this decade. The bill creating the plan states that it redistricts North Carolina "[f]or the purpose of nominating and electing members of the North Carolina House of Representatives in 2022 *and periodically thereafter*." N.C. SESS. LAW 2022-4 (emphasis added). That statutory language, and not the litigation position advanced by Legislative Defendants, reflects the will of the legislature and is the law of North Carolina. Although of course the General Assembly cannot evade the constitutional ban on mid-decade redistricting by failing to include such language, the presence of such language powerfully confirms the universal understanding that the 2022 House districts were "established" as the districts governing elections for the entire decade.

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no court-drawn Senate or House plan is at issue here. And Legislative Defendants offer nothing more than their *ipse dixit* in asserting (LD Br. 53) that a remedial districting plan drawn by the General Assembly after a court's invalidation of an earlier plan is "no different" than a plan drawn by the court itself—a conflation that plainly contradicts North Carolina law. *Compare* N.C. Gen. Stat. § 120-2.4(a) (addressing remedial districting plans enacted by the General Assembly), *with id.* § 120-2.4(a1) (addressing remedial districting plans modified by the court "[i]n the event the General Assembly does not act to remedy any identified defects to its plan within [the specified] period of time"). The appropriate historical parallels for the 2022 plans are not the judicially drawn 2002 plans, as suggested by Legislative Defendants (LD Br. 53), but rather the 2004 plans, which were drawn by the General Assembly following a court order.

B. If the 2022 Senate and House plans could be discarded, there would be no reason to also discard the initial plans that the General Assembly enacted during its first regular post-census session in 2021.

For the reasons just explained, there is no lawful basis for the General Assembly to replace established legislative districts that it enacted in 2022 with new districts created and enacted between now and the next decennial census. But even if this Court decides not only to withdraw *Harper II* and overrule *Harper I*, but also to enjoin the State Board of Elections from using the 2022 Senate and House districts, it must require the State Board to hold elections under the 2021 districts, rather than allowing the General Assembly to start over. If the 2022 districting plans were rendered unavailable, using the 2021 plans would be the correct remedy for four reasons.

First, it is impossible to assert that any alleged error in *Harper I* somehow taints the districts that the General Assembly enacted in November 2021. This case was, of course, not filed until *after* those districts were enacted. And this Court did not hand down *Harper I* until three months later, in February 2022.

Second, if the Court believes that North Carolina should use whatever legislative districting plans would have existed had partisan-gerrymandering claims never been held justiciable and had this entire litigation never

happened, it need not speculate. Those plans are exactly what the General Assembly passed in November 2021.

Third, although permission to redistrict mid-decade is what the Legislative Defendants now seek from this Court, that is not what the full General Assembly, in bills enacted into law, actually mandated. The 2022 enactments containing the remedial Senate and House plans each provided that if this Court's decision in *Harper I* were "made inoperable . . . or ineffective," the 2021 plans would automatically, by operation of law, become "again effective." N.C. SESS. LAWS 2022-2, § 2 (Senate plan); N.C. SESS. LAWS 2022-4, § 2 (House plan). So if this Court renders *Harper I* "inoperable . . . or ineffective," the General Assembly has already mandated reinstatement of the 2021 districts. Legislative Defendants cannot change the prescribed remedy the General Assembly explicitly enacted into law simply because they now deem it politically inconvenient.

Fourth, the General Assembly's November 2021 Senate and House districts were enacted "at the first regular session convening after the return of [the] decennial census of population taken by order of Congress." N.C. CONST. art. II, §§ 3, 5. Thus, the November 2021 plans complied with the Constitution's timing requirement. By contrast, any future legislative plans that this Court might authorize in response to Legislative Defendants' plea would *not* be enacted "at the first regular [post-census] session," *id.*, and thus

would *not* be timely under the North Carolina Constitution. The plain text of the Constitution, in provisions with roots extending back to 1868, thus prohibits exactly what Legislative Defendants have invited this Court to bless. The Court should decline their invitation.

CONCLUSION

The Court should deny the requests for relief in Legislative Defendants' rehearing petition and supplemental brief.

Respectfully submitted this 3rd day of March 2023.

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