STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 015426
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 500085
REBECCA HARPER, et al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	

LEGISLATIVE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO *NCLCV* AND *HARPER* PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

In 2019, a three-judge panel issued the unprecedented ruling that partisan intent in redistricting is unconstitutional, even though the North Carolina Supreme Court seventeen years earlier had ruled that "[t]he General Assembly may consider partisan advantage and incumbency

protection in the application of its discretionary redistricting decisions." *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 390 (2002). Notwithstanding that the North Carolina Constitution "clearly contemplates districting by political entities" and that this is "root-and-branch a matter of politics," *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.), the panel determined that the way redistricting had occurred in North Carolina for decades—primarily under Democratic Party control—was suddenly unconstitutional. But that opinion offered no standards or guidance to guide future General Assemblies in crafting constitutional districting plans.

Now, the preliminary-injunction motions pending before this Court seek to extend that panel's holding, thereby exposing it as a threat to constitutional order in this State. Despite that the 2021 redistricting was the most transparent and non-partisan legislative redistricting in North Carolina and voluntarily followed to the letter the process the three-judge panel ordered for the 2019 remedial phase, a few private persons employing sophisticated experts who can make a computer simulation show anything at will—are dissatisfied. They think there are better district configurations than what the peoples' representatives chose. And they ask this Court to employ the judicial power of the State to pick their preferred configurations over the General Assembly's, even though the North Carolina and U.S. Constitutions delegate this *legislative* power to the General Assembly. These suits show that the *Common Cause* ruling does not provide any judicially manageable standard and will lead only to constant redistricting litigation, regardless of what the General Assembly actually does. Future plaintiffs could as easily disagree with the present Plaintiffs as the present Plaintiffs can disagree with the General Assembly.

This Court should reject the justiciability holding of the 2019 panel or, at a minimum, restrict the holding to its facts, which are not remotely present in 2021. These lawsuits are not likely to succeed, and there is no equitable merit to the motions for interlocutory injunctions, which

seek to impose on a *provisional* basis the will of a tiny minority against "the will of the people, legally expressed." *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 638 (1897). The motions should be denied.

Background

A. Historical Background and Prior Litigation

After each decennial census, "States must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). In North Carolina, the State Constitution commits that task solely to the authority of the General Assembly. N.C. Const. art. II, §§ 3, 5. "Redistricting is never easy." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). It has not been easy in North Carolina. The lawsuits of both sets of Plaintiffs should be understood against a lengthy historical and procedural background, which is summarized below.

1. Reconstruction Through the 2000s Cycle

"North Carolina has an extensive history of problematic redistricting efforts tracing back to the 1730s, which has generated significant litigation." *Dean v. Leake*, 550 F. Supp. 2d 594, 597 (E.D.N.C. 2008). From Reconstruction through the 2000 redistricting cycle, the Democratic Party controlled the redistricting process and was responsible for those "problematic redistricting efforts."

a. "After the Reconstruction Era and the rejuvenation of the Democratic Party, the practice of gerrymandering . . . became a favored tactic in gaining partisan control of the congressional delegation." D. Orr, Jr., *The Persistence of the Gerrymander in North Carolina Congressional Redistricting*, 9 Southeastern Geographer 29, 43 (1969). The paradigmatic example were the "bacon-strip" districts:

> Republican strength in North Carolina had been concentrated in the western mountain sections, where similar social and economic

> interests prevail. If those counties were combined into congressional districts, Republican congressmen would be elected. Democrats have chosen the dispersal alternative. A few Republican counties are grouped with Democratic counties in the central section of the state. The effect created one-county wide congressional districts that run horizontally across the state, creating what some have called bacon strips.

Leroy C. Hardy, *Considering the Gerrymander*, 4 Pepp. L. Rev. 243, 258–59 (1976). "One such district extended from Pender County on the coast, westward along the South Carolina line through seven more counties all the way to Mecklenburg, a total distance of approximately 250 miles." Orr, *supra*, at 43.

No equal-population requirement curbed the Party's political aims, and the notion that a partisan-fairness requirement was lurking then and there in the State Constitution was preposterous to them. *Id.*. The result of "180 years" of Democratic dominance in redistricting was "the rural domination of the [S]tate's congressional delegation" and the frustration of "the rising tide of Republicanism" in the State. *Id.*at 39.

In fact, when a Republican congressional candidate, Charles Jonas, successfully tailored his message to win one of the bacon-strip districts, the Democratic General Assembly promptly redrew the lines to pair him with a Democratic member in a district predominantly composed of Democratic-leaning territory (which could as easily be identified then as now, because vote totals then and now are reported at the precinct level). *Id.* at 44. But voters have free will:

> Amid Republican charges of gerrymandering, Jonas soundly defeated [the Democratic incumbent] in the 1962 election. In addition, when the legislators 'stacked' the Eighth District boundaries so as to include a preponderance of Democratic counties, they simultaneously gave the adjoining Ninth District an increased Republican character, an oversight which allowed another Republican, James T. Broyhill of Caldwell County, also to be elected to Congress.

Id. Rep. Jonas received no assistance from the State courts in winning elections.

In the first redistricting after the Supreme Court announced the one-person, one-vote rule, the Democratic-controlled General Assembly drew districts that "were as distorted as could be found in any state in the country." *Id.* at 46. A court invalidated that plan for failure to comply with the one-person, one-vote rule, but allowed an election to occur under it because of "the tremendous gulf which existed between the status quo and the constitutional requirements" and the "imminence of the 1966 primaries." *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966). Democrats set right back to work, drawing a district that was publicly described as "a dinosaur or a left-handed monkey wrench" that was "'packed' with a projected vote favorable to Representative Jonas far in excess of that needed to win." Orr, *supra*, at 49. Stated differently, Democratic map drawers sought to collect Republican voters in one district and remove them from neighboring districts to make the neighboring districts more favorable to Democratic electoral prospects. Other districts were "hardly compact and barely contiguous." *Id.* The federal court expressed its disappointment with the obvious gerrymandering, noting "[r]egretfully, we note that tortuous lines still delineate the boundaries of some of the districts" and hoped that, "following the 1970 decennial census," the districts would be drawn to be "reasonabl[y] compact." *Drum v. Seawell*, 271 F. Supp. 193, 195 (M.D.N.C. 1967). Nevertheless, it allowed the districts to be used, allowing the Democratic Party to again achieve the spoils of their electoral victory—which "is a compelling reminder that, indeed, 'elections have consequences.'" *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *1 (N.C. Super. July 08, 2013) (Ridgeway, Crosswhite, Hinton, JJ.).

b. The Democratic Party was not done. After the 1980 census, the Democratic-controlled General Assembly redrew the congressional lines, and a paramount concern was its "need . . . to protect its turf and its incumbents." Beeman C. Patterson, *The Three Rs Revisited: Redistricting, Race and Representation in North Carolina*, 44 Phylon 232, 233 (1983). Among the

results of this approach "was the incongruous lines drawn in the Second Congressional District to satisfy the incumbent, L.H. Fountain, who wanted to be sure that urban areas, such as the city of Durham, would be excluded from his district," resulting in an odd shape "called 'Fountain's Fishhook' because of the way it curved around urban areas." *Id.* In creating the district, the General Assembly used race as a proxy for politics, as "white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters." J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* 2487 (1999). Indeed, "racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions because of the 'ripple effects' of changes in one district on the shape of another." *Id.*

"'The incident shows that in drawing districts for a specific political purpose, 20th Century North Carolina legislators [were] not much different from their counterparts in 19th Century Massachusetts.' 'The Legislature,' [a prominent newspaper] paper noted in another editorial a few days later, 'has given the state districts that are hooked, humped, and generally ungainly—in a word, gerrymandered—to protect incumbents.'" *Id.* at 251 (citation omitted).

c. In 1992, the Democratic-controlled General Assembly drew perhaps the most infamous district of all time, known as the Freeway District:

> It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the

> interstate with both car doors open, you'd kill most of the people in the district.'"

Shaw v. Reno, 509 U.S. 630, 635–36 (1993) (*Shaw I*) (citations omitted). In fact, the entire redistricting plan was, as one redistricting expert described it, "a contortionist's dream," composed of four of the least compact districts in the nation and districts that "plainly violate the traditional notion of contiguity." Timothy G. O'Roarke, *Shaw v. Reno and the Hunt for Double Cross-Overs*, 28 Political Science and Politics 36, 37 (March 1995). The plan was drawn in secret by Democratic political consultant John Merritt and "emerged as the result of consultations among aides to incumbent congressmen and members of the redistricting committees"—which, of course, occurred in secret. *See Shaw v. Hunt*, 861 F. Supp. 408, 466 (E.D.N.C. 1994). In short, "the North Carolina legislature threw caution to the wind, sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race." *Id.*

Republican-affiliated redistricting plaintiffs asserted that the plan was an unconstitutional partisan gerrymander, and their claim was promptly dismissed. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992).[1] Another set of plaintiffs challenged the majority-minority districts as racial gerrymanders, and their claim succeeded. *See Shaw I*, 509 U.S. at 657–58 (recognizing a cause of action for racial gerrymandering); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (*Shaw II*) (striking down the district under this cause of action).

In his dissent, Justice Stevens observed "that this case reveals the *Shaw* claim to be useful less as a tool for protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends." *Shaw II*, 517 U.S. at 920 (Stevens, J., dissenting).[2] He observed that Democratic legislators "rejected Republican Party

[1] The "Blue" in that case was now-Senator Dan Blue, who was Speaker of the House at the time.
[2] *See also Shaw v. Hunt,* 861 F.Supp. 408, 462, 465, 468 (E.D.N.C. 1994) *vacated on other grounds,* noting that Districts 1 and 12 were drawn to primarily protect Democrat incumbents.

maps that contained two majority-minority districts because they created too many districts in which a majority of the residents were registered Republicans." *Id.* at 937. In other words, the hideous *Shaw* districts were, in his view, really partisan gerrymanders.

Justice Stevens anticipated the Democratic Party's next move. The General Assembly enacted a new congressional plan containing a new bizarrely shaped district, which "retains the basic 'snakelike' shape and continues to track Interstate 85." *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999) (*Cromartie I*). This time, the General Assembly asserted that it "drew its district lines with the intent to make District 12 a strong Democratic district." *Id.* at 549.

The Supreme Court accepted this "legitimate political explanation for its districting decision" and rejected the challenge—thereby allowing the Democratic Party to reap the benefit of its control of the General Assembly. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*). In fact, the Supreme Court gave the partisanship defense a privileged status in redistricting litigation. It emphasized that, where this defense is raised, extra "[c]aution is warranted," given that "race and political affiliation are highly correlated." *Id.*. Most importantly, the Supreme Court imposed an onerous requirement for a redistricting plaintiff, when the partisanship defense is raised, to present "alternative ways" in which "the legislature could have achieved its legitimate political objectives" with a "greater racial balance." *Id.* at 258. Partisanship had been established as the best defense to a claim of racial gerrymandering.[3]

d. Now that partisan gerrymandering had been approved—and became a legally advisable tactic—the Democratic Party plowed into the 2001 redistricting with partisan impunity.

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[3] Although a state may also defend on the ground that "traditional districting principles," rather than race, predominated, this has proven to be a weak defense. A plaintiff need not show "alternative ways" in which the redistricting plan could have been drawn, and the plaintiff need not show a departure from traditional districting principles at all. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797–800 (2017).

The 2001 congressional plan, like all the Democratic Party's plans, "were drawn outside of the General Assembly," in secret. Ex.1, Churchill Dep. 19:11–16. What was *not* secret was the partisan motive. Democratic Representative Wright stated expressly at a Redistricting Committee hearing that the plan was drawn "with the intent of certainly keeping the Democratic advantage." Ex.2, Nov. 14, 2001 Congressional Redistricting Comm. Tr. 25:22–26. He also agreed that District 13, another visible oddity that ran from Wake County to the Virginia border and then south into Guilford county to pick up highly Democratic areas, was "done to make sure that the 13th was a Democratic district" and, in fact, to be "a more stronger Democrat district than" before, and he expressly clarified that Democratic members were "looking at ways to enhance the performance Democratically . . . ." Ex. 2, Nov. 14, 2001 Congressional Redistricting Comm. Tr. 36:8–37:21.[4]

Because this was the legally correct course of action, none of these districts were invalidated. Indeed, no challenge was filed.

2. The 2010s Cycle

In 2011, the Republican Party controlled both chambers of the General Assembly for the first time since Reconstruction—control gained by winning seats in House and Senate redistricting plans drawn and passed by a Democratic-controlled legislature.

a. In the 2011 redistricting, the General Assembly interpreted the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which held that VRA § 2 imposes a "majority-minority" rule, *id.* at 17, to require the creation of majority-minority districts with a black voting-age population, or "BVAP," of at least 50%. Accordingly, the General Assembly included 28 majority-minority house and senate districts in the 2011 legislative plans and two additional

[4] Like the 1992 Congressional Plan, Democrats in 2001 drew their plan that was eventually adopted by the General Assembly "off site" and in secret. *Dickson v. Rucho* Deposition of Erika Churchill pp. 17-19 & 156-160, attached hereto as Exhibit 1.

majority-minority districts in the congressional plan. Lawsuits were subsequently filed challenging the legislative plans and the congressional plan under the federal Equal Protection Clause. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016).

The State defended some of the districts on the ground that they were drawn for predominantly political, not racial, reasons. *Cooper v. Harris*, 137 S. Ct. 1455, 1468–69, 1472–73 (2017). That is, the State raised the *Cromartie II* defense, but the district court in the congressional case rejected it. *Harris v. McCrory*, 159 F. Supp. 3d 600, 618–21 (M.D.N.C. 2016). Central to that ruling was its finding that the political explanation was not a sufficiently prominent rationale to protect District 12 because it "was more of a post-hoc rationalization than an initial aim." *Id.* at 620. The court emphasized that the redistricting chairpersons' contemporaneous public statements "attempted to downplay" the role of politics and did not, at the time, assert "that their sole focus was to create a stronger field for Republicans statewide." *Id.* If it had, the legislature could have had sufficient justification for the plan.[5] A similar ruling was issued in the legislative case. *Covington*, 316 F.R.D. at 139 ("[T]here is no evidence in this record that political considerations played a primary role in the drawing of the challenged districts."). The Supreme Court affirmed both decisions. *Cooper*, 137 S. Ct. 1455; *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

b. Having been denied the defense established in *Cromartie II* that allowed the Democrat majority to draw maps favoring their party, the General Assembly set to work redistricting with the Supreme Court's—and Plaintiffs' lawyer's—admonitions in mind. The

[5] That was the position of the plaintiffs in that case. Their briefing criticized the General Assembly for "revisionist history" and for public statements affirming the importance of the Voting Rights Act while omitting any reference to partisanship. Brief for Appellees, *Cooper*, 133 S. Ct. 1455 (2017) (No. 15-1262) 2016 WL 5957077, at *20 (2016).

General Assembly did not consider race in redrawing the legislative and congressional lines. But because not considering race was insufficient in *Cooper*—since the courts found that it *did* use race despite its contrary assertions—it was necessary to make a clear record to establish the *Cromartie II* defense. In redrawing legislative and congressional boundaries, the General Assembly represented in its criteria and in public statements that partisan data was a predominant criterion used in redistricting.

Plaintiffs, represented by lawyers in this case, sued. First, in November 2018, they challenged the legislative plans in this Court. *Common Cause v. Lewis*, 18 CVS 014001 (filed Nov. 13, 2018). After a year of discovery and a two-week trial, the *Common Cause* court ruled for the first time in North Carolina history that partisan motive in redistricting renders a plan invalid under various provisions of the State Constitution, including its Equal Protection Clause and its Free and Fair Elections Clause. The *Common Cause* court, however, insisted that it was not claiming a judicial right "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128 (N.C. Super. Sep. 03, 2019). Rather, it believed that the judicial task is "to take the Adopted Criteria that the General Assembly itself, in its sole discretion, established, and compare the resulting maps with those criteria to see 'how far the State had gone off that track because of its politicians' effort to entrench themselves in office.'" *Id.* (quoting *Common Cause v. Rucho*, 139 S. Ct. 2484, 2521 (2019) (Kagan, J., dissenting)). The finding of partisan motive was not particularly difficult because "Legislative Defendants openly admitted that they used prior election results to draw districts to benefit Republicans in both 2011 and 2017." *Id.* at *115. The *Common Cause* court also relied in part on expert mapping-simulation reports that

purported to show that the legislative plans were partisan outliers when compared to a baseline of innumerable maps supposedly drawn to achieve the General Assembly's own criteria. *Id.* at *17.

The *Common Cause* court soon learned the problem with that latter reliance. The *Common Cause* court placed exceptional limits on the General Assembly's remedial process, *id.* at *133, and the General Assembly responded with a process—conducted completely in public on live audio and video livestream—that selected districts at random from maps provided at the liability phase by one of the *Common Cause* plaintiffs' experts (Dr. Chen), follow by subsequent minor modification. Nevertheless, the *Common Cause* plaintiffs objected, called the resulting plan an extreme partisan gerrymander, and presented an expert report of Dr. Chen purporting to show that *his own simulated districts* (with minor modifications) were partisan outliers. Ex. 3, Plaintiffs' Objections to Remedial Plans at 14–44, *Common Cause v. Lewis*, No. 18 CVS 014001 (filed Sept. 27, 2019). The *Common Cause* court overruled the objections. Ex. 4, Order on Remedial Plans, *Common Cause v. Lewis*, No. 18 CVS 014001 (entered Oct. 28, 2019).

Plaintiffs, represented by the same lawyers, challenged the congressional plan enacted to remedy the *Shaw* violation, and the same panel that decided the *Common Cause* case issued an injunction. Ex. 5, Order on Injunctive Relief, *Harper v. Lewis*, 19 CVS 012667 (entered Oct. 28, 2019). The court, however, found a likelihood of success predicated entirely on the General Assembly's "detailed record . . . of partisan intent and the intended partisan effects . . . ." *Id.* at 12. The court found that the General Assembly had formally permitted consideration of partisan data in the criteria and instructed the map-drawing consultant to use partisan data in constructing the districts. *Id.* at 12–13. The court *did not* rely on the expert mapping simulations in *Harper*.

The General Assembly conducted another redistricting, again in public view and without a partisan-intent criterion. Again, the *Common Cause* plaintiffs objected, presented expert mapping

simulations purporting to show that the new plan was "an extreme and obvious partisan gerrymander," and again asked for injunctive relief. Ex. 6, Plaintiffs' Motion to Set Schedule for Review of Remedial Plan, *Harper v. Lewis*, 19 CVS 012667 (filed Nov. 15, 2019). The panel had now seen expert simulations purporting to show that every plan the General Assembly adopted, no matter how public and no matter how close to the *Plaintiffs'* prior simulated maps, constituted an extreme partisan gerrymander. The panel had enough and rejected the challenge. Ex. 7, Order, *Harper v. Lewis*, 19 CVS 012667 (filed Dec. 2, 2019).

B. The 2021 Redistricting

1. The 2021 redistricting was uniquely difficult because of a five-month delay in the release of the census results due to the global Covid-19 pandemic. North Carolina did not receive the census data necessary to redistrict until August 12, 2021. And because that data did not come in a "ready to draw" package, it took several additional weeks for legislative staff to load data and configure software for terminals that legislators and the public could use.

The General Assembly worked promptly to redistrict all the same. Both the House Redistricting Committee the Senate Redistricting and Elections Committee had already been conducting meetings, and they adopted criteria to govern the congressional and legislative line-drawing before the census results were announced. On August 12, 2021, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections met, and adopted Joint Criteria for redistricting. These criteria largely mirror traditional districting criteria, including in relevant part instructions that:

- the number of people in each congressional district be as equal as practicable under the 2021 decennial census;
- the number of people in each legislative district be within 5 percent of the ideal population under the 2021 decennial census;
- districts be contiguous;

- that voting districts (VTDs) should be split only when necessary;
- the Committees make reasonable efforts to draw compact districts;
- the Committees may consider municipal boundaries;
- the Committees may consider member residence;

Exhibit 8. To avoid violations identified in the 2010 cycle, the criteria also included the following directives:

> **Racial Data**. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.
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> ***
>
> **Election Data**. Partisan considerations and election results data shall not be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

Id. An additional criterion relevant to this case reads in full:

> **Community Consideration**. So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

Id. There was no priority to the criteria. *Id.* at 56:50 *et seq.*

The General Assembly conducted public hearings across the State, beginning on September 8, 2021 and running through September 30, 2021.[6] Legislators then began drawing

[6] The *Harper* Plaintiffs allege that the General Assembly avoided having hearings in large urban areas, and that only three hearings occurred outside of the typical workday. This is false. Hearings were held in the State's largest cities, including Charlotte, Winston-Salem, Fayetteville, Durham, and Wilmington. Eight hearings began at 5:00 PM or later. Hearings were also held in every one of the then 13 congressional districts. Furthermore, constituents from all over the State were free to communicate with members of both redistricting committees via email, phone, or any other method of virtual communication. This is in addition to the public access to at least one room where the general public could build their own districts, and the public portal opened for public input on redistricting that was open throughout the process. The public made use of all of these methods of providing comment.

maps, on public terminals during sessions that were recorded. All of the map-drawing occurred in this public process. After submissions and proposals by legislators and the public, additional hearings were held throughout the State on October 25 and 26, 2021, including hearings in Raleigh, Wilmington, and Greenville.

2. In early November, maps were proposed and voted on leading to the adoption of enacted plans on November 4, 2021 (the "2021 Plans"). During all Senate and House Redistricting Committee meetings, and during all full sessions of the House and Senate, Democratic members were given a meaningful opportunity to offer amendments, and comment on proposed plans. In addition, the General Assembly established a detailed record of the reasoning for the configurations of the districts. Some of the goals for the 2021 Congressional Plan are summarized here:

- CD1 is anchored in northeastern North Carolina based on testimony from a public hearing in Pasquotank that this region be maintained as a community of interest; the district was configured to take in the Outer Banks and most of the State's shoreline and to keep the finger counties of northeastern North Carolina together, as well as most of the counties that run along the State's border with Virginia. 2011-11-01 Senate Committee Hr'g 37:50, *et seq.*[7]

Indeed, Democratic members of the General Assembly praised the Chairs' attempts to create a "public transparent process" to draw the maps, as well as their ability to collaborate with the Republican members to develop the scheduling of the public hearings and other public input. See 2021-11-03 House Redistricting Committee Hr'g 48:28 (available at https://www.youtube.com/watch?v=M53S7TbN6ew) (statement from Rep. Harrison); 2021-11-01 Senate Redistricting and Elections Committee Hr'g 1:18:02 (available at https://www.youtube.com/watch?app=desktop&v=KgSkfFY7r7g) (statement from Sen. Davis).

[7] The November 1, 2021 hearing can be found at: https://www.youtube.com/watch?v=KgSkfFY7r7g

- CD2 was configured to contain most of rural northeastern North Carolina, to maintain whole counties (16 of 18 are whole), and to avoid splitting municipalities (none are split). *Id.* at 39:07, *et seq.*
- CD3 was configured to keep mostly rural counties in southeastern North Carolina near the coast within the same district and to improve the compactness of the prior district; extensive input from a public hearing in New Hanover was incorporated, including that Cape Fear River Basin be kept in one district, that New Hanover and Brunswick Counties be kept together, and that Bladen and Columbus Counties be maintained in a single district. *Id.* at 39:45, *et seq.*
- CD4 was configured to be a nearly perfect four-county district south of Raleigh, and these counties were chosen because they have similar geography, industry, and proximity to population base in the region in Fayetteville and Raleigh; an online comment requested that Cumberland, Harnett, and Sampson Counties be kept together in a congressional district, and this was accomplished by adding population in Johnston and one precinct in Wayne County; the district is highly compact and splits no municipalities. *Id.* at 40:42 *et seq.*
- CD5 was configured to be based entirely in Wake County, comprising Garner, Knightdale, Raleigh, Rolesville, Wake Forest, Wendell, and Zebulon; these municipalities are viewed as sharing common interests, given that people live and work and commute within these municipalities; no municipalities were split. *Id.* at 41:41 *et seq*.
- CD6 was configured to include Durham and Orange Counties and a portion of Wake County that contains Apex, Cary, and Morrisville, which were all viewed as a coherent community of interest, and to match the configuration of this district that has existed in this

region, in roughly the same form, for decades; no municipalities were split. *Id.* at 42:12 *et seq.*

- CD7 runs from the Triangle west through the Central Piedmont region encompassing Davidson, Guilford, and Harnett Counties and a portion of Wake County, the purpose being to bring together rural areas and smaller cities and towns. *Id.* at 42:51 *et seq.*
- CD8 is rooted in the Sandhill region of North Carolina including eight whole counties and a portion of Mecklenburg County; the configuration was created in part based on a comment by the Moore County Democratic Chair, who suggested that Sandhills counties including Moore, Scotland, and Hoke to be kept together in a Sandhills district. *Id.* at 43:40, *et seq.*
- CD9 constitutes the General Assembly's effort to keep the City of Charlotte together in one district, given its cohesive community; this was not strictly possible, given that Charlotte is too large for one congressional district, but the adopted configuration succeeded in keeping 83% of Charlotte in one district that, in turn, is 97% composed of Charlotte. *Id.* at 44:25 *et seq*.
- CD10 is composed of suburban and exurban areas that stretch between the population centers of Charlotte and the Triad region, which constitute a community of interest; the district keeps all of the City of High Point, based on a comment at a public hearing in Forsyth. *Id.* at 44:47, *et seq.*
- CD11 is based in the northwest corner of North Carolina containing eight whole counties and two partial counties based on a desire to maintain the incumbent in the district; a key goal was maintaining Greensboro as much as possible in the district, and the goal was achieved with more than 90% of Greensboro included. *Id.* at 45:26 *et seq.*

- CD12 was configured to join suburbs outside Charlotte to an area in and around Winston-Salem, which was achieved by incorporating four whole counties and one partial county; no municipalities were split. *Id.* at 45:55.
- CD13 contains municipalities and towns to the west and north of Charlotte based on an online comment suggesting that towns in North Mecklenburg, including Cornelius, Huntersville, and Davidson, be joined into a single district. *Id.* at 46:22 *et seq.*
- CD14 is anchored in western North Carolina to take in the mountain counties up to the westernmost tip of the State; the General Assembly implemented a comment at a Jackson County public hearing asking that McDowell and Polk Counties be removed from the district and that it be drawn into Watauga County. *Id.* at 47:01 *et seq.*

The legislative record is filled with information regarding goals like these. Specifically, in introducing the bill that ultimately was enacted as the House and Senate plans, Sen. Hise explained in detail, on a district-by-district and sometimes a VTD-by-VTD basis, the rationale for the decisions made in drawing the map that was ultimately passed as the 2021 Senate Plan. 2021-11-02 Senate Committee Hr'g 1:01:21, *et seq.* (available at https://www.youtube.com/watch?v=G0VerOsNMm4 (titled "2021-11-02 Committee (Senate)")). Sen. Hise explained, for example, why three New Hanover County precincts were selected for inclusion in Senate District 8, *id*. at 1:04:47, the reason for VTD splits and efforts to keep municipalities whole in Wake County, *id*. at 1:08:00 and 1:12:48, why Forsyth County was paired with Stokes County as opposed to Yadkin County, *id*. at 1:21:56, and the choices concerning the southwestern North Carolina county grouping configurations involving Cleveland, Gaston, Lincoln, Henderson, Polk, and Rutherford Counties, *id*. at 1:29:00. Similarly, while Rep. Hall did not go into detail each of 120 House districts, at the House Redistricting Committee hearing on

November 2, 2021, Rep. Hall gave an overview of the 2021 House Plan, describing how the proposed map followed the adopted criteria and the overarching goal of retaining the cores of prior districts where possible. 2021-11-02 House Committee Hr'g at 9:41:17 *et seq.* (available at https://www.youtube.com/watch?v=7pyfVT6VOc4&t=34565s (titled "2021-11-01 Redistricting Map Drawing (House))). Rep. Hall answered all questions from committee members as to why districts are configured as they are. The General Assembly also made available extensive data pertaining to each of the enacted plans.[8]

In addition, the legislative record shows that the Senate Committee received and adopted two amendments from Black Democratic Members, Gladys Robinson and Natalie Murdock, concerning the Durham/Chatham and Guilford/Rockingham regions. 2021 Senate Redistricting and Elections Committee Hr'g 3:45:46 et seq.[9] (consideration and approval of proposed amendment to districts in Durham and Chatham counties) and 3:52:00 et seq. (consideration and approval of proposed amendment to districts in Guilford and Rockingham counties). Democratic members testified stated in open committee that they supported the groupings districts as amended

[8] These are available online:

Senate : https://webservices.ncleg.gov/ViewBillDocument/2021/53447/0/SL%202021-174%20-%20StatPack%20Report

Congressional: https://webservices.ncleg.gov/ViewBillDocument/2021/53447/0/SL%202021-174%20-%20StatPack%20Report

House: https://webservices.ncleg.gov/ViewBillDocument/2021/53428/0/SL%202021-175%20-%20StatPack%20Report

[9] Available at https://www.youtube.com/watch?v=G0VerOsNMm4

and that the amended districts had no VRA issues. Id. at 3:48:04 and 3:52:49. The committee adopted them, and they are in the 2021 Senate Plan.

C. The Present Lawsuits

Two sets of plaintiffs filed the two lawsuits before the Court on motions for preliminary injunctions, and they are referred to here respectively as the *NCLCV* Plaintiffs and the *Harper* Plaintiffs. Both lawsuits rely on the *Common Cause* ruling and assert partisan gerrymandering claims.[10]

1. The *NCLCV* Plaintiffs challenge the 2021 Congressional, House, and Senate Plans under the North Carolina Constitution's Free Elections, Equal Protections, Free Speech, and Free Assembly Clauses. The *NCLCV* Plaintiffs allege that these plans are unlawful partisan gerrymanders because they are insufficiently proportional. Their theory is that "an electoral climate with a 50-50 split in partisan preference should produce a roughly 50-50 representational split." Moon Affidavit § 3.1; *NCLCV* Compl. ¶¶ 3, 88, 126–131. According to the *NCLVC* Plaintiffs, the "mark[]" of a map as a "partisan gerrymander" is "that it prevents the disfavored party from receiving a majority of seats, even when that party's candidates earn a majority of votes statewide." *NCLCV* PI Mem. 23. Absent from the *NCLCV* Plaintiffs' complaint and its preliminary-injunction papers is a plausible allegation that the General Assembly adopted a partisan-data criterion or otherwise announced a partisan purpose behind any of the 2021 Plans. Instead, the *NCLCV* Plaintiffs allege that, because it was *possible* for legislators to draw lines for partisan reasons, it *did* happen. *See, e.g.*, *NCLCV* Compl. ¶¶ 69–71.

[10] The *NCLCV* Plaintiffs also assert racial claims but do not move for preliminary relief on that basis.

The *NCLCV* Plaintiffs believe they can draft better maps than the General Assembly by "harnessing the power of mathematics and computer science." *NCLCV* Compl. ¶ 1. They assert that better maps than the General Assembly's can be created using "high-performance computers," "cutting-edge computational methods and resources" unavailable to the General Assembly, and a set of unidentified criteria, *id.* ¶ 154. They have purported to create one map approaching "Pareto optimality" for each House of the General Assembly and the congressional delegation. *Id.* But they leave what that means to the imagination. Their preliminary-injunction motion asks the Court to enjoin the use of the 2021 Plans in the 2022 elections, including the general election. Perhaps recognizing that such an injunction would be preempted by federal law, *see* 2 U.S.C. § 7; *Foster v. Love*, 522 U.S. 67 (1997), they also ask that, if the General Assembly cannot draft and finalize maps remediating the infirmities they supposedly identify in two weeks' time, the Court should order the State to use the *NCLCV* Plaintiffs' map in the 2022 elections. Compl. Prayer for Relief ¶ g; PI Mem. 58–59. In short, the *NCLCV* Plaintiffs ask this Court to determine that their plans are better than the General Assembly's and legislate their own plans into North Carolina law—*at the preliminary-injunction stage*.

2. The *Harper* Plaintiffs present a similar case predicated on *Common Cause* and its novel theory of partisan gerrymandering, but these plaintiffs challenge only the 2021 Congressional Plan, not the legislative plans. These are many of the same plaintiffs who challenged the 2019 congressional plan and whose challenge was rejected at the preliminary-injunction stage, based on a record much like the one before this Court.[11] Like the *NCLCV* Plaintiffs, the *Harper*

[11] In fact, the *Harper* Plaintiffs first attempted to bring this suit through a motion to amend their complaint in the prior *Harper* case for the purpose of keeping the same panel that decided *Common Cause*. That forum-shopping effort failed, and now they have voluntarily dismissed the prior *Harper* case.

Plaintiffs have no direct evidence that partisan motive entered the line-drawing, and, like the *NCLCV* Plaintiffs, they ask for the negative inference that partisan motive *must* have impacted lines because it cannot be proven *not* to have done so. *See, e.g.*, PI Mem. 5–8. The *Harper* Plaintiffs also rely on an expert analysis criticizing district lines and mapping simulations purporting to show that the 2021 Plans are extreme partisan outliers. The *Harper* Plaintiffs ask for a new court-drawn congressional plan to govern the 2022 election—*as preliminary relief*.

The Legal Standard

"A preliminary injunction . . . is an extraordinary measure taken by a court to *preserve the status quo* of the parties during litigation." *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (N.C. 1977) (emphasis added). It will be issued only if (1) "a plaintiff is able to show likelihood of success on the merits of his case," (2) "a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation," and (3) a "weigh[ing] [of] the equities" supports a preliminary injunction. *Holmes v. Moore*, 270 N.C. App. 7, 15, 34 840 S.E.2d 244, 254, 265 (N.C. App. 2020) (citations omitted).

Argument

These very lawsuits stand as a testament against their own underlying legal theory. Once the *Common Cause* panel invited partisan gerrymandering lawsuits, it should have recognized that partisan interest groups would overstay that welcome. After all, plaintiffs sued the General Assembly last cycle for *every* choice it made. When it failed to prioritize partisan goals, it was sued for racial gerrymandering. When it announced partisan goals, it was sued for partisan

gerrymandering. Now that it has forbidden both racial and partisan goals—it is sued for both.[12] Under Plaintiffs' theory, the facts simply do not matter; these cases are about political power. The 2021 redistricting was the most transparent, open, and non-partisan legislative redistricting in the history of North Carolina, if not the United States. It mirrored what the *Common Cause* court ordered the last time the General Assembly faced suit. But no amount of transparency or neutral criteria will satisfy these Plaintiffs. Until the General Assembly (or at least its current Republican majority) no longer draws the lines, the floodgates will never close. They should never have been opened. The *Common Cause* justiciability holding contravened binding precedent, and it should be rejected.

In any event, this case is not *Common Cause*. The General Assembly did not use partisan data, its criteria forbade any such use, and neither set of plaintiffs has credible evidence to the contrary. The *NCLCV* Plaintiffs disagree with the State Constitution's delegation of authority over redistricting to the General Assembly and contend that, if a "better" plan can exist, the Constitution demands it, and it should be afforded the force of law. But that would be a baffling result: the *NCLCV* Plaintiffs' plans enjoy no popular support, they were drawn in private quarters and in secret, and the *NCLCV* Plaintiffs have not even given a transparent account of the criteria controlling their line-drawing—much less the detailed account of line-by-line purpose the General Assembly has provided. No public hearings informed the proposed plans, and no public comment has been afforded. Yet the *NCLCV* Plaintiffs demand that this Court impose these black-box plans on 10.4 million North Carolina residents, with no questions asked—not even in discovery. Even if

[12] As noted, the *NCLCV* Plaintiffs have not sought provisional relief under their racial theories, but these theories illustrate the conundrum the State and this Court face.

"good government" were the law, the *NCLCV* Plaintiffs are on the wrong side of "good government."

So, too, are the *Harper* Plaintiffs. Like the *NCLCV* Plaintiffs, they have no direct evidence to support their claims. Instead, they dropped piles of paper, including lengthy expert reports, on the Court and opposing parties at 3:30pm on Tuesday, November 30, less than 72 hours before their preliminary-injunction hearing and in violation of this Court's rules. This Court should not be fooled. The expert reports have not been vetted in a fair adversarial process, they do not establish the predicates of their claims, and they provide no basis for this Court to find that the General Assembly did not follow its own criteria. The *Harper* Plaintiffs' experts did not seek to input the General Assembly's non-partisan goals into their algorithms, which is essential to make an even arguably fair assessment of partisan motive and intent. Instead, they rewrote their criteria in a transparent effort to rig the analysis in such a way to register any non-partisan goal not accounted for in the algorithm as partisan. And the analysis shows, on its own terms, only a muted partisan intent and effect. That is no basis to impose an undemocratic plan on 10.4 million North Carolinians.

I. Plaintiffs Are Unlikely To Succeed on the Merits

A. Plaintiffs Lack Standing

Plaintiffs are unlikely to succeed in establishing their own standing to challenge the 2021 Plans. "Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965); *see also New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 116, 840 S.E.2d 194, 204 (2020), *as modified on denial of reh'g* (May 18, 2020) ("[T]he only persons

entitled to "call into question the validity of a statute [are those] who have been injuriously affected thereby in their persons, property or constitutional rights."). "The direct injury requirement applicable in cases involving constitutional challenges to the validity of government action is a rule of prudential self-restraint based on functional concern for assuring sufficient concrete adverseness to address difficult constitutional questions." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021) (quotation marks omitted).

1. The *Harper* Plaintiffs

The *Harper* Plaintiffs are unlikely to establish standing, and their own presentation shows it. Because the right to vote is individual and unique to each person, and any "interest in the composition of 'the legislature as a whole'" is "not an individual legal interest," the U.S. Supreme Court has recognized that a voter is only directly injured by specific concerns with that voter's districts. *Gill v. Whitford,* 138 S. Ct. 1916, 1932 (2018). A plaintiff has standing to challenge the districts in which that plaintiff lives, but cannot raise generalized grievances about redistricting plans. *See id; see also United States v. Hays,* 515 U.S. 737, 745 (1995). The U.S. Supreme Court also offered parameters for assessing individualized injury. One is that a "hope of achieving a Democratic [or Republican] majority in the legislature" is not a particularized harm; the voter's interest is in the voter's own district, where the voter votes. *Gill*, 138 S. Ct. at 1932. Another is that a district's partisan composition is not a cognizable injury if a similar composition would result "under any plausible circumstance." *Id.* at 1924, 1932. A third is that injury must be proven, not merely alleged. *Id.* at 1931–32.[13] The *Harper* Plaintiffs are unlikely to establish standing under this test.

[13] Though not binding, U.S. Supreme Court precedent is "instructive" for interpreting North Carolina standing requirements. *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006). It is especially instructive here, where the case law is unanimous and directly on point.

To begin, the *Harper* Plaintiffs claim to live only in CD1, CD4, CD6, CD7, CD9, CD10, CD11, and CD14 under the 2021 plan. *Harper* PI Mot. at Ex. A, Madduri Decl., Exs. J-U. That means the *Harper* Plaintiffs have no colorable assertion of standing to challenge six of the congressional districts (CD2, CD3, CD5, CD8, CD12, and CD13).

Next, some *Harper* Plaintiffs reside in CD9 and CD6, which they allege (along with CD5 and CD12, where no *Harper* Plaintiff resides) are "packed" with Democratic voters and admit would be naturally packed in all events. *See Harper* Ex. H, at 56. According to their own evidence, these Democratic voters are able to elect their preferred candidates under the 2021 Congressional Plan and would continue to have that ability in their expert's numerous counter-factual scenarios. These Plaintiffs have clearly not suffered any harm. *Gill*, 1916 S. Ct. at 1932.

Next, some *Harper* Plaintiffs reside in CD1, CD7, and CD10. *See Harper* Ex. H, at 56. Although these districts are heavily Republican (as are CD3, CD12, CD8, and CD13, where no *Harper* Plaintiff resides), the *Harper* Plaintiffs' own expert's analysis shows that this is so as a matter of natural geography; they would live in heavily Republican districts in all events. *See Harper* Ex. H, at 56. Moreover, the *Harper* Plaintiffs' expert's analysis shows that many districts are not partisan outliers (including CD5, CD11, CD3, CD12, CD1, CD7, CD8, and CD13). *See Harper* Ex. H, at 56. Individuals in these districts have no colorable claim to a direct injury at all.

That leaves only two districts, CD4 and CD14, where, according to their allegations, residents can plausibly claim that a different configuration might yield a different electoral result. *See Harper* Ex. H, at 56. These individuals' claims fall short as well. For one thing, numerous possible configurations of these districts would *still* be highly favorable to Republican electoral prospects. *See id.* And, regardless, American law and democratic tradition presume that a person is represented by the person's designated representative, regardless of descriptive similarity or

party affiliation. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). It is therefore not self-evident that these Plaintiffs are injured simply in that they may be represented by a Republican after the 2022 election or in that the map places them in a district with constituents who prefer Republican candidates. Plaintiffs must demonstrate an additional individual injury from the district lines and have failed to do so.

2. The *NCLCV* Plaintiffs

The *NCLCV* Plaintiffs lack standing to sue to pursue a generalized interest in more Democratic Party-friendly plans, to "harness[] the power of mathematics and computer science" to advance a "new [academic] field known as 'computational redistricting'" in redistricting lawsuits, *NCLCV* Compl. ¶ 1–2, or for any other academic or partisan pursuit. As an initial matter, the *NCLCV* Plaintiffs claim to live in CD2, CD4, CD6, CD11, CD12, and CD13, as well as Senate Districts 2, 4, 12, 20, 23, 27, 32, 37, and House Districts 6, 10, 27, 29, 56, 58, 61, 72, and 98. NCLCV Compl. ¶¶ 14-28. This means the *NCLCV* Plaintiffs lack standing to challenge eight congressional districts, 42 out of 50 Senate districts, and 111 out of 120 House districts. Further, the *NCLCV* Plaintiffs do not establish that their own districts would shift from being Republican-leaning to Democratic-leaning under a different configuration, or that in all election scenarios they are prevented from electing their candidate of choice. Their arguments all concern an alleged statewide injury. *See, e.g.*, *NCLCV* PI Mem. 26–27, 33–34, 41. They also have failed to establish standing. *See Gill*, 138 S. Ct. at 1930–31.

The organizational plaintiff, the North Carolina League of Conservation Voters, Inc., fares no better. It alleges it is a "nonpartisan nonprofit advocacy organization whose mission is to protect the health and quality of life of all North Carolinians, by fighting to build a world with clean air, clean water, clean energy, and a safe climate, all protected by a just and equitable democracy."

NCLCV Compl. ¶ 11. NCLCV claims that its membership includes "voters of all political stripes—Democrats, Republicans, and independents," *id.* at ¶ 11 n.4, and that it engages in the electoral process to elect candidates who "share its values, to build a pro-environment majority" in North Carolina. *Id.* at ¶ 11. NCLCV has not shown how any redistricting legislation has negatively impacted its ability to advocate for its positions or to fundraise. Nor would such an assertion make sense, because redistricting legislation does not control how a private organization may speak, solicit donations, or associate with allies. Further, NCLCV has not accounted for how electing an increased number of Democrats might cause "harm" to their Republican members.

NCLCV alternatively claims to bring a claim on behalf of its members, and this too is unavailing. Under North Carolina law, an organization has standing to bring suit on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129-30, 388 S.E.2d 538, 555 (1990). None of those elements are satisfied. To the first element, for the reasons set forth above, the *NCLCV* Plaintiffs lack standing in their own right. Indeed, NCLCV concedes that it cannot confirm that it has members in many districts. *NCLCV* Compl. at ¶ 11 n.4. As for the second element, NCLCV claims to be a nonpartisan organization with both Republicans and Democrats and that it focuses its work on environmental advocacy. That is not germane to assisting the ability of Democratic Party voters to elect Democratic Party candidates, which is the avowed purpose of this suit. To the extent it claims to pursue a "just and equitable democracy," that is not a basis for standing. "Generally available grievance[s] about government" do not confer standing. *Gill*, 138 S. Ct. at 1923 (internal quotation omitted). And finally, the right to vote is individual and personal to each

citizen. *Id.* at 1929. NCLCV has members of all political "stripes" and cannot plausibly claim to fully understand, let alone represent, the personal political and voting preferences of its members. It is improper for an organization to assert its members' individual right to vote.

B. The Federal Constitution Bars Plaintiffs' Claims Against the Congressional Plan

The *Harper* Plaintiffs and *NCLCV* Plaintiffs challenge the 2021 Congressional Plan solely under the State Constitution. But the *federal* Constitution provides that the North Carolina General Assembly is responsible for establishing congressional districts. "The Framers addressed the election of Representatives to Congress in the Elections Clause." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019). It provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Elections Clause harbors no ambiguity; the word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). Here, it refers undisputedly to the General Assembly, not the North Carolina courts.

Thus, "[t]he only provision in the Constitution that specifically addresses" politics in congressional redistricting plans "assigns [the matter] to the political branches," not to judges. *Rucho*, 139 S. Ct. at 2506. What's more, the Elections Clause is the *sole* source of state authority over congressional elections; regulating elections to federal office is not an inherent state power. *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Thus, for a court applying state law to have any authority to address Plaintiffs' claims, it must derive from the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

This case is in all material respects like *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), where the Eighth Circuit rejected a state court's effort to alter state legislation on the ground that the state constitution required that change. In *Carson*, the Minnesota Secretary of State "agreed" with private plaintiffs "to *not* enforce the ballot receipt deadline" codified by Minnesota statute, and a "state court entered the consent decree order" against such enforcement on state constitutional grounds. *Id.* at 1056. The Eighth Circuit found that this likely violated the federal Constitution, reasoning "that the Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause of Article II, Section 1 of the United States Constitution," which, like the Elections Clause, delegates power over presidential elections to state legislatures. *Id.* at 1059. "Simply put, the Secretary has no power to override the Minnesota Legislature." *Id.* at 1060. So too here: this Court should decline Plaintiffs' invitation to overstep separation of powers and override the North Carolina General Assembly in setting the lines of congressional districts.

C. Plaintiffs' Claims Are Not Justiciable

Plaintiffs' claims also are unlikely to succeed because they are not justiciable. North Carolina courts lack jurisdiction over political questions. *See, e.g.*, *Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). The State Constitution delegates to the General Assembly, not courts, and certainly not the Democratic Party and their agents, the power to create congressional districts. Because "a constitution cannot be in violation of itself," *Stephenson v. Bartlett*, 355 N.C. 654, 378, 562 S.E.2d 377, 378 (2002), a delegation of a political task to a political branch of government implies a delegation of political discretion. *See id.* 371-72, 562 S.E.2d at 390.

Both sets of Plaintiffs rely on the justiciability holding of *Common Cause* for the proposition that partisan considerations in redistricting are unconstitutional. But that decision

disregarded the direct opposite conclusion of the North Carolina Supreme Court, which has made clear that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 355 N.C. at 371, 562 S.E.2d at 390. To be sure, this must occur "in conformity with the State Constitution," *id.*, but *Stephenson* was referring to the textual limitations the North Carolina Constitution imposes on redistricting, such as the whole-county rules governing legislative plans. *See id.* Although the Constitution subjects the General Assembly's discretionary exercise of redistricting authority to a series of specific criteria—including that districts be of approximately equal population and that county lines not be unnecessarily crossed—and although the State courts have correctly asserted the prerogative to enforce these express provisions, this only emphasizes the non-justiciable nature of Plaintiffs' claims. Just as "[t]he people of North Carolina chose to place several explicit limitations upon the General Assembly's execution of the legislative reapportionment process," *id.* at 389, they *could* have chosen to adopt express partisan fairness metrics that would, in turn, be judicially enforceable. The absence of the criteria Plaintiffs propose from the Constitution is proof that the State courts are not free to invent them. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 461, 385 S.E.2d 473, 486 (1989) (finding express redistricting requirements in some constitutional provisions to foreclose inferring requirements in others); *Cooper v. Berger*, 371 N.C. 799, 810–11, 822 S.E.2d 286, 296 (2018) ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (citation omitted)).

Beyond the textually clear restrictions on redistricting, courts in North Carolina have repeatedly refused to encroach on the power of the General Assembly. "Our North Carolina Supreme Court has observed that 'we do not believe the political process is enhanced if the power

of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.'" *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 08, 2013) (quoting *Pender County v. Bartlett*, 361 N.C. 491, 506, 649 S.E. 3d. 364, 373 (2007)). Whether or not the General Assembly's acts are wise, "this court is not capable of controlling the exercise of power on the part of the General Assembly, . . . and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly . . . and erecting a despotism of [judges], which is opposed to the fundamental principles of our government and usage of all times past." *Howell v. Howell*, 151, N.C. 575, 66 S.E. 571, 573 (1911). Courts in other states have issued similar rulings. Just days ago, the Wisconsin Supreme Court held that "[w]hether a map is 'fair' to the two major political parties is quintessentially a political question." *Johnson v. Wisconsin Elections Comm'n*, N.W.2d , 2021 WL 5578395, at *9 (Wis. Nov. 30, 2021).

Indeed, it has been settled for over 100 years in North Carolina that these claims are non-justiciable. *Howell* rejected as non-justiciable a claim that lines of a special-tax school district "were so run as to exclude certain parties opposed to the tax and include others favorable to it." *Howell*, 151 N.C. at 575, 66 S.E. at 572. The court (1) found that an "attempt to gerrymander" the district "was successfully made," (2) could not "refrain from condemning" that as a matter of policy, and (3) concluded that the body that adopted the lines acted erroneously in ignorance and without full knowledge that the private party that proposed the plan had intended to gerrymander the district. *Id.* at 575, 66 S.E. at 574. And yet the court *still* held that "the courts [are] powerless to interfere and aid the plaintiffs." *Id.* "There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 575, 66 S.E. at 573. This line of judicial prudence was upheld less than twenty years later in *Leonard v. Maxwell,* when the North

Carolina Supreme Court held that the "the question [of reapportionment] is a political one, and there is nothing the courts can do about it." 216 N.C. 89, 3 S.E.2d 316, 324 (1939). This Court should follow this binding precedent and refuse to "cruise in nonjusticiable waters." *Id.* Numerous other cases hold that the lines of legislatively created districts are not subject to judicial review. *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 70 S.E. 634, 635 (N.C. 1911) (holding the General Assembly's authority to "declare and establish" the "true boundary between…counties…is a political question, and the power to so declare is vested in the General Assembly."); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth*., 237 N.C. 52, 62 74 S.E.2d 310, 317 (1953) ("[T]he power to create or establish municipal corporations…is a political function which rests solely in the legislative branch of the government."); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) ("The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function."); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) ("Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate."); *Raleigh and Gaston R.R. Co. v. Davis,* 19 N.C. (2 Dev. & Bat.) 451, 465 (1837) ("The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road….").

The claims here are no different from the claim the North Carolina Supreme Court rejected in *Dickson v. Rucho*, 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014),[14] under the "Good of the Whole" clause found in Article I, Section 2. The court held that an argument that plans favorable to one political party were not enacted for the "best" interests of "our State as a whole" is "not based upon a justiciable standard." *Id*. Although styled under different provisions, Plaintiffs'

[14] *Cert. granted, judgment vacated on other grounds*, 575 U.S. 959 (2015).

claims are no different in substance or in terms of justiciability. This Court is bound to follow this precedent as written. *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (finding lower court "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina"); *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014).The failure of the *Common Cause* court to honor binding precedent does not excuse this Court from the same obligation.

Further, no satisfactory or manageable criteria or standards exist to adjudicate the sorts of claims Plaintiffs make. "The lack of standards by which to judge partisan fairness is obvious from even a cursory review of partisan gerrymandering jurisprudence." *Johnson*, 2021 WL 5578395, at *9. Both sets of Plaintiffs here admit that their demand is for proportional representation, but "[t]his theory has no grounding in American or [North Carolina] law or history, and it directly conflicts with traditional redistricting criteria." *Id.* "Even if a state's partisan divide could be accurately ascertained, what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law." *Id.* It is elementary that "the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs,* 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991)(internal quotations and citations omitted). There is no rule "that this Court can address the problem of partisan gerrymandering because it must." *Gill*, 138 S. Ct. at 1929. It is not the role of the State courts to update the Constitution to address "existing conditions"; "[h]owever liberally [a court] may be inclined to interpret the fundamental law, [the court] [would] offend every canon of construction and transgress the limitations of [the court's] jurisdiction to review decisions upon matters of law or legal inference [and] undert[ake] to extend the function of the court to a judicial amendment of the Constitution." *Elliott v. Gardner*, 203 N.C. 749, 166 S.E. 918, 922 (1932).

Plaintiffs here want a constitutional amendment. Claims asserting that a districting plan is somehow harmful to democracy are "not based upon a justiciable standard." *Dickson*, 367 N.C. at 575, 766 S.E.2d at 260. Because "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), a "partisan gerrymandering" claim could only proceed with some reliable standard for distinguishing good from bad politics. Plaintiffs cannot offer any test for discerning "at what point" politics "went too far." *Rucho*, 139 S. Ct. at 2501. That is because this question simply asks whether a political act is wise or unwise.

Put simply, Plaintiffs' case "is a case about group political interests, not individual legal rights." *Gill,* 138 S. Ct. at 1933. Even if Plaintiffs think their preferences are good for democracy, courts are "not responsible for vindicating" them. *Id.* Plaintiffs complain of the political impact of district lines that will, in all events, have political consequences. But a "politically mindless approach" is not advisable, and, "in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Gaffney*, 412 U.S. at 753. It is simply impossible in this arena to avoid political results.

The problems with maintaining judicial impartiality in the face of highly partisan redistricting lawsuits ring as true in state court as in federal court. The *Common Cause* court's justiciability holding has been shown to open the proverbial floodgates of litigation: there has been a partisan-gerrymandering claim pending in this State at every moment since the *Common Cause* liability ruling was handed down. Continuation of this anomaly would only invite more litigation and at all levels of government. It would subject legislative will to judicial oversight and invade this discretionary sphere on a highly subjective basis. And each case would tempt the presiding

judge or judges to abandon neutral rules of law in favor of partisan preference. Vindicating a fear that legislatures might place "too much" weight on partisan considerations would pose the unquestionably unacceptable risk that judges will place *any* weight on such considerations—thereby trading partisan redistricting for partisan redistricting *litigation*. There is no reason to open this door and every reason to close it.

D. Plaintiffs' Claims Are Not Cognizable

Justiciability aside, the rights Plaintiffs claim do not fall within the scope of the constitutional provisions they cite. All of these provisions guarantee distinct individual rights, not the group rights to partisan fairness that form the basis of Plaintiffs' claims. The constitutional starting point is the presumption that any act of the General Assembly is constitutional. *Wayne Cnty. Citizens Ass'n for Better Tax Control*, 328 N.C. at 29, 399 S.E.2d at 315. "The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Id.* (quotation marks omitted). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.*; *see also Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781, 784 (1936) (same); *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016) (same). Plaintiffs cannot meet this onerous standard.

1. *Free and Fair Elections*. Plaintiffs' claim under the Free Elections Clause runs directly counter to that Clause's plain text and purpose to preserve elections from the very inter-branch intermeddling Plaintiffs advocate. "The meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation." John Orth & Paul Newby, *The North*

Carolina State Constitution ("Orth") 56 (2d ed. 2013). The Free Elections Clause simply bars any act that would deny a voter the ability to freely cast a vote or seek candidacy. *See Clark v. Meyland*, 261 N.C. 140, 142-43, 134 S.E.2d 168, 170 (1964). Plaintiffs make no assertion that any voter is prohibited from voting or faces intimidation likely to deter the exercise of this right—only that the Free Elections Clause guarantees "each major political party . . . to fairly translate its voting strength into representation." Compl. ¶ 198. But the right to win or assistance in winning is not encompassed by this provision. *Royal v. State*, 153 N.C. App. 495, 499, 570 S.E.2d 738, 741 (2002) (ruling the free elections clause does not require public financing of campaigns). "The idea that partisan gerrymandering undermines popular sovereignty because the legislature rather than the people selects representatives is rhetorical hyperbole masked as constitutional argument. When legislatures draw districts, they in no way select who will occupy the resulting seats." *Johnson*, 2021 WL 5578395, at *12 (citation omitted).

Reading the Free Elections Clause to contain such rights would be ahistorical and counter-productive to free elections. *See Stephenson*, 355 N.C. at 370-71, 562 S.E.2d at 389 (looking to "history of the questioned provision and its antecedents" in interpreting the State Constitution). The Free Elections Clause derives from the English Declaration of Rights of 1689, which provided that "election of members of Parliament ought to be free." Orth 56.[15] No one thought that this contained a prohibition against "partisan gerrymandering." Elections to the English Parliament were often conducted in so-called rotten boroughs—districts far and away more gerrymandered than anything possible now because they could be created with only a handful of constituents.

[15] *See also* English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown ("English Declaration of Rights"), Yale Law School: The Avalon Project, https://avalon.law.yale.edu/17th_century/england.asp (last visited Dec. 2, 2021).

Rotten boroughs were not eliminated in England until the Reform Act of 1832, so the notion that they were somehow outlawed in England in 1689 (or, in North Carolina, in 1776) is untenable. What the free-elections provision of the English Declaration of Rights *did* do was prohibit other branches of government from meddling with elections to Parliament. Put another way, the declaration that elections would be "free" vindicated separation-of-powers concerns. Going forward, Parliament controlled the "methods of proceeding" as to the "time and place of election" to Parliament. 1 William Blackstone, Commentaries 163, 177–179 (George Tucker ed., 1803); 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797).

What Plaintiffs want would sound eerily familiar to the English and the framers of the North Carolina Constitution. And they would recoil at it. Plaintiffs are avowed supporters of the Democratic Party and do not want "fair" elections; they want the North Carolina courts to tamper with the political composition of the 2021 Plans. This is an attack on, not a vindication of, free elections. As history shows, commitment to separation of powers preserves free elections. The Free Elections Clause does not "authorize[] this court to recast itself as a redistricting commission in order to make its own political judgment about how much representation particular political parties deserve——based on the votes of their supporters——and to rearrange the challenged districts to achieve that end." *Johnson*, 2021 WL 5578395, at *10. The Free Elections Clause is best read to *forbid* that.

Indeed, the *NCLCV* Plaintiffs double down and argue that the Free Elections Clause promises them favorable districts regardless of whether the General Assembly redistricted with partisan intent—i.e., that the Constitution requires that the General Assembly *must affirmatively assist them in electing their preferred candidates*. *NCLCV* PI Mem. 47. They are asking for favoritism not equality. "A proportional party representation requirement would effectively force

the two dominant parties to create a 'bipartisan' gerrymander to ensure the 'right' outcome." *Johnson*, 2021 WL 5578395, at *11. The *NCLCV* Plaintiffs do not hide from this fact; they trumpet it. The Wisconsin Supreme Court adequately addressed this absurd idea, which is the logical conclusion of the arguments of both sets of Plaintiffs:

> Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the "major" parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional. The populace that voted for Libertarians is scattered throughout the state, thereby depriving them of any real voting power as a bloc, regardless of how lines are drawn. Only meandering lines, which could be considered a gerrymander in their own right, could give the Libertarians (or any other minor party) a chance. Proportional partisan representation would require assigning each third party a "fair" share of representatives (while denying independents any allocation whatsoever), but doing so would in turn require ignoring redistricting principles explicitly codified in the Wisconsin Constitution.

Johnson, 2021 WL 5578395, at *11 (citation omitted). Predictably, the *NCLCV* Plaintiffs' supposedly "optimized" maps do nothing to assure persons who favor third-party or non-party candidates an opportunity to elect their preferred candidates. It is a theory of major-party favoritism, and it is anathema to the Constitution.

2. *Equal Protection*. Plaintiffs' equal-protection claim, taken on its face, fails. It is not predicated on a "classification" that "operates to the disadvantage of a suspect class or if a classification impermissibly interferes with the exercise of a fundamental right." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 392 S.E.2d 352, 355 (1990). Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 51-53, 707 S.E.2d 199, 206 (2011); *Libertarian Party of North Carolina v State*, No. 05 CVS 13073, 2008 WL 8105395, at *6 (N.C. Super. Ct. May 27, 2008).

While the right to vote is fundamental, political considerations in redistricting do not "impinge" that right in any way, much less to a degree warranting strict scrutiny. *Town of Beech Mountain v. Cnty. of Watauga*, 324 N.C. 409, 413, 378 S.E.2d 780, 783 (1989) (applying rational basis scrutiny when restrictions "impinge[d] to some limited extent on" the exercise of a fundamental right and expressly declining to apply strict scrutiny). There is nothing in the Enacted Plans that operates to "totally den[y] . . . the opportunity to vote." *Dunn v. Blumstein*, 405 U.S. 330, 334–35 (1972) (cited approvingly by *Town of Beech Mountain*, 378 S.E.2d at 783). Nor is there an unequal weighting of votes as occurs when districts are of markedly unequal population or where districts have different numbers of representatives. *See Stephenson*,355 N.C. at 378-79, 562 S.E.2d at 394 (finding unequal weighting where voters in some districts elected five representatives and voters in others elected one or two). Here, all individual votes are counted and equally weighted. Plaintiffs' contention is that voters of each major party do not have an equal opportunity to prevail, but equal-protection principles do not protect the right to win. In fact, there "is not a fundamental right" even to have "the party of a voter's choice appear on the ballot." *Libertarian Party of North Carolina*, 2008 WL 8105395, at *7, *aff'd*, 365 N.C. 41, 707 S.E.2d at 199. If the law were otherwise, the *Stephenson* Court would not have endorsed "consider[ation] [of] partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 390. Thus, rational-basis review applies, and any plan that complies with the equal-population rule and other legal requirement is amply supported by a rational basis. The Enacted Plans clearly meet this standard.

3. *Speech and Assembly*. Plaintiffs' free speech and association claims fare no better. North Carolina courts interpret the rights to speech and assembly in alignment with federal case law under the First Amendment. *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d

615, 620 (2014); *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). The right to free speech is impinged when "restrictions are placed on the espousal of a particular viewpoint," *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or where retaliation motivated by speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 478, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing that "plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities); *see Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999). If there are no restraints on speech, then redistricting cannot fairly be characterized as retaliation.

Nothing in the Enacted Plans place "restrictions . . . on the espousal of a particular viewpoint," *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or "would likely chill a person of ordinary firmness from continuing to engage" in expressive activity, *Toomer*, 155 N.C. App. At 478, 574 S.E.2d at 89. Plaintiffs "appear to desire districts drawn in a manner ensuring their political speech will find a receptive audience; however, nothing in either constitution gives rise to such a claim." *Johnson*, 2021 WL 5578395, at *13. "Associational rights guarantee the freedom to participate in the political process; they do not guarantee a favorable outcome." *Id.* Simply put, "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. People are free to speak their mind and petition the Legislature—no matter whether they affiliate with the same political party with their representative or not. And they remain free to join the Democratic Party and vote for

Democrats. What the Constitution guarantees is the right to meet up and speak up—not to be listened to. Plaintiffs present no evidence that they chose to forbear from speech or association for fear of gerrymandered districts, and no such assertion would be credible given that real gerrymandering actually took place in this State at the hands of their own Democratic Party. Indeed, taken to its logical end, Plaintiffs' theory would lead to the absurd result that any person who did not vote for their elected representative would have a free speech and free assembly claim under North Carolina's Free Speech and Free Assembly Clauses.

E. Plaintiffs' Claims Are Unlikely To Succeed Under Any Theory That May Be Justiciable and Cognizable

Even if partisan gerrymandering claims were justiciable, the claims of both sets of Plaintiffs in these cases would still be unlikely to succeed because they do not satisfy any standard that may arguably apply. There can be no serious quarrel with the principle that "the power of the courts" should not be "consistently invoked to second-guess the General Assembly's redistricting decisions." *Pender Cnty.*, 361 N.C. at 506, 649 S.E.2d at 373. Accordingly, those jurists who have argued that partisan gerrymandering claims should be viewed as constitutionally justiciable and cognizable have opined that courts must "not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, [the correct standard] takes as its baseline a State's *own* criteria of fairness, apart from partisan gain." *Rucho*, 139 S. Ct. at, 2516 (Kagan, J., dissenting). The *Common Cause* decision could not have been clearer that it was *not* claiming a judicial right "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." 2019 WL 4569584, at *128. Rather, it believed that the judicial task is "to take the Adopted Criteria that the General Assembly itself, in its sole discretion, established, and compare the resulting maps with those criteria to see 'how far the State had gone off that track because of its politicians' effort to entrench themselves

in office.'" *Id.* (quoting *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting)). Although the plaintiffs in that case were found to have established constitutional violations under this method, Plaintiffs here do not.

1. Intent

An essential element of any cognizable constitutional partisan gerrymandering claim is discriminatory intent. *See Common Cause*, 2019 WL 4569584, at *114 ("[T]he plaintiffs challenging a districting plan must prove that state officials' predominant purpose in drawing district lines was to entrench their party] in power by diluting the votes of citizens favoring their rival." (quotation and edit marks omitted)). In *Common Cause*—after a full trial on the merits—the trial court found this element met based in large part on "direct evidence": "Legislative Defendants openly admitted that they used prior election results to draw districts to benefit Republicans in both 2011 and 2017." *Id.* at *115. This case is different. The General Assembly adopted a criterion rejecting the use of political data in redistricting, and the line-drawing process was conducted in public, amounting to the most transparent legislative redistricting in United States history.

Neither set of Plaintiffs identifies direct evidence that contradicts the General Assembly's own assertions of its intent. That omission alone should be sufficient to reject Plaintiffs' claims. "The good faith of [public] officers is presumed and the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies." *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971). This Court at this preliminary, highly expedited stage is in no position to discredit a co-equal branch of government, and neither set of Plaintiffs provides a basis for such an exceptional ruling. Instead, both sets rely on indirect evidence that was belatedly

dumped on the Court, which has not been vetted in an appropriate adversarial proceeding, and which fails on its face.

a. The *NCLCV* Plaintiffs attempt to shift the burden, contending that it is *possible* that legislators utilized political data or relied on personal knowledge of political demographics. *See, e.g.*, *NCLCV* Compl. ¶¶ 69–71. But *possibility* does not equal a showing of likelihood of success in *proving* this occurred. It is "the plaintiffs" who "*must prove* that state officials' predominant purpose . . . was to entrench their party in power." *Common Cause*, 2019 WL 4569584, at *114 (quotation and edit marks omitted) (emphasis added). They also contend that the General Assembly's criteria permitted partisan considerations because the criteria permitted legislators to use their "local knowledge" in drawing districts, but the criteria expressly permitted this only "[s]o long as a plan complies with the foregoing criteria," including the *express bar* on partisan considerations. Exhibit 8. So, the criterion means exactly the opposite of what the *NCLCV* Plaintiffs say.

The *NCLCV* Plaintiffs also contend that discriminatory intent may be inferred from the alleged fact that statewide election results, when transposed onto the 2021 Plans, "translate[] competitive elections, including elections with statewide Democratic victories, into Republican candidates winning at least 10 of 14 seats." *NCLCV* Compl. ¶ 91; *see also id.* ¶ 101 (similar assertion regarding 2021 Senate Plan); *id.* ¶ 114 (similar assertion regarding 2021 House Plan). But that is unremarkable when the North Carolina Constitution does not utilize proportional representation. Democratic and Republican constituents are not evenly divided in the State; the Democratic Party appeals to concentrated groups of voters in urban areas, and the Republican Party has broader geographic appeal. 2021-11-01 Senate Committee Hr'g 55:08; Ex. 9, Affidavit

of Sean Trende ¶¶ 30–32 & Exs. 2-A & 2-B.[16] As a result, any number of plans, drawn without legally cognizable discriminatory intent, will reveal a natural geographic advantage for the Republican Party. The Democratic Party's recourse is to tailor its message to a similarly dispersed population, not to seek a court injunction. Plaintiffs' assertion says nothing of discriminatory intent, only of the *NCLCV* Plaintiffs' "desire for proportional representation," *Rucho*, 139 S. Ct. at 2499, which was rejected out of hand as not a legally cognizable claim in *Common Cause*, *see* 2019 WL 4569584, at *100 ("Plaintiffs do not seek proportional representation."). Indeed, *Common Cause* recognized that non-partisan computer simulations would yield "scenarios where Democrats would win 50% of the statewide vote but less than 50% of the seats in either chamber." *Id.*

The *NCLCV* Plaintiffs resort to extensive line-by-line criticisms of districts in the 2021 Plans. *See, e.g.*, *NCLCV* Compl. ¶¶ 93–99. But the *NCLCV* Plaintiffs make no effort to assess whether those lines may be the result of "the Adopted Criteria that the General Assembly itself, in its sole discretion, established." *Common Cause*, 2019 WL 4569584, at *128. As shown above, in public hearings the General Assembly presented detailed explanations for district configurations across plans, yet neither set of Plaintiffs addresses that explanation. They instead rely on speculation about the purpose and effect of lines, but this speculation has no foundation in the legislative record and cannot substitute for the legislative record that exists. They are not likely to succeed in showing that post hoc guesswork, rather than the General Assembly's own explanation for lines, is accurate. At base, the *NCLCV* Plaintiffs simply opine that—using "the power of mathematics and computer science," Compl. ¶ 1—they can think of better ways to redistrict. To that end, they present three maps drawn with unknown criteria, which they present as "Optimized"

[16] This recording can be found at: https://www.youtube.com/watch?v=KgSkfFY7r7g

plans. This Court, unlike the court in *Common Cause*, is transparently "called upon to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." *Common Cause*, 2019 WL 4569584, at *128. It should reject that overture.

b. The *Harper* Plaintiffs fare no better. As an initial matter their presentation is profoundly prejudicial because it consists of a 50-page brief and hundreds of pages of exhibits, including lengthy expert reports, served on Legislative Defendants on Tuesday, November 30, after 3:30 pm. This was after the deadline for their filing, N.C. R. Civ. P. 6(d), and Legislative Defendants did not have adequate time to examine, vet, and prepare rebuttals to this lengthy presentation. The adversarial process cannot function properly to disclose the truth when one side is so thoroughly hamstrung in its response. There is no basis for the Court to make election decisions impacting 10.4 million residents without properly vetting the validity and bases of this showing. The motion should be denied on that basis alone.

Regardless, the *Harper* Plaintiffs fail to establish a likelihood of success. Like the *NCLCV* Plaintiffs, they open by opining that a "closely divided state[]" should have closely divided legislative bodies, PI Mem. 5, an overt appeal to proportional representation. They also ask for a negative-inference presumption against the General Assembly, that because it was possible for partisan considerations to enter the process, they *did*—and to a legally cognizable extent. *Id.* at 5–8.[17] That is a far cry from *Common Cause*, where "Legislative Defendants openly admitted that

[17] The *Harper* Plaintiffs take remarkable license with the facts, interpreting Chairman Hall's statement that he "can't speak" to whether "other members of this committee" reviewed maps by consultants as his "tacitly acknowledge[ing] that legislators had already been presented with maps drawn by outside political consultants." PI Mem. 7–8 (citation omitted). In turn, Plaintiffs later refer to this already stretched assertion by stretching it further: "Legislative Defendants allowed legislators to sit down at those terminals and simply copy maps drawn by outside political consultants using prohibited political data." *Id.* at 35. That statement is unsupported, to put it

they used prior election results . . . .” 2019 WL 4569584, at *115. The *Harper* Plaintiffs supply no basis for the Court to disregard the legislators’ assertion that partisan considerations did not enter the process. Like the *NCLCV* Plaintiffs, the *Harper* Plaintiffs engage in extensive criticism of district lines, *see, e.g.* PI Mem. 8–14, with no analysis of the General Assembly’s criteria or stated purposes for those lines.[18] They think they could do better than the General Assembly, but that is legally irrelevant. *Common Cause*, 2019 WL 4569584, at *128. Grasping at straws and confirming the obvious incentive Democrats had not to vote for the plans, the *Harper* Plaintiffs also opine that “the gerrymandered nature of the 2021 Plan is reflected in the fact that it was approved on strict party-line votes.” PI Mem. 35. If that theory held currency, a minority party could obtain an automatic judicial veto of any legislation simply by voting against it, leading to absurd lawsuits and chaos.

The *Harper* Plaintiffs also rely on expert mapping simulations, which purport “to determine the extent to which a map-drawer’s subordination of nonpartisan districting criteria, such as geographic compactness and preserving political subdivision boundaries, was motivated by partisan goals.” PI Mem. 25. But these exercises produce meaningful results (if at all) only where they were “generated in accordance with” the General Assembly’s non-partisan criteria. *Id.* at 26. None of the mapping exercises matched the General Assembly’s non-partisan goals. As outlined in detail above, the General Assembly announced its non-partisan goals for each district,

charitably. The drawing room terminals were broadcast live and archived on the General Assembly’s website. If Plaintiffs had evidence of this sort of maneuvering, they had every opportunity to present it to the Court.

[18] The Cooper expert report lacks the rigor necessary to qualify as admissible or credible expert opinion. The report walks through district lines *ad hoc* displaying confirmation bias, i.e., narrating the alleged purpose behind lines that support a pre-conceived narrative. There is no comprehensive catalogue of work or consistently applied methodology. The opinion is not “the product of reliable principles and methods.” *State v. McGrady*, 368 N.C. 880, 892, 787 S.E.2d 1, 10 (2016).

including, for example, that CD1 take in the outer banks and most of the State's shoreline and keep the finger counties of northeastern North Carolina together, that CD4 combine counties south of Raleigh with similar interests, and that CD11 maintain the incumbent in the district. As the *Common Cause* court explained, "the plaintiff must show that the redistricting body intended to apply partisan classifications or deprive citizens of the right to vote on equal terms in an invidious manner or in a way unrelated to any legitimate legislative objective," and legitimate objectives include "maintain[ing] communities of interest" and "avoid[ing] the pairing of incumbents." 2019 WL 4569584, at *114 (quotation marks omitted). "[A] plaintiff in a partisan gerrymandering case cannot satisfy the discriminatory intent requirement simply by proving that the redistricting body intended to rely on political data or to take into account political or partisan considerations." *Id.* Without accounting for the General Assembly's own non-partisan goals, the *Harper* Plaintiffs' experts cannot show that partisan intent is causing the supposed partisan effect—or that partisan intent even exists.

Importantly, it is readily apparent, even from a cursory review of the *Harper* Plaintiffs' experts' work, that they have overtly misapplied the criteria. Dr. Chen, for example, programed his algorithm to give municipal boundaries "lower priority" than other criteria. *Harper* Plaintiffs' Ex. H, at 8. Dr. Pegden, meanwhile, did not program his algorithm to avoid splitting municipalities—or to adhere to the General Assembly's criteria at all—but rather picked three criteria: "preserve districting criteria such as population deviation, compactness, and splitting of counties." *Harper* Plaintiffs' Ex. I, at 1. But, as shown, the legislative record establishes that keeping municipalities whole was a priority, as again and again, the General Assembly sought and achieved configurations that split no municipalities. Indeed, the contemporaneous legislative record that the entire 2021 Congressional Plan split only *two* municipalities. 2011-11-01 Senate

Committee Hr'g 55:08 *et seq.*[19] Further, as detailed above, the legislative history shows the retaining district cores was a priority, but the experts' algorithms give this criterion no weight. And, as also shown above, the legislative history shows that criteria were not formally ranked, yet Dr. Chen's algorithm was programed to rank criteria in a manner Dr. Chen chose in *his* discretion. All Plaintiffs' experts' algorithms show is that different criteria can lead to different results—nothing more. *Compare Harper* Plaintiffs' Ex. I, at 2 (stating that Dr. Pegden's method relies on "the districting criteria I consider" (emphasis added)) *with Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (opining that a proper analysis "takes as its baseline a State's *own* criteria").

Finally, even a cursory review of the *Harper* Plaintiffs' showing undercuts their likelihood of showing partisan intent. As noted above, their expert's report shows that more districts fall within the range of completely non-partisan maps than falls outside the range. *See Harper* Ex. H, at 56 (showing that CD5, CD11, CD3, CD12, CD1, CD7, CD8, and CD13 have the same partisan configuration as simulated maps drawn with no partisan intent). To prevail in showing discriminatory intent without any direct evidence, a plaintiff must "show a clear pattern, unexplainable on grounds other than" unlawful intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The *Harper* Plaintiffs' have not made this showing.

2. Effect

Another essential element of any arguably cognizable partisan gerrymandering claim is discriminatory effect. *Common Cause*, 2019 WL 4569584, at *116 ("Plaintiffs must also establish that the enacted legislative districts actually had the effect of discriminating against—or subordinating— voters who support candidates of the Democratic Party"). Neither set of Plaintiffs is likely to establish this element at trial.

[19] *See* https://www.youtube.com/watch?v=KgSkfFY7r7g

a. The Court can make quick work of the *NCLCV* Plaintiffs' likelihood of success on this element, because their case is predicated solely on their "desire for proportional representation." *Rucho*, 139 S. Ct. at 2499. They provide two benchmarks for measuring effect, and both assume proportionality. First, they allege that transposing statewide election results in a close race should yield the same result in a lawfully drawn legislative or congressional plan. *NCLCV* Compl. ¶¶ 91, 101, 114. Stated differently, any departure from proportional representation constitutes an unlawful effect, in their view. No serious jurist agrees. *See Rucho*, 139 S. Ct. at 2509 (Kagan, J, dissenting) (stating that legitimate "standards . . . . do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other"). Second, the *NCLCV* Plaintiffs posit that "optimized" maps can be drawn to achieve an "almost evenly divided" delegation or body. *NCLCV* Compl. ¶¶ 161; *see also id.* ¶¶ 166, 174. This, too, simply asks the Court "to rely on [its own] ideas of electoral fairness," not on a cognizable legal standard. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). The Court should decline the invitation "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." *Common Cause*, 2019 WL 4569584, at *128. In all events, *NCLCV* Plaintiffs and "the power of mathematics and computer science" cannot change the simple fact that redistricting in North Carolina (and every other state) is an inherently geographic exercise, and Republicans in North Carolina hold a geographic advantage in having more voters spread out around the State. *See* Ex. 9, Affidavit of Sean Trende ¶¶ 30–32 & Exs. 2-A & 2-B.

b. The *Harper* Plaintiffs are also not likely to establish a legally significant partisan effect. As discussed above, the *Harper* Plaintiffs rely on mapping-simulation exercises that do not correctly account for the General Assembly's non-partisan considerations. Just as those exercises

are not capable of showing intent, they are not capable of showing effect because they did not account for the General Assembly's "chosen districting criteria." *Rucho*, 139 S. Ct. at 2520. And, because many districts fall within the same partisan electoral effect as non-partisan simulated maps, the *Harper* Plaintiffs are unlikely to establish an improper partisan effect.

II. The Equitable Factors Cut Decisively Against a Preliminary Injunction

Equitable considerations alone defeat the provisional relief requested by both sets of plaintiffs. "A preliminary injunction is "an extraordinary remedy and will not be lightly granted." *Travenol Labs., Inc. v. Turne*r, 30 N.C. App. 686, 692, 228 S.E.2d 478, 483 (1976). The Court is obligated to "engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (N.C. App. 1978). This means both that a movant must establish irreparable harm, *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856 (1990), and that "the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams*, 243 S.E.2d at 160, 36 N.C. App. at 86. And Plaintiffs bear an even heavier burden than do most, because they challenge an Act of the General Assembly. *See Fox v. Board of Commissioners,* 244 N.C. 497, 500-01, 94, S.E.2d 482, 485 (1956) (the constitutionality of an act of the General Assembly may not be enjoined "unless it is alleged and shown by plaintiffs that such enforcement will cause them to suffer personal, direct and irreparable injury."); *see also Plemmer v, Matthewson,* 281 N.C. 722, 726, 190 S.E.2d 204, 207 (1972).

Here, the balance of equities is no contest. As explained above, the Plaintiffs have, at best, a difficult path to establishing a sufficient injury even to confer standing. *See* § I.A, *supra*. Denying them provisional relief is unlikely to cause them any harm at all, let alone a *substantial* and

irreparable harm, *Williams*, 243 S.E.2d at 160, 36 N.C. App. at 86. On the other hand, the harm to the State, the General Assembly, and the general public is difficult to overstate. The 2021 Plans were enacted through a democratic process, in full public view, by the peoples' elected representatives. Plaintiffs want that plan replaced either in a highly expedited and truncated process without sufficient time for public input or—more likely—by a remedial plan drawn behind closed doors according to an undisclosed set of criteria.[20] No public comments informed either the simulated or supposedly "optimized" plans, no elected representative has sponsored them, and there is zero transparency concerning their configurations. For all the Court knows, partisan intent predominated. The Court is asked to jettison work of the most transparent and non-partisan legislative redistricting in history to engraft Plaintiffs and their counsel and experts as a fourth branch of North Carolina government. To say this is unfair and undemocratic does not begin to describe the constitutional insult an injunction would impose. Fortunately, no principle of law or equity supports this request.

1. *Status Quo*. Plaintiffs demand that this Court enjoin the lawfully enacted 2021 plans, order an expedited remedial process, and in the case of the NCLCV Plaintiffs, adopt their preferred "optimized" plans. *Harper* PI Mot 1; *NCLCV* PI Mot. 1–2, ¶ 4. They also ask the Court to move the March 2020 primary schedule. *Harper* PI Mot. at 49; *NCLCV* PI Mot. at 3, ¶ 7(c). But this requested relief alters the *status quo* and is unavailable as a matter of law. A preliminary injunction is an "extraordinary measure taken by a court to *preserve the status quo* of the parties during litigation." *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759 (quoting *Investors, Inc. v.*

[20] Under N.C.G.S. § 120-2.4, the Court must first afford the General Assembly the opportunity to enact remedial districts before engaging in judicial districting.

Berry, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)) (emphasis added).[21] The status quo in this case is a primary schedule established by law and a set of plans duly adopted by the General Assembly.

Binding precedent bars Plaintiffs' request to depart from that status quo. In *Carroll v. Warrenton Tobacco Bd. of Trade, Inc.*, 259 N.C. 692, 696, 131 S.E.2d 483, 486 (1963), the North Carolina Supreme Court held that movants "asserting rights they have not previously exercised" were "not seeking to preserve the status quo" and were categorically barred from preliminary relief. *See also Seaboard Air Line R. Co. v. A. Coast Line R. Co.*, 287 N.C. 88, 96, 74 S.E.2d 430, 436 (1953) (reversing a preliminary injunction because it was "not to restore what has been unlawfully changed, but to create a new condition not theretofore existing; not to prevent a wrong but to obtain opportunity to exercise a right; not to prevent a disruption of existing service, but to create a new service."); *Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co.*, 235 N.C. 737, 740, 71 S.E.2d 21, 23–24 (N.C. 1952) (same). This case is no different. The rights asserted are ones Plaintiffs have "never exercised," since they have never voted under a redistricting plan that satisfies their notion of a lawful plan.[22]

2. *Harm to the State and the Public*. The harm to voters and the public from the requested provisional injunctions would be severe and irreparable. To begin, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a

[21] The *NCLCV* Plaintiffs miss this point in asserting that they may obtain a mandatory injunction. *See NCLCV* PI Mem. 13 n.8. Even a mandatory injunction must be tailored to "*restore* a status quo." *Automobile Dealer Resources Inc. v. Occidental Life Ins. Co. of N.C.*, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (N.C. App. 1972) (emphasis added).

[22] The panel in the first *Harper* case avoided this problem only by a peculiar legal fiction that the *status quo* in that case was the time when the 2016 congressional plan was invalidated in federal court and, hence, "no lawful congressional district map for North Carolina existed." Ex. 5, *Harper* PI Order at 12.

form of irreparable injury." *Maryland v. King*, 567 U.S.1301, 1303 (2012) (internal quotations and citations omitted). This is even truer for statutes relating to elections because "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). This alone is a good reason not to enjoin the duly enacted 2021 redistricting plans before even resolving these lawsuits fully upon the merits after a proper opportunity to develop a record.

Another reason to not issue an injunction is that the injunction will cause significant disruption, confusion, and uncertainty into the State's election processes—an election process already on a tightened timeframe due to the census delay this year. Those concerns are so significant that courts do not automatically intrude into upcoming elections *even* when there has been a final judgment on the merits. *See, e.g.*, *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) ("The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation."); *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (same). Even good-intentioned judicial reforms of election laws can be counter-productive, since the intrusion itself causes harm. Any action must occur "at a time sufficiently early to permit the holding of elections…without great difficulty" or else *no* action should occur. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). That is true both under federal law (which governs congressional elections) and North Carolina law.

North Carolina courts recognize and apply this concept in redistricting litigation, and rightfully so. In *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), the North Carolina Supreme Court affirmed a lower court final judgment striking down the state legislative plan in its decision (issued August 2007), but *stayed* the remedial phase until *after* the 2008

elections to "to minimize disruption to the ongoing election cycle . . . ." *Id.* at 510, 649 S.E.2d at 376. Likewise, in *Dickson v Rucho*, No. 11 CVS 16896, 2012 WL 7475634 (N.C. Super. Jan. 20, 2012), the court applied *Pender County* and denied a preliminary-injunction motion filed in early November of 2011 because of "the proximity of the forthcoming election cycle and the mechanics and complexities of state and federal election law." *Id.* at *1. The panel emphasized that its ruling did not imply "a lack of merit" and said that the plaintiffs "raised serious issues and arguments" in challenging the plan. *Id.* Still, that was insufficient to warrant an injunction because of the difficulties involved in administering elections and also because the short time frame "leaves little time for meaningful appellate review" or "curative measures by the General Assembly." *Id.* That analysis flows from the fundamental point that last-minute changes in election procedure harm election administration, which itself burdens the right to vote. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (outlining factors courts should weigh when deciding to enjoin an impending election). The Court in *Dickson* reached this decision 25 days prior to the opening of the filing period, and approximately four months prior to the primary. If such a time frame was too short to disturb the election framework in *Dickson,* the three days prior to the opening of the filing period and three months before the March 2022 primaries is clearly too short as well.

Federal courts—where status quo-altering preliminary injunctions occasionally are allowed—are similarly reluctant to grant such extraordinary relief, reasoning that "the harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs . . . ." *Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996). Such cases recognize that courts "must balance the need to protect voting rights that may be affected by the [challenged] plans with the need to avoid the adverse effect on voting rights that comes with delay and confusion" – that by ramming through a remedial

plan immediately, "the shifting district and precinct lines would leave candidates in limbo, voters confused, and election officials with the burden of implementing new maps in a timely manner with very limited resources." *Perez v. Texas*, No. 11-CA-360, 2015 WL 6829596, *4 (W.D. Tex. Nov. 6, 2015). Other federal cases are in accord. *See, e.g.*, *Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012) ("spawning chaos rather than confidence in the election process is a result we cannot endorse"); *Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) (denying preliminary injunctive relief in redistricting case); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 501 (S.D.N.Y. 2004) (same); *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991), *aff'd in part and vacated in part as moot*, 502 U.S. 954 (1991) (even if the possibility of corrective relief under a districting plan at a later date exists, does not merit a preliminary injunction); *MacGovern v. Connolly*, 637 F. Supp. 111, 116 (D. Mass. 1986) (denying a preliminary injunction because when "disruption to the political process…is weighed against the harm to plaintiffs of suffering through one more election based on an allegedly invalid districting scheme, equity requires that we deny relief."); *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (taking it as a given that a redistricting plan could not be *created* and *imposed* at the preliminary-injunction stage and thus observed that preliminary injunction could take only the form of delaying an election).

This is in line with numerous other cases finding belated requests for relief too late to impact an upcoming election. *See, e.g.*, *Md. Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 609 (4th Cir. 1970) (thirteen weeks prior to candidate filing deadline held too late); *Dean v. Leake*, 550 F. Supp. 2d 594, 606 (E.D.N.C. 2008) (four months prior to election too late); *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971) (five months out from election too late); *Kilgarlin v. Martin*,

252 F. Supp. 404, 444 (S.D. Tex. 1966), *aff'd in relevant part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967) (ten months too late).

Simply stated, the injunctive relief Plaintiffs seek would cause disruption on a massive scale. Voters, political parties, and candidates have been spending the past 30 days—since final passage of the plans on November 4, 2021—learning the new districts, recruiting supporters, aligning with candidates, and getting ready for the primaries. Disturbing those settled expectations and upending the State's political processes through a rushed process creates exactly the confusion and chaos disapproved in cases like *Pender County*, *Dickson*, *Perez*, and *Kostick*. The Court would also have to afford the General Assembly "a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law." N.C. Gen. Stat. Ann. § 120-2.4. If the General Assembly were unsuccessful, the Court would be required to conduct a *provisional* remedial process—which might ultimately prove unnecessary—requiring the appointment of a special master, objections to that appointment, proposals and a report by the special master, litigation over that report, and another hearing on the plan. There is no way to accomplish that in the necessarily careful and deliberative manner that will be required to protect the public's right to vote—much less to afford objecting parties the opportunity to seek redress and comply with all election law deadlines ahead of the 2022 election.

3. *Non-Harm to Plaintiffs*. Comparatively, Plaintiffs have not demonstrated the type of harm necessary to warrant the drastic injunctive relief they seek. They allege they live in districts that, based on various metrics and analyses performed by Plaintiffs' experts, have been politically gerrymandered such that it is either too easy for them to elect their candidates of choice (packed districts) or too hard (cracked districts). But, as discussed above, they ask for districts where they do not reside to be invalidated, many districts would not likely be meaningfully different in a

partisan sense in a computer-simulated plan—*even under their own analysis*—and the injury they claim is, in all events, abstract. Neither set of Plaintiffs has alleged or shown that they are unable to obtain representation in Congress or the General Assembly by whomever will ultimately represent them. As explained, there is a legal and historical presumption that a person is represented by the elected representative for the person's district—even if the person did not vote for that representative. *See, e.g.*, *Bandemer*, 478 U.S.at 132.

Injuries far more serious than those Plaintiffs alleged in their preliminary-injunction motions have been rejected by courts as a basis to hastily grant injunctive relief. *See, e.g.*, *Vera v. Richards*, 861 F. Supp. 1304, 1351 (S.D. Tex. 1994), *aff'd Bush v. Vera*, 517 U.S. 952 (1996) (declining to issue relief, even after finding egregious racial gerrymanders, either for the 1994 or 1996 elections, even though the violation was finally adjudicated in September 1994); *Ashe v. Bd. of Elections in the City of N.Y.*, 1988 WL 68721 (E.D.N.Y. June 8, 1988) (denying preliminary injunction even after finding a likelihood of success on a Voting Rights Act violation due to proximity to election). The purported harm of living in alleged unconstitutional districts does not outweigh the enormous practical impact of the demanded injunction.

CONCLUSION

The motions should be denied.

Respectfully submitted this the 2nd day of December, 2021.

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