No. 416P21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellants, REBECCA HARPER, et al., Plaintiffs- Appellants, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al. Defendants- Appellees.	)	From Wake County No. 21 CVS 015426 From Wake County No. 21 CVS 500085

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LEGISLATIVE DEFENDANTS' COMBINED RESPONSE IN OPPOSITION TO (1) *HARPER II* PETITIONERS' PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS AND MOTION TO SUSPEND APPELLATE RULES, AND (2) NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL'S PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS, ALTERNATIVE PETITION FOR WRIT OF CERTIORARI, MOTION TO SUSPEND APPELLATE RULES AND EXPEDITE SCHEDULE, AND PETITION FOR WRIT OF SUPERSEDEAS OR PROHIBITION

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Representative Destin Hall, Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton, Speaker of the North Carolina House of Representatives Timothy K. Moore, and President Pro Tempore of the North Carolina Senate Philip E. Berger, all in their official capacities (the "Legislative Defendants"), respectfully respond in opposition to the Petitions for Discretionary Review Prior To Determination by the

Court of Appeals and Motions to Suspend Appellate Rules filed in the two above-captioned cases (the "*Harper* Petition" and the "*NCLCV* Petition," respectively, or the "Petitions," collectively), as well as the integrated Petition for Writ of Supersedeas or Prohibition (the "Supersedeas Petition") filed by the *NCLCV* Plaintiffs. For the following reasons, the Petitions and Supersedeas Petition should be denied.

INTRODUCTION

The Petitions are defective vehicles for adjudicating the constitutional issues they purport to raise or to halt the ongoing administration of the 2022 elections. The three-judge panel below found that Petitioners are unlikely to establish as a matter of fact, and beyond a reasonable doubt, that the redistricting plans they challenge (collectively, the "2021 Plans") were drawn with partisan intent. That should be no surprise. The 2021 redistricting was the most transparent and non-partisan legislative redistricting in North Carolina history. The General Assembly adopted a criterion barring "[p]artisan considerations and election results data," and it is entitled to a presumption that it and its members adhered to this rule. The 2021 Plans were drawn in public in recorded sessions, and the General Assembly presented an extensive legislative record establishing the purposes of district lines at a granular level. Because the three-judge panel found no basis to rebut the strong presumption in favor of these acts of the General Assembly, there is a threshold vehicle defect in Petitioners' request for this Court to decide, in Petitioners' framing, "whether the North Carolina State Constitution provides any check on the General Assembly's power to destroy majority rule in our state." *NCLCV* Petition 1; *see also Harper* Petition 4. The Court would only need to determine whether the State Constitution limits so-called

"partisan gerrymandering" if it were established, as fact, that a challenged redistricting plan were gerrymandered. That is not the case before this Court.

Instead, Petitioners here seek to establish the troubling—and, indeed, anti-democratic—proposition that any well-funded private citizen or public interest group can come to court, drop the label "gerrymander" in a filing, and get an injunction impacting the voting opportunities of 10.4 million North Carolina residents, regardless of the merits of the case. Both Petitions before the Court take remarkable liberty with the evidentiary record, asking this Court to infer from the *possibility* that legislators may have had access to political data that legislators *did* use political data. They repeatedly misstate the import of items they cite. They make improper assumptions concerning their own unvetted allegations about an alleged lack of proportional representation and propose inferences upon inferences from alternative maps. But because these alternatives were not drawn to achieve the General Assembly's non-partisan criteria, they say nothing meaningful about partisan intent or effect. That is acknowledged in the very legal authority Petitioners rely on.

Further, because the inferences Petitioners wish to draw are so attenuated and complex, this Court, even if it reached the constitutional issues raised in the Petitions, would have little choice but to remand for evidentiary hearings before injunctive relief could properly be entered. There is insufficient time for that procedure, and only by jettisoning due process and prioritizing the unproven allegations of a select few individuals over the interests of the entire State could this Court order relief. That is why the court below found that the equities weighed against preliminary

relief, which is yet another holding that would need to be overturned for Petitioners to prevail. In fact, the *Harper* Petitioners have not even raised a challenge to the trial court's findings on the equities, so the *Harper* Petition is not sufficient to obtain reversal of the preliminary injunction decision and should be denied on that basis alone.

Besides, the three-judge panel correctly determined that Petitioners are unlikely even to establish standing to challenge the 2021 Plans. Even assuming Petitioners' own theories of standing, they do not have individual plaintiffs residing in many districts, which is the standard requirement to show standing in a redistricting case. This means that the Petitions could—at best—place only portions of the 2021 Plans before this Court, raising perplexing questions about the scope of relief and nature of proof. This is yet another reason why the speed at which Petitioners ask to obtain what is in effect *final* relief at the *provisional* stage is unacceptable. The Petitions should be denied and the regular litigation process should be followed.[1]

For similar reasons, the *NCLCV* Petitioners' Supersedeas Petition should also be denied. First, a writ of supersedeas does not afford Petitioners the relief they seek. N.C. R. App. P. 23(a)(1) provides that a writ of supersedeas may be sought "to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken…." Here, however, Petitioners do not seek to stay the effectiveness of the three-judge panel's denial of their Motion for Preliminary Injunction; instead,

[1] The trial court is proceeding expeditiously and has asked the parties to propose a scheduling order by next Tuesday, 14 December 2021.

they demand that this Court issue the same mandatory injunction the *NCLCV* Petitioners sought below, which would have delayed (but now would stop mid-stream) the candidate filing process for North Carolina's 2022 elections.

Similarly, the relief sought in the Supersedeas Petition is not available through a writ of prohibition. "Prohibition was '[a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power.'" *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 568, 853 S.E.2d 698, 708 (2021) (quoting "Prohibition," Black's Law Dictionary (11th ed. 2019)). *See also* N.C. R. App. P. 22(a) (noting that "[a]pplications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners . . . ."). Here, the requested writ would not be issued to the three-judge panel that denied the *NCLCV* Petitioners' Motion for Preliminary Injunction, but rather the agencies that administer the elections in North Carolina. Again, the relief sought is a mandatory injunction and is not available by writ of prohibition.

In any event, the three-judge panel's denial of Petitioners' Motions for Preliminary Injunction should not be disturbed because candidate filling for North Carolina's congressional and state legislative races opened at approximately 8:00 a.m. on 7 December 2021, and, according to the North Carolina State Board of Elections, candidates have already filed notices of candidacy for congressional and state legislative offices. *See* State Board of Elections, Candidate List Grouped by Contest (updated Dec. 8, 2021), available at

https://s3.amazonaws.com/dl.ncsbe.gov/Elections/2022/Candidate%20Filing/2022_Primary_Election_Candidate_PDFs/2022_primary_candidate_list_by_contest_federal_and_state.pdf. Accordingly, the relief sought via the Supersedeas Petition is moot, and the Petition should be denied.

STATEMENT OF THE FACTS AND BACKGROUND

1. 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.[2] N.C. Const. art. II, §§ 3, 5. On 4 November 2021, the General Assembly enacted a new map for congressional and legislative elections in North Carolina. The process was uniquely difficult because of the COVID-19 pandemic, which delayed the release of census results by five months and sharply limited the time for redistricting.

The General Assembly worked promptly to redistrict in an even-handed and transparent manner. Prior to the receipt of the requisite census data on August 12, 2021, the House Redistricting Committee and the Senate Redistricting and Elections Committee had been conducting meetings, and had already developed criteria to govern the congressional and legislative line-drawing before the census results were announced. Hours before they received the census data, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections met, and

[2] A discussion of the history of redistricting in North Carolina can be found at *Harper* App. p 404-414.

enacted Joint Criteria for Redistricting. The Joint Criteria largely mirrored traditional districting criteria, including in relevant part instructions that[3]:

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

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.
>
> ***
>
> **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.

The Joint Criteria stated that "[s]o 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.*

[3] The full Adopted Criteria can be found here: https://www.ncleg.gov/documentsites/committees/Senate2021-154/2021/08-12-2021/Criteria.adopted.8.12.pdf

The General Assembly conducted public hearings across the State, beginning on 8 September 2021 and running through 30 September 2021. Hearings were held in every one of the then 13 congressional districts, including the in five of the State's largest cities: Charlotte, Winston-Salem, Fayetteville, Durham, and Wilmington. Further, eight hearings began at 5:00 PM or later so as to allow individuals to participate after the close of business. *See generally* North Carolina General Assembly, 2021 Redistricting Video and Audio, https://ncleg.gov/Documents/493#Video (collecting video of, e.g., public hearings, map drawing sessions, and committee and legislative body meetings conducted in connection with the 2021 redistricting process). Members of the public were also free to communicate with members of both redistricting committees via email, phone, or any other method of virtual communication. And the public was provided access to at least one room at the General Assembly where they could build their own districts. The Chairs also provided a public portal where members of the public could provide input on redistricting that was open throughout the process. The public made use of all of these methods of providing comment, and the legislative record shows that input from comments were implemented in the 2021 Plans.

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).

After public hearings concluded, legislators began drawing maps. They did so on public terminals during sessions that were recorded. Legislators started their preparation of state legislative districts from a set of county clusters developed by a non-partisan group of academic researchers at Duke University that implemented the *Stephenson* county grouping process. All map drawing occurred in this public process. After submissions and proposals by legislators and the public, additional hearings throughout the State were held on 25 and 26 October, 2021, including in Raleigh, Wilmington, and Greenville. Finally, in early November, maps were proposed and voted on leading to the adoption of enacted plans on 4 November 2021. *See* North Carolina General Assembly, Senate Bill 740 / SL 2021-174, https://ncleg.gov/BillLookUp/2021/S740 (legislative history of S740 (2021 Congressional Plan)); https://ncleg.gov/BillLookUp/2021/S739 (legislative history of S739 (2021 NC Senate Plan)); https://ncleg.gov/BillLookUp/2021/H976 (legislative history of H976 (2021 NC House Plan)).

2. During all Senate and House Redistricting Committee meetings, and during all full sessions of the House and Senate, members of the Democratic Party were given a meaningful opportunity to offer amendments, ask questions about, and comment on proposed plans. In addition, the General Assembly established a detailed

record of the purposes of the configurations of the districts. By way of example, the record shows the following legislative goals:

- 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.*[4]

- 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 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.*

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

- 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 in a single district, 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. This was done out of a desire to maintain the incumbent in the district. Another 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*.

- Finally, 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. In introducing the bill that ultimately was enacted as the Senate plan, 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 as to of 120 House districts, at the House Redistricting Committee hearing on 2 November 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.

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. (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). Both Democratic members stated in open committee that they supported the district groupings as amended and that the amended districts had no VRA issues. *Id.* at 3:48:04 and 3:52:49. The committee adopted the two amendments, and they are in the 2021 Senate Plan.

3. The two sets of Petitioners here filed suit and sought provisional injunctive relief. Both sets of Petitioners rely on an unreported Superior Court decision, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sep. 03, 2019), which was decided after a decade's worth of other redistricting challenges, months of discovery, and a two-week trial.

The *NCLCV* Petitioners challenge the 2021 Congressional, House, and Senate Plans under the North Carolina Constitution's Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses. The *NCLCV* Petitioners allege that these plans are unlawful partisan gerrymanders because they are insufficiently proportional.[5] 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. Absent from the *NCLCV* Petitioners' Complaint and its

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

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* Petitioners allege that, because it was *possible* for legislators to draw lines for partisan reasons, it *did* happen. *See, e.g.*, *NCLCV* Compl. ¶¶ 69–71.

The *NCLCV* Petitioners 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. It remains unknown who created the plans, what criteria was used, why specific lines were chosen, whether political or racial information was considered, and anything else a citizen would want to know about a proposed redistricting plan. This black box is the opposite of the transparent 2021 legislative process.

The *NCLCV* Petitioners' preliminary-injunction motion asked the three-judge panel below 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* Petitioners' map in the 2022 elections. Compl. Prayer for Relief ¶ g. In short, the *NCLCV* Petitioners 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*.

The *Harper* Petitioners present a similar case, but they challenge only the 2021 Congressional Plan, not the 2021 Legislative Plans. Like the *NCLCV* Petitioners, the *Harper* Petitioners have no direct evidence that partisan motive entered the line-drawing, and ask for the negative inference that partisan motive *must* have impacted lines because it cannot be proven *not* do have done so. *See, e.g.*, *Harper* Petition 8–9. The *Harper* Petitioners relied on an expert analysis criticizing district lines and mapping simulations purporting to show that the 2021 Plans are extreme partisan outliers. The *Harper* Petitioners also asked for a new court-drawn congressional plan to govern the 2022 election—*as preliminary relief*.

4. Petitioners' cases were consolidated for consideration by a three-judge panel. *See N.C.G.S.* § 1-267.1. Fewer than 72 hours before their preliminary-injunction hearing, and in violation of the trial court's rules, the *Harper* Petitioners served for the first time hundreds of pages of exhibits, including lengthy expert reports, on the trial court and opposing parties. The expert reports were not, and still have not been, vetted through a fair adversarial process.

After a lengthy hearing on December 3, 2021, the three-judge panel found against Petitioners on every issue and denied their preliminary-injunction motions.

First, the Panel held that Petitioners' claims are non-justiciable under the political-question doctrine. Second, it found that Petitioners are unlikely to establish standing. Third, it found that Petitioners' requested relief improperly seeks to alter the status quo, rather than preserve it. Fourth, it found that Petitioners have not established irreparable harm or that any harm outweighs the harm of an injunction. Fifth, the three-judge panel found that the Petitioners are unlikely to establish discriminatory intent because "the evidence presented shows that the General Assembly did not use any partisan data in the creation of these congressional and state legislative districts, suggesting a lack of intent." *Harper* App. p 11.

Petitioners appealed. Now they ask this Court to grant discretionary review before the Court of Appeals rules, to suspend the rules of appellate procedure, to issue (in effect) the preliminary injunction the panel below denied, and to set an expedited briefing schedule.

ARGUMENT

Petitioners demand extraordinary relief: an injunction issued on a highly expedited basis that invalidates the 2021 Plans and throws the 2022 primaries into disarray. But these lawsuits remain at an early stage, and the relief Petitioners could obtain is, at best, *provisional*. And Petitioners ask for this relief after having lost below on every aspect of their preliminary-injunction motions—the law, the facts, and the equities. Petitioners have not presented their evidence at trial, it has not been vetted in discovery, and their presentations make no effort to account for the exhaustive legislative record establishing the General Assembly's purposes behind the 2021 Plans. They fill their Petitions with bolded and italicized statements that are

unfounded, often come without any citation, and misconstrue any material that is cited. Petitioners believe they can simply drop the word "gerrymander" in briefing, state without even a citation that "[t]he 2021 Plan is inarguably an extreme partisan gerrymander," *Harper* Petition 14, and obtain a total upheaval of the election process that all 10.4 million North Carolina residents must utilize to exercise the franchise. That is not how litigation works.

Even if the constitutional questions presented were worthy of this Court's review, it would be improper to resolve them in this highly expedited process and on an incomplete and unvetted record. It is not enough for Petitioners to obtain a ruling from this Court that partisan-gerrymandering claims are justiciable. That would, at best, afford Petitioners a remand for further preliminary-injunction proceedings with insufficient time to conduct meaningful discovery and obtain a ruling before elections simply must be conducted. Petitioners stake their position on the incredible hope that this Court will engage in its own fact-finding on an undeveloped record before Legislative Defendants have been afforded any discovery and even before the Court of Appeals has the opportunity to weigh in. That would be exceptional, and this Court should not accept that invitation.

I. This Case Should Not Be Certified For Review Prior to Determination By The Court of Appeals

Both sets of Petitioners demand that this Court certify this case for discretionary review before determination by the Court of Appeals, but their Petitions are unsuitable for such extraordinary process. In the ordinary course, the parties must obtain a determination by the Court of Appeals before bringing their case to this Court.

N.C.G.S. § 7A-27. Petitioners in this case seek to invoke a narrow statutory exception to that rule, pursuant to which this Court "may" certify a case for review before determination by the Court of Appeals in the following circumstances:

> (1) The subject matter of the appeal has significant public interest.
>
> (2) The cause involves legal principles of major significance to the jurisprudence of the State.
>
> (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.
>
> (4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.
>
> (5) The subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.

N.C.G.S. § 7A-31(b).

Discretionary review should not be granted lightly. "[P]ublic policy, which has been not inaptly termed the 'manifested will of the state,' is very largely a matter of legislative control[.]" *Reid v. Norfolk S. R. Co.*, 162 N.C. 355, 78 S.E. 306, 307 (1913) (citations omitted). Under the State's public policy as established in N.C. Gen. Stat. § 7A-27, appeals from decisions of the trial court are to be reviewed first (and perhaps only) by the Court of Appeals, *see* N.C. Gen. Stat. § 7A-27(b). This policy allows issues to be resolved by one set of specialized appellate judges *before* this Court's resources are tapped, and permitting this process to unfold in the ordinary course allows this Court to determine whether a case satisfies the discretionary-review elements by reference to the work of the Court of Appeals.

For all the reasons that follow, this Petition does not meet the criteria of § 7A-31(b) and the Court should not certify this case for discretionary review before determination by the Court of Appeals.

A. This case does not implicate legal principles of major significance to the State, to the public, or to the administration of justice.

The first two discretionary-review factors, as well as the fifth, ask whether the questions presented are significant to the State, the public, or the administration of the courts. N.C.G.S. § 7A-31(b)(1), (2) and (5). This case is not an appropriate vehicle for resolving any such issues. The Petitions purport to present an ideal opportunity for this Court to address whether so-called "partisan gerrymandering" claims are justiciable and resolve the conflict between the justiciability holding of the panel below and the holding of the *Common Cause* panel. This argument is unpersuasive given the provisional nature of the relief sought by Petitioners, the lack of almost any adversarial record development, and the timing pressures implicated by Petitioners' desire to prevent any of the 2021 Plans from being used in the administration of the 2022 elections—which are already occurring.

1. As an initial matter, constitutional challenges do not qualify *per se* for discretionary review—or else the General Assembly would not have repealed the prior statute creating an appeal as of right in such cases. This Court has often denied certification in cases implicating the right to vote. *See, e.g.*, Pet'n for Discretionary Review, *in Common Cause v. Lewis*, 373 N.C. 258, 834 S.E.2d 425 (2019) (invoking "the right to vote in nonpartisan, non-discriminatory House districts" as a matter of significant public interest) (invoking the right to vote as a matter of "significant public

interest"); Pet'n for Discretionary Review, *in N.C. State Conference of the NAACP v. Moore*, 261P18-2, 2019 WL 2018297 (May 1, 2019) (invoking the right to vote as a matter of "significant public interest"); *N.C. State Conference of the NAACP v. Moore*, 372 N.C. 359, 828 S.E.2d 158 (June 11, 2019) (mem.) (denying petition). It has also done so in other cases purportedly implicating other fundamental rights. *See, e.g.*, Pet'n for Discretionary Review, *Bessemer City Express, Inc. v. City of Kings Mountain*, 85P03, 2003 WL 23325713 (Feb. 5, 2003) (invoking fundamental constitutional rights and substantive due process to seek discretionary review of denial of preliminary injunction against zoning ordinance); *Bessemer City Express, Inc. v. City of Kings Mountain*, 357 N.C. 61, 579 S.E.2d 384 (2003) (mem.) (denying petition); *Leandro v. State,* 346 N.C. 336, 344, 488 S.E.2d 249, 253 (1997) (denying joint request for discretionary review prior to determination by Court of Appeals in case implicating fundamental right to education).

Moreover, the question of whether partisan gerrymandering is justiciable is not particularly difficult because this Court has answered it: "[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). The State Constitution clearly articulates the legal requirements governing district lines, *see NCLCV* Petition 4–5, and the absence of a partisan-fairness criterion signals that it cannot be inferred into the text, *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)). 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).

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) the court 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. *See 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 trial court dutifully followed this law, and there is no compelling reason to revisit it now.

2. In any event, this case does not cleanly present the question whether partisan gerrymandering claims are justiciable because a series of threshold deficiencies in Petitioners' claims make it unlikely that the question will even be adjudicated.

The court below found that Petitioners are unlikely to establish that the 2021 Plans were drawn with discriminatory partisan intent, which must be established "beyond a reasonable doubt." *Rowlette v. State*, 188 N.C. App. 712, 723, 656 S.E.2d 619, 626 (2008) (citation omitted). That being so, there is no basis for this Court to reach the subsequent constitutional question whether partisan intent violates the State Constitution or presents a justiciable question. *See, e.g.*, *State v. Wallace*, 49 N.C. App. 475, 484–85, 271 S.E.2d 760, 766 (1980) (collecting cases for the proposition that courts "will not decide questions of a constitutional nature unless absolutely necessary to a decision of the case"). The 2021 redistricting process was the most transparent and non-partisan legislative redistricting in North Carolina history, and Petitioners are unlikely to establish that it was unconstitutional, even assuming merit in their legal position. That Petitioners still insist that the resulting plans are "extreme partisan gerrymanders," *NCLCV* Petition 3, says more about the ease with which redistricting litigants throw invective in court filings than it does about the 2021 redistricting process.

In any event, Petitioners do not satisfy the standards articulated in the *Common Cause* ruling, and that shows throughout their Petitions. Even if partisan

gerrymandering claims were justiciable, they would have to "limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting). 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." *See Pender County v. Bartlett,* 361 N.C. 491, 506, 649 S.E.2d 364, 373 (2007). 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)).

The Petitions follow precisely the path *Common Cause* and Justice Kagan's dissent condemned: they posit that an ideally fair process and maps can be prepared based on criteria manifestly different from those non-partisan goals the General

Assembly chose to implement. To begin, Petitioners ask for proportional representation, claiming that because they allege that the Democratic Party will not obtain a majority of the seats with a majority of the vote, the 2021 Plans are gerrymanders. *See, e.g.*, *NCLCV* Petition 2; *Harper* Petition 7-10. The *Common Cause* court held that proportional representation is not a legal right. *Common Cause*, WL 4569584, at *100. Next, Petitioners present alternative plans—prepared in a black box with unknown and undisclosed criteria—that purport to show both partisan intent and effect because the General Assembly did not achieve Petitioners' redistricting goals. *NCLCV* Petition 12; *Harper* Petition 15. But this is exactly backwards: their maps are supposed to achieve *the General Assembly's* goals and show that partisan, rather than non-partisan, goals created the imbalance they complain of. *See Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting) (opining that a proper analysis "takes as its baseline a State's *own* criteria"). In particular, the *Harper* Petitioners' simulated plans are troubling because, by failing to account for the General Assembly's well-documented goals, they register as *partisan* goals that the *Common Cause* court held to be impermissible. *See* 2019 WL 4569584, at *114.

Ultimately, Petitioners ask this Court to flip the burden of proof. They simply state again and again that the General Assembly drew the plans with partisan intent, but they have no cognizable evidence of this. They admit that the criteria forbade partisan considerations, whereas the General Assembly in *Common Cause* was forthright in utilizing partisan data, *see Common Cause*, 2019 WL 4569584, at *115, and this was the basis of the preliminary injunction in the first *Harper* case, *NCLCV* Add.

147–156. There is no direct evidence of partisan intent here. Petitioners contend that legislators must be assumed to have harbored such considerations because the Chairs had no way to babysit co-equal members of the body and ensure that partisan data was not consulted outside of the public portal room. *See Harper* Petition 8–9; *NCLCV* Petition 8-9. But it is Petitioners 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). "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). The court closest to the facts found that Petitioners are unlikely to prove this, which is an independently sufficient basis to reject their Petitions.[6]

3. This case suffers from the additional vehicle defect that Petitioners were found unlikely to establish standing. It is axiomatic that "[o]nly 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 Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 116,

[6] *Harper* Petitioners allege (at paragraph 16 of the Complaint, App. p 96) that legislators carried maps into the Public Portal room; however, counsel for *Harper* Petitioners admitted to the three-judge panel that this was speculation. She clarified that while the video showed some legislators brought in paper, no one could see what was on the paper itself. Counsel also admitted that she cannot say for sure that Democrats did not bring in partisan information into the drawing room. (*Harper* App. p 612-613).

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." (quotation marks omitted)). "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).

As the trial court noted, it is undisputed that no individual *Harper* Petitioner resides in six challenged congressional districts (CD2, CD3, CD5, CD8, CD12, and CD13), and no individual *NCLCV* Petitioner resides in eight (CD1, CD3, CD5, CD7, CD8, CD9, CD10, CD14). Meanwhile, there is no individual *NCLCV* Petitioner residing in 42 of 50 Senate districts and 111 out of 120 House districts. Courts have set residency in challenged districts as a minimum standard for showing standing—or else citizens of some districts could obtain changes to other districts they do not reside in whether or not the residents of *those* districts actually want those changes. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018). Thus, even taking Petitioners' arguments at face value—e.g., that the individual petitioners, including those who live in districts that they allege will be represented by Democratic members, are injured by partisan redistricting—very few districts challenged in these cases will be properly before this Court. This creates the perplexing practical scenario that relief

issued by this Court would reach some portions of the State and not others.[7] To be sure, the *NCLCV* organizational petitioner contends that it has standing to assert the voting rights of its members, but that is untenable. The right to vote is personal to each voter in North Carolina and cannot be vindicated by an organization on behalf of persons who chose not to join this lawsuit (which they surely would not have had to pay to join). The right to vote is the type of "claim" that "requires 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), especially where NCLCV claims to have members who are not members of the Democratic Party and may have no interest in a lawsuit purporting to vindicate the rights of Democratic voters to elect Democratic candidates into office. *See* N.C. League of Conservation Voters, About https://nclcv.org/about-us/ (explaining that the organization is "non-partisan").

4. The trial court also found against Petitioners on the equities, concluding that they have not established irreparable harm or that irreparable harm to them outweighs the harms of the injunction. This presents yet another question standing between Petitioners and review of the constitutional question they present.

First, this question is a particular problem for the *Harper* Petitioners because their statement of issues presented does not include the question whether the trial court properly determined that the equities cut against them. *See Harper* Petition 28. The *Harper* Petitioners behave as if this case were before the Court after a full trial

[7] To be clear, Legislative Defendants argued below and continue to argue that no Petitioner has standing, but this Court need not agree or even reach that question to see how defective these Petitions are.

and set for review of all case issues directly, whereas a preliminary injunction may only be issued if the plaintiff makes demanding showings on the equities. *See, e.g.*, *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (N.C. 1977). Because the *Harper* Petitioners failed to present this question, it is not properly before the Court. *Willowmere Community Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 558 nn. 3 & 4, 803 S.E.2d 558, 561 nn.3 & 4 (2018) (stating established rule that review in this Court is limited to the questions presented in the petition for discretionary review). The *Harper* Petition should be denied on this basis alone.

Second, although the *NCLCV* Petition presents a challenge to all aspects of the preliminary injunction ruling, *see NCLCV* Petition 22, the Court's need to address this issue weighs down this appeal with further baggage, rendering the *NCLCV* Petition a poor vehicle to resolve any pure issues of law. The *NCLCV* Petitioners ask this Court to reject the unanimous view of the panel below, which is closer to the facts of this case, that any harms to Petitioners would be minimal at most and that the harms to the other parties and the public from an injunction would be enormous.

The panel's position is manifestly correct. On the one hand, the "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). Issuing an injunction would 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. These 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). This proposition is true under federal law (which governs congressional elections) and North Carolina law, and has been recognized by this Court in redistricting litigation. *See Pender Cnty.,* 361 N.C. 491, 649 S.E.2d 364. On the other hand, Petitioners have struggled even to establish *standing*, let alone *irreparable harm*.

5. Yet another question that must be resolved is whether the federal Constitution deprives this Court of authority to enjoin the congressional plan. The *Harper* Petitioners and *NCLCV* Petitioners 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*, 139 S. Ct. at 2495. 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 Petitioners' 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

Petitioners' invitation to overstep separation of powers and override the North Carolina General Assembly in setting the lines of congressional districts.

B. This case does not qualify for the substantial delay factor.

Petitioners contend that discretionary review is necessary to avoid "substantial harm" from delay. *Harper* Petition 26; *see also NCLCV* Petition 22–23. But factors of timing cut *against* review.

1. It is already too late to interfere with the election process, so the substantial harm at issue here would be *inflicted* by expediting proceedings in this Court. That proposition is settled law. In *Pender County v. Bartlett*, 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007), this Court concluded that a decision issued on 24 August 2007, striking down a handful of legislative districts—after full adjudication on the merits—came too late to impact the 2008 elections; thus, the Court stayed its decision until the following election. Here, it would be impossible to reach a sound conclusion in less than a month, so the Court could summarily deny the Petition on this basis.

2. The provisional and highly expedited posture of these cases presents a compelling reason for this Court to wait further record and procedure development before intervening. Appellate review of interlocutory orders is generally disfavored. *See, e.g., Clark v. Craven Regional Med. Auth.*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990); *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). Accordingly, even where there is appellate jurisdiction over an interlocutory order, when the subject of the interlocutory appeal "goes to the heart of [Petitioners'] legal challenge," this Court has found it appropriate not to entertain an interlocutory review and, instead, to "await resolution at the final hearing when all the facts upon

which such resolution must rest can be fully developed." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 358, 261 S.E.2d 908, 913, *on reh'g*, 299 N.C. 731, 265 S.E.2d 387 (1980). In particular, "this Court will pass upon the constitutionality of a statute only when the issue is squarely presented upon an adequate factual record and only when resolution of the issue is necessary to determine the rights of the parties before it." *Id.* at 359, 261 S.E.2d at 914.

Avoiding review of such weighty issues on an incomplete record benefits judicial economy, as it "prevent[s] fragmentary and premature appeals that unnecessarily delay the administration of justice and...ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980). *See also Anderson v. Assimos*, 356 N.C. 415, 416-17, 572 S.E.2d 101, 102 (2002) (noting that a "constitutional analysis always requires thorough examination of all the relevant facts" and "if the factual record necessary for a constitutional inquire is lacking, 'an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction.'") (citation omitted). For that reason, this Court has denied discretionary review prior to a determination by the Court of Appeals in appeals from interlocutory orders implicating even fundamental rights. *See, e.g., Holmes v. Moore*, 832 S.E.2d 708 (Mem) (N.C. 2019) (denying certification in an appeal from a superior court order denying a preliminary-injunction in a challenge to S.B. 824, a bill requiring voters to produce identification to vote); *Bessemer City Express, Inc. v. City of Kings Mountain*, 357 N.C. 61, 579 S.E.2d 384 (N.C. 2003) (mem.) (denying petition for review before judgment

of Court of Appeals order dismissing appeal from order denying preliminary-injunction against zoning ordinance).

The record here is incomplete, to put it mildly. The *Harper* Petitioners' motion for preliminary injunction consisted of a 50-page brief and hundreds of pages of exhibits, including lengthy expert reports that cumulatively analyzed trillions of so-called simulated plans, all served on Legislative Defendants on Tuesday, 30 November 2021 after 3:30 p.m, three days before the three-judge panel held argument on their preliminary injunction. This was after the filing deadline set forth in N.C. R. Civ. P. 6(d), and Legislative Defendants did not have a fair opportunity to examine, vet, and prepare rebuttals to these expert reports or other materials. The *NCLCV* Petitioners, meanwhile, rest their case on three alternative maps that were created with an undisclosed set of criteria and in secret. There has been no discovery. The adversarial process cannot function properly to disclose the truth when one side is so thoroughly hamstrung in its response. There is certainly no basis for this Court to issue an injunction when the parties are still ascertaining basic facts.

Petitioners can hardly help but acknowledge that the record here is insufficient to resolve the complicated factual questions they raise. The *Harper* Petitioners improperly resort (at 16–17) to public commentary—including a Tweet—that are outside the record on appeal, asking this Court to try the redistricting plans through press accounts and based on observations of persons not even in North Carolina. This 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.

And it is no answer to insist that the existing election calendar be suspended—with candidate qualification now in-progress for the 2022 primary elections—and the 2021 Plan suspended pending further appellate review. Such relief would have the effect of rendering the plans unconstitutional without Petitioners first satisfying their burden, as "a statute enacted by the General Assembly is presumed to be constitutional," and "all doubts must be resolved in favor of the [statute]." *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (quoting *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)). The General Assembly is under no obligation to assume that the laws it passes are constitutionally deficient. And, of course, it is Petitioners' "burden to establish their right to a preliminary injunction." *Pruitt*, 288 N.C. at 373, 218 S.E.2d at 351. This Court has no legislative authority to enact new election timelines.

3. In that respect, this case marks a sharp contrast to the appellate record normally presented in a redistricting challenge. *Stephenson v. Bartlett,* 355 N.C. 354, 359, 562 S.E.2d 377, 382 (2002) and *Pender County v. Bartlett*, 361 N.C. 491, 495, 649 S.E.2d 364, 376 (2007) were both appeals from the entry of summary judgment on the merits of redistricting claims. This Court heard appeal from a judgment after trial in *Dickson v. Rucho,* 367 N.C. 542, 548, 766 S.E.2d 238, 244 (2014), vacated by 575 U.S. 959 (2015). *Common Cause* was likewise a judgment entered after a full trial on the merits. No. 18CVS014001, 2019 WL 4569584 (N.C. Super. Sep. 3, 2019). The major federal cases of the past decade, *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), and *Common Cause v. Rucho*, 318 F.

Supp. 3d 777, 811 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019), were likewise decisions entered after a trial. As the many hundreds of pages of opinions at the trial and appellate levels in these cases demonstrate, proper record development is essential to deciding these cases. That record is absent here.

The timing and poor record-development in this case renders it an exceptionally poor vehicle to decide the questions presented in the Petitions. And worse, a hasty decision to delay the 2022 primaries and enjoin the use of the 2021 congressional plan would contravene the principles of cases like *Bailey* and *Anderson* and plunge the State's election mechanics into chaos.

C. The Court should refuse review before determination in the Court of Appeals, which has agreed to review the case en banc

An equally compelling reason for this Court to deny discretionary review prior to decision by the Court of Appeals has been the speed with which that court has acted in the companion *NCLCV* case. On 6 December 2021, the en banc court vacated a stay of the candidate-filing deadline and agreed to hear a Petition for Writ of Supersedeas or Prohibition on an expedited basis. *See NCLCV* App. p. 697-697.

Hearing this case in the first instance in the Court of Appeals is consistent with the State's public policy, as most recently affirmed by the 2016 amendments to section 7A-27. Session Law 2016-125 deleted a direct pathway of appeal to this Court for facial challenges to acts of the General Assembly. *See* 2016 Session Law 125 § 22(b). This indicates that neither constitutional nor redistricting challenges are automatic candidates for bypassing the Court of Appeals.

Allowing the Court of Appeals to review the case in the first instance is equally appropriate given that court is sitting en banc, the jurisdiction for which was established in 2016. The point of en banc review at the Court of Appeals is to encourage *further* Court of Appeals development of cases before this Court's intervention, and the prior rule allowing an appeal as of right from Court of Appeals opinions that draw a dissent was abolished. *See* N.C.G.S. § 7A-30(2) (2017). Courts should follow—not circumvent—the legislative purpose behind amendments to statutes. *See Matter of Jones*, 59 N.C. App. 547, 549, 297 S.E.2d 168, 170 (1982). Here, the public policy of the State favors direct appeal to the Court of Appeals and extraordinary review by this Court is not warranted under the factors of N.C.G.S. § 7A-31(b).

II. The Petition for a Writ of Certiorari Should Be Denied

The *NCLCV* Petitioners alternatively seek the issuance of a writ of certiorari. "Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). In cases involving timely appeals from interlocutory orders, the Court has treated a petition for a writ of certiorari and a timely petition for discretionary review as substantially similar. *See Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982) ("Except in extraordinary circumstances, this Court will not consider, either by writ of certiorari or discretionary review, any denial of a motion for summary judgment . . . ."). Just as this Court is cautious about the risk that discretionary review invites litigants to "procrastinate the administration of justice . . . [by] bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders," *Fayetteville St. Christian Sch.*, 299 N.C. at 358, 261 S.E.2d at 913 (quoting *Veasey v.*

Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950)), the same risk inheres in permitting certiorari jurisdiction. *Harbor Point Homeowners Assn. ex rel. Bd. of Directors v. DJF Enterp., Inc.*, 206 N.C. App. 152, 165, 697 S.E.2d 439, 448 (2010) (citing Veasey). For the same reasons that the *NCLCV* Petitioners' Petition for discretionary review pursuant to N.C.G.S. § 7A-31(b) should be denied, so too should their Petition for writ of certiorari.

III. If The Court Certifies Any Of Petitioners' Proposed Issues, It Should Also Certify Additional Issues To Be Briefed

Should the Court certify any or all Petitioners' proposed issues for discretionary review or review via writ of certiorari, it would be obligated to address constitutional and discretionary limits of its authority. Therefore, it should also certify the following issues pursuant to N.C. R. App. P., Rule 15(d):

1. Whether the Elections Clause of the federal Constitution permits a state court to reject and, potentially, replace the state legislature's law establishing the times, places, or manner of congressional elections.
2. Whether it is too late in the election cycle to disturb the superior court's preliminary-injunction judgment.

IV. The Motion to Suspend The Rules of Appellate Procedure Should Be Denied As Moot

For reasons stated above, the Court should deny the Petitions and allow the Court of Appeals to resolve their appeal in the first instance, consistent with ordinary appellate procedure. If the Court agrees, it should deny Petitioners' motion to suspend the rules of appellate procedure without prejudice to allow Petitioners to refile the motion with the Court of Appeals.

If the Court chooses to exercise jurisdiction at this time (it should not), Legislative Defendants are prepared and willing to litigate the case on an expedited basis. However, Petitioners' demand for fulsome briefing within 15 calendar days with argument "as soon as possible" thereafter, *see Harper* Pet. At 29–30, is unrealistic and downplays the important nature of the questions they seek the Court's guidance on. Namely, Petitioners seek determination on whether the political question doctrine applies to political gerrymandering claims, and if the claims are justiciable, what guidelines apply. No jurist should be placed in a position to decide these important questions in a mere 15 days, without a full evidentiary record. Indeed, Petitioners' demand for the Court to reverse the superior court's denial of their motions for preliminary-injunction would call for further proceedings in the trial court to rehear the preliminary injunction motion with the benefit of the Court's decision—all to be concluded in enough time to allow the 2022 elections to be governed by a remedial plan that itself would require litigation. Petitioners do not explain how this is workable in the time available given the limitations identified by the State election administrators.

Legislative Defendants caution the Court that, if the issues in this case are somehow so "exceptionally important and singularly urgent" as to require this Court's immediate attention, *see Harper* Pet. at 29, the Court should not sacrifice accuracy for the sake of speed. And if, as Petitioners suggest, the Court should expedite the adjudication of this appeal, even if this results in a risk of error, then any error should

be in the superior court's favor. Again, this is a fact-bound appeal challenging a preliminary-injunction decision that the superior court was best positioned to interpret.

REASONS WHY THE WRIT OF SUPERSEDEAS OR WRIT OF PROHIBITION SHOULD NOT ISSUE

As noted, the *NCLCV* Petitioners have integrated into their Petition seeking discretionary review a request for this Court to issue the extraordinary writ of supersedeas or writ of prohibition. First, writs of supersedeas and prohibition are improper vehicles for the injunctive relief Petitioners seek. Second, the relief Petitioners seek would disrupt, not maintain, the status quo, especially because candidate filing has already begun under the 2021 Plans. Finally, Petitioners cannot show a likelihood of success on the merits of their claims, making these extraordinary writs unavailable.

I. The Relief Petitioners Seek In Their Supersedeas Petition Is Not Available Through A Writ of Supersedeas Or Prohibition.

Though Petitioners have styled their petition as a "Petition for Writ of Supersedeas or Prohibition," this petition is a proverbial wolf in sheep's clothing: the actual relief sought by the Petition is the same affirmative injunction that was denied by the bipartisan three-judge panel below. The purpose of a writ of supersedeas is "to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal" pending appellate review. N.C. R. App. P. 23(a)(1). "A 'supersedeas,' properly implemented, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if an execution has been issued, it prohibits further proceedings under it." *Staffords v. King*, 90 F. 136, 140 (4th Cir. 1898) (citing *Hovey v. McDonald*, 109 U.S. 159 (1883)). It "operates to stay enforcement of a lower courts judgment pending review by the appellate court." W.

Shuford, *North Carolina Civil Practice and Procedure* § 95:6 (citing N.C. R. App. P. 23(c) Drafting Committee Note).

The Petitioners question whether the relief they seek—"suspension of the candidate-filing period pending review of the December 3 Order"—is appropriately sought as a writ of supersedeas or a writ of prohibition. *See* Petition, p.23 & n.3. The answer is neither a writ of supersedeas or prohibition can offer Petitioners the **injunctive** relief they seek. Indeed, Petitioners admit they are seeking the same **injunctive** relief in this Petition that they sought from the bipartisan panel below: "In substance, the NCLCV Petitioners thus had already asked the panel for the relief they seek here—and the request was denied." *Id.* Unfortunately for Petitioners, the nature of the relief provided by a writ of supersedeas is to stay the execution of an affirmative order requiring a party to act or prohibiting a party from taking action; in other words, writs of supersedeas are granted for the purpose of forestalling a trial court's order, typically by the trial court's *granting* of a preliminary injunction and the appellate court thereby requiring that certain action be taken or not taken. *See, e.g.*, *N.C. Baptist Hosp. v. Novant Health, Inc.*, 195 N.C. App. 721, 723, 673 S.E.2d 794, 796 (2009) (appealing trial court's grant of preliminary injunction enjoining a party from challenging a hospital project and petitioning for a writ of supersedeas); *Artis & Assocs. v. Auditore*, 154 N.C. App. 508, 509., 572 S.E.2d 198, 199 (2002) (appealing trial court's grant of preliminary injunction enjoining an employee from violating an employment agreement and petitioning for a writ of supersedeas); *Looney v. Wilson*, 97 N.C. App. 304, 308, 388 S.E.2d 142, 145 (1990) (appealing trial court's

grant of preliminary injunction restraining defendants from continuing to occupy the property and petitioning for a writ of supersedeas); *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 480, 241 S.E.2d 700, 703 (1978) (appealing trial court's grant of preliminary injunction enjoining an employee from violating a covenant not to compete and petitioning for a writ of supersedeas). Here, the trial court panel has not ordered the parties to do or refrain from doing anything; accordingly, a writ of supersedeas cannot issue, for there is no execution or enforcement available to be stayed.

The alternative writ of prohibition filed by Petitioners fares no better. The purpose of a writ of prohibition, as "the negative counterpart to a writ of mandamus," is to prevent "a trial tribunal from acting in excess of its authority." *Shuford North Carolina Civil Practice and Procedure* § 95:4. Prohibition historically has been used as "[a]n extraordinary writ issued by an appellate court to prevent a lower court from exceeding its jurisdiction or to prevent a nonjudicial officer or entity from exercising a power." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 2021-NCSC-6, 376 N.C. 558, 568, 853 S.E.2d 698, 708 (citing "Prohibition," Black's Law Dictionary (11th ed. 2019)). "Prohibition would be the appropriate vehicle to prevent a trial court judge from exercising jurisdiction when none exists or from entering unlawful orders." *Id.* (citing *State ex rel. Payne v. Ramsey*, 262 N.C. 757, 138 S.E.2d 405 (1964); *Matter of Greene*, 297 N.C. 305, 255 S.E.2d 142 (1979)).

Petitioners' requested writ of prohibition should be denied because, as with their requested writ of supersedeas, it does not afford the injunctive remedy they seek here. Again, the three-judge panel has not taken any actions outside of its authority

or entered any unlawful orders. Instead, the three-judge panel has simply determined that Petitioners are unlikely to succeed on the merits of their case and declined Petitioners' invitation to enter an injunction altering the status quo. Accordingly, there is no act that has been taken or may be taken by the three-judge panel which exceeds its authority or is unlawful, and therefore no writ of prohibition can issue.

II. The Relief Petitioners Seek In The Supersedeas Petition Will *Alter*, Rather Than *Preserve*, The Status Quo.

As recognized by the bipartisan three-judge panel in denying Petitioners' Motion for Preliminary Injunction, Petitioners are seeking provisional relief establishing a state of affairs that never existed, not provisional relief seeking to maintain an existing state of affairs. Importantly, as of 8:00 a.m. the morning of 7 December 2021, candidate filing for North Carolina's congressional and state legislative races reopened. Candidates have already filed notices of candidacy for Congressional and state legislative offices. Accordingly, the status quo is that candidate filing is currently proceeding apace, and any order suspending candidate filing for these races would alter that status quo.

To be clear, the current status quo—i.e., ongoing candidate filing—is not the result of any affirmative order of the three-judge panel, but rather as a result of the ordinary operation of state law and election administration. This is a key distinction from the cases cited by Petitioners in support of their argument that writs are commonly issued in cases such as these and further illustrates why a writ of supersedeas is an inappropriate vehicle for the relief requested. In both *Community Success Initiative v. Moore v. Moore*, 861 S.E.2d 885, 886 (N.C. 2021), and *N.C. State Bd. of Educ.*

v. State, 371 N.C. 170, 814 S.E.2d 67 (2018), the respective trial courts issued orders granting affirmative relief (a preliminary injunction in the former, and a summary judgment in the latter) which a writ of supersedeas could stay to maintain the status quo. Here, the Panel's order did not disrupt the status quo. The status quo existed prior to the three-judge panel's denial of Petitioners' Motion for Preliminary Injunction, and it continues to exist without any interference by the three-judge panel. There is no "execution or enforcement" that can be stayed under N.C. R. App. P. 23.

In short, a writ of supersedeas requested by Petitioners would not preserve the status quo—it would upend it. The status quo today is that candidates have filed in districts under the 2021 Plans and more candidates will do so as the filing period continues, so any order by this Court staying that would disrupt that status quo. Accordingly, Petitioners' Petition should be denied.

III. The Writ of Supersedeas Or Writ Of Prohibition Are Further Not Warranted Because The *NCLCV* Petitioners Have Failed To Demonstrate They Are Likely To Succeed On The Merits.

Setting aside that the *NCLCV* Petitioners' requested extraordinary relief is unavailable either through a writ of supersedeas or prohibition and would upend the status quo, the *NCLCV* Petitioners should not receive their requested relief because they are unlikely to succeed on the merits of their claims. Petitioners had the opportunity to present their merits arguments to the bipartisan panel below, but the panel held that Petitioners failed to meet the exacting standard required of them to obtain a preliminary injunction. This Court should similarly find that they are unlikely to succeed on the merits for the reasons set forth *supra*.

By way of illustration, to grant the *NCLCV* Petitioners' writ of supersedeas or prohibition, which would have the effect of completely up-ending North Carolina's 2022 primary election calendar, this Court would have to find—now, on an emergency basis and with the poor state of the record below—a likelihood that Petitioners would succeed on the merits of all of these important gating questions:

1. Standing. The *NCLCV* Petitioners 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. And the Court would have to do so despite the fact the NCLCV Petitioners do not even claim to live in eight of North Carolina's fourteen congressional districts, 42 out of 50 Senatorial districts, and 111 out of 120 House districts, and despite the fact that the *NCLCV* Petitioners do not establish that their own districts would shift from being Republican-leaning to Democratic-leaning under a different configuration, or that they are prevented from electing their candidate of choice. Their arguments all concern an alleged statewide injury. They also have failed to establish standing. *See Gill*, 138 S. Ct. at 1930–31.

2. The Elections Clause. The *NCLCV* Petitioners challenge the 2021 congressional plan solely under the North Carolina Constitution, but as explained above, the United States Constitution governs elections to Congress—and it delegates the responsibility to manage those elections to the General Assembly as the Legislature

of the State within the meaning of the Elections Clause. U.S. Const., art. I, § 4, cl. 1. Any other exercise of power is *ultra vires* as a matter of federal law.

3. Justiciability. In order to grant a writ of supersedeas in this case, this Court would have to also find that the *NCLCV* Petitioners were likely to succeed on their claims—an analysis that *first* requires a finding that the claims are justiciable at all. 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.

As set forth above, however, for more than a *century* these types of claims have been held non-justiciable political questions. *See Howell*, 151, N.C. 575, 66 S.E. 571. There is no rule "that this Court can address the problem of partisan gerrymandering because it must," *Gill*, 138 S. Ct. at 1929, and the Supreme Court eventually decided—rightly—that "partisan gerrymandering claims present political questions beyond the reach of the federal courts" because "federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Rucho*, 139 S. Ct. at 2506-07. *See also Johnson v. Wisconsin Elections Comm'n*,

_ N.W.2d _, 2021 WL 5578395, at *9 (Wis. Nov. 30, 2021) ("[w]hether a map is 'fair' to the two major political parties is quintessentially a political question"). This Court would have to chart a very different path—on an irresponsibly expedited basis—in order to even find the *NCLCV* Petitioners' claims justiciable, let alone find them likely to succeed on the merits.

Even if this Court did resolve each of these important gating questions in the *NCLCV* Petitioners' favor, it would then have to reach the merits of their claim—developed on a one-sided, paltry record. But, as explained, those Petitioners have not come close to establishing a likelihood of success on the merits of their claims, even if they were cognizable (they are not) and even if Petitioners had standing to assert them (they do not).

4. Claims Not Cognizable. Justiciability aside, the rights Plaintiff-Appellants 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 Plaintiff-Appellants' claims. The constitutional starting point is the presumption that any act of the General Assembly is constitutional. *Wayne Cnty. Citizens Ass'n*, 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). Petitioners cannot meet this onerous standard.

First, Petitioners' 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 Plaintiff-Appellants 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). Plaintiff-Appellants 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." *NCLCV* 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).

Second, Petitioners' 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 2021 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. Petitioners' 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.

Third, Petitioners' 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). No person of reasonable firmness would forego expression out of fear that district lines will be drawn with partisan intent. There are no restraints on speech, and redistricting cannot fairly be characterized as retaliation.

Nothing in the 2021 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. Petitioners' free speech and association claims, thus, fare no better than their free elections and equal protection claims.

CONCLUSION

Legislative Defendants respectfully request that this Court enter an order denying the Petitions for Discretionary Review Prior To Determination By The Court of Appeals and Motion to Suspend Rules of Appellate Procedure in these consolidated matters, along with the Petition for Writ of Supersedeas or Writ of Prohibition.

Respectfully submitted this the 8th day of December, 2021.

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N.C. R. App. P. 33(b) Certification:
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CERTIFICATE OF SERVICE

It is hereby certified that on this the 8th day of December, 2021, the foregoing was served on the individuals below by email:

4856-1154-5606 v.1

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