No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al.,

Plaintiffs,

v.

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

Defendants.

BRIEF OF *HARPER* PLAINTIFFS-APPELLANTS

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BRIEF OF *HARPER* PLAINTIFFS-APPELLANTS

ISSUES PRESENTED

1. Did the trial court err in holding that partisan gerrymandering claims are "nonjusticiable" under the North Carolina Constitution and thus North Carolina courts have no power to remedy even the most extreme partisan gerrymanders?

2. Did the trial court err in holding that *Harper* Plaintiffs lack standing?

3. Did the trial court err in holding that the 2021 Congressional, House, and Senate Plans do not violate the North Carolina Constitution's Free Elections Clause?

4. Did the trial court err in holding that the 2021 Congressional, House, and Senate Plans do not violate the North Carolina Constitution's Equal Protection Clause?

5. Did the trial court err in holding that the 2021 Congressional, House, and Senate Plans do not violate the North Carolina Constitution's Freedom of Speech and Assembly Clauses?

STATEMENT OF THE CASE

This is an appeal of a final judgment entered by a three-judge panel of the Superior Court in a challenge to the Congressional, House, and Senate redistricting plans (the "2021 Plans") enacted by the General Assembly on 4 November 2021. *Harper* Plaintiffs—25 North Carolina voters who collectively reside in all 14 of North Carolina's congressional districts and every House and Senate county grouping at issue—filed their Complaint on 18 November 2021, and their Amended Complaint on 12 December. They allege that the 2021 Plans are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, art. I, § 10, Equal Protection Clause, art. I, § 19, and Free Speech and Assembly Clauses, art. I, §§ 12, 14.

On 22 November 2021, a three-judge panel of the Superior Court was assigned to preside over the case. On 3 December, *Harper* Plaintiffs' lawsuit was consolidated with *North Carolina League of Conservation Voters v. Hall*, No. 21 CVS 015426, and Plaintiff

Common Cause was later granted intervention. Both *Harper* Plaintiffs and *NCLCV* Plaintiffs moved for a preliminary injunction.

The trial court denied a preliminary injunction on 3 December 2021. *Harper* Plaintiffs sought this Court's immediate discretionary review, and on 8 December, this Court granted a preliminary injunction staying the candidate filing period pending final resolution of this action, postponing all primaries to 17 May 2022, and directing the trial court to conduct further proceedings and issue its final judgment by 11 January.

The trial court conducted a bench trial from 3 January to 6 January. It issued its final judgment on 11 January, finding that all three of the 2021 Plans are extreme partisan gerrymanders. The trial court nonetheless entered judgment for Legislative Defendants, principally on the theory that Plaintiffs' claims are nonjusticiable due to a lack of judicially manageable standards.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court's judgment is immediately appealable pursuant to N.C.G.S. § 7A–27(b)(1), and this Court has jurisdiction over this appeal pursuant to N.C.G.S. § 7A–31(b) and this Court's order of 8 December 2021.

INTRODUCTION

Rarely do redistricting plans subvert the democratic process to the extent found by the trial court here. A three-judge panel of the Superior Court unanimously found that North Carolina's 2021 Congressional, House, and Senate Plans are extreme partisan gerrymanders that Legislative Defendants drew, intentionally and effectively, to maximize Republican advantage and dilute the voting power of North Carolina's Democratic voters.

The effect of the maps' systemic bias, the court determined, is to ensure Republican dominance in North Carolina's congressional delegation and entrench Republican control of both chambers of the General Assembly regardless of how the people vote. In particular, the House and Senate Plans are "especially effective in preserving Republican supermajorities" in the General Assembly even in elections where Democrats would break the supermajorities under nonpartisan maps, while the Congressional Plan "was designed specifically to ensure that Republicans can efficiently and consistently win at least ten [of the State's fourteen] congressional seats." (R pp 3565, 3668, Findings of Fact ("FOF") ¶¶ 142, 455). These maps are as gerrymandered as they come, carefully crafted to ignore the will of the people and guarantee Republican electoral victories across the State for the next decade.

Despite unanimously finding that the 2021 Plans are intentional extreme partisan gerrymanders, the trial court held that North Carolina courts are powerless to do anything about it. According to the trial court, partisan gerrymandering claims brought under North Carolina's Constitution are "nonjusticiable" because there are no judicially manageable standards to adjudicate such claims. But the standard for resolving partisan gerrymandering claims—a test with dual requirements of intent and effect—is one that courts apply every day. And this case, perhaps more than any other, demonstrates the ease with which courts can apply this standard to redistricting plans challenged as extreme partisan gerrymanders.

Indeed, the trial court found that the 2021 Plans are extreme partisan gerrymanders using the same statistical methodologies successfully employed by courts throughout the country—methodologies that the trial court itself acknowledged provide "mathematically

precise" measures of the degree of partisan bias, (R p 3575, FOF ¶ 176), and do not rest on "any ideas of proportional representation or notions of fairness." (R p 3564, FOF ¶ 138). Even Legislative Defendants' own expert found the maps to be gerrymandered. The notion that courts are incapable of identifying intentional and effective gerrymanders with manageable standards is belied by the fact that so many courts, including the trial court here, have done just that.

The decision below, if affirmed, would categorically preclude North Carolina courts from adjudicating any challenge to the partisan gerrymandering of congressional or state legislative districts—even where, as here, those districts undeniably thwart the democratic process to an extraordinary degree. Extreme partisan gerrymanders like the 2021 Congressional, House, and Senate Plans trample the fundamental constitutional right of millions of North Carolinians to vote in elections that fairly and truthfully reflect the popular will, to participate equally in the political process, and to join with others to advance their political beliefs. Courts have an obligation to act when faced with such egregious constitutional wrongs. This Court should do so here and end, once and for all, the scourge of extreme partisan gerrymandering that has made a mockery of representative democracy in North Carolina.

STATEMENT OF THE FACTS

The trial court correctly found, based on a mountain of evidence, that North Carolina's 2021 Congressional, House, and Senate Plans are all extreme partisan gerrymanders. The court found that the 2021 Plans were drawn, intentionally and effectively, to maximize Republican advantage, entrench Republican dominance in North

Carolina's congressional delegation, and guarantee Republican control of the General Assembly.

A. Republicans repeatedly gerrymandered the maps last decade.

In the 2010 elections, Republicans gained control of both the North Carolina House and Senate for the first time since 1870. (R p 3544, FOF ¶¶ 101–02). Since then, "[t]he General Assembly's intentional redistricting for partisan advantage has been subject to judicial review in multiple cases." (R p 3541, FOF ¶ 91). In 2016, federal courts invalidated North Carolina's 2011 congressional and state legislative maps as unlawful racially gerrymanders. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604–05 (M.D.N.C. 2016); *Covington v. North Carolina*, 316 F.R.D. 117, 176–78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

In 2019, North Carolina courts invalidated the remedial plans enacted by the General Assembly as unlawful partisan gerrymanders. In *Harper v. Lewis*, 19 CVS 12667 (N.C. Super. Ct. Oct. 28, 2019) ("*Harper I*"), a three-judge panel of the Superior Court granted a preliminary injunction barring further use of the 2016 remedial congressional map based on the plaintiffs' partisan gerrymandering claims under North Carolina's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. (R pp 3542–43, FOF ¶ 97). "Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten republicans and three democrats." (R p 3541, FOF ¶ 92); *see also* (R pp 3542–43, FOF ¶ 97). Likewise, in *Common Cause v. Lewis*, 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019), a three-judge panel invalidated the 2017

remedial state legislative plans as partisan gerrymanders under the same constitutional provisions. "While Republican legislators did not publicly state that they drew the maps for partisan advantage" as they did with the congressional plan, the court "determined that the 2017 legislative maps at issue were the result of extreme partisan gerrymandering." (R p 3541-42, FOF ¶¶ 94–95). It "further found that these claims were justiciable and the standards for evaluating the plaintiffs' claims were satisfactory and manageable." *Id.*

B. Any façade of transparency in the 2021 process crumbled at trial.

Because Republicans control both chambers of the General Assembly, they once again had unilateral control over the redistricting process following the 2020 decennial census. Although Legislative Defendants claimed that the 2021 process would be transparent and nonpartisan, the evidence showed it was neither.

On 12 August 2021, the Joint Redistricting Committees adopted official criteria (the "2021 Adopted Criteria") to guide the enactment of new plans. Unlike the 2016 adopted criteria, which provided that "[r]easonable efforts shall be made not to divide a county into more than two districts," (Ex. p 216), the 2021 Adopted Criteria included no similar limitation, eventually enabling Legislative Defendants to split the state's three most heavily Democratic counties into three separate congressional districts each. And while the 2021 Adopted Criteria provided that "[p]artisan considerations and election results data shall not be used in the drawing of districts in the 2021 Congressional, House, and Senate plans," (R pp 3530–31, FOF ¶ 54), the evidence regarding the map-drawing process and the enacted plans themselves establish that this direction was deliberately ignored.

Legislative Defendants purported to require legislators to draw and submit maps using software on computer terminals in the committee hearing rooms. (R p 3535, FOF ¶ 67). Defendant Representative Destin Hall—Chair of the House Redistricting Committee—publicly assured his colleagues that they could be confident in the process because that software did not include political data, and because the House and Senate Committees and the "House as a whole" would "only consider maps that are drawn in this committee room, on one of the four stations." (R p 3536, FOF ¶ 67).

That assurance was false. While the computer terminals in the committee hearing room did not themselves contain partisan election data, the House and Senate Committees did nothing to prevent legislators or staff from using such data to draw or analyze maps on other electronic devices outside (or even inside) the committee hearing room, which is precisely what occurred. (R p 3537, FOF ¶ 73).

Contrary to Representative Hall's assurances, the evidence at trial revealed that in between his sessions at the public terminal, he repeatedly met with a member of his staff and others for "strategy sessions" in which he reviewed "concept maps" that were created on an unknown computer, using unknown redistricting software and data. (Ex. pp 3376–77, 3380–81). Representative Hall testified that he would study these "concept maps" in the private room and rely on them to draw district lines for particular House county clusters on the public terminal, and that his staffer at times displayed the "concept maps" on his smartphone while accompanying Representative Hall during his map-drawing sessions at the public terminal. (Ex. pp 3363-66, 3457–58, 3465).

After Legislative Defendants initially falsely denied the existence of any non-public materials related to their map-drawing activities, they eventually were forced to admit their existence, and the trial court ordered Legislative Defendants to produce the "concept maps" and related materials on 28 December 2021. But Legislative Defendants never did so. Instead, they asserted in verified interrogatory responses that "the concept maps that were created were not saved, are currently lost and no longer exist." (Ex. p 4922).

Of the six defendant legislators from whom Plaintiffs sought information about their map-drawing processes, four invoked legislative privilege and refused to testify in this case, notwithstanding their lead roles in drawing the Senate and Congressional maps. Plaintiffs never got the opportunity to determine whether those key legislators, like Representative Hall, relied on maps drawn by political aides outside the committee room on computers that contained or may have contained political data.

The General Assembly enacted the 2021 Congressional, House, and Senate Plans on November 4, 2021. (R pp 3537–39, FOF ¶¶ 74–79). All three plans passed along strict party-line votes, with no Democrat in either chamber voting for any of them. (R pp 3539–40, FOF ¶¶ 80–84).

C. The trial court found that the 2021 Plans are extreme partisan gerrymanders.

In a 258-page decision issued 11 January 2022, the trial court found that the 2021 Plans are extreme partisan gerrymanders.

1. The 2021 Congressional Plan is an extreme partisan gerrymander.

Based on the analyses of *Harper* Plaintiffs' experts, which the trial court adopted, the court found that the 2021 Congressional Plan is an "intentional, and effective, pro-Republican partisan redistricting" that locks in ten Republican seats. (R pp 3564, 3658, FOF ¶¶ 140, 423). The court found that "the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." (R p 3658, FOF ¶ 423). Both the plan as a whole and each individual district "is the product of intentional pro-Republican partisan redistricting." (R p 3564, FOF ¶ 140) (statewide); *see* (R pp 3675–96, FOF ¶¶ 484–566) (district-by-district). "Even though [Plaintiffs'] experts employed different methodologies, each expert found that the enacted plan is an outlier that could only have resulted from an intentional effort to secure Republican advantage." (R p 3658, FOF ¶ 423).

The plan, the court found, "reduces the anticipated number of Democratic seats, disadvantaging Democratic voters, by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." (R p 3558, FOF ¶ 125). And "the 'cracking and packing' of Democratic voters in Guilford, Mecklenburg, and Wake counties has 'ripple effects throughout the map.'" (R p 3560, FOF ¶ 127) (quoting Ex. p 4219).

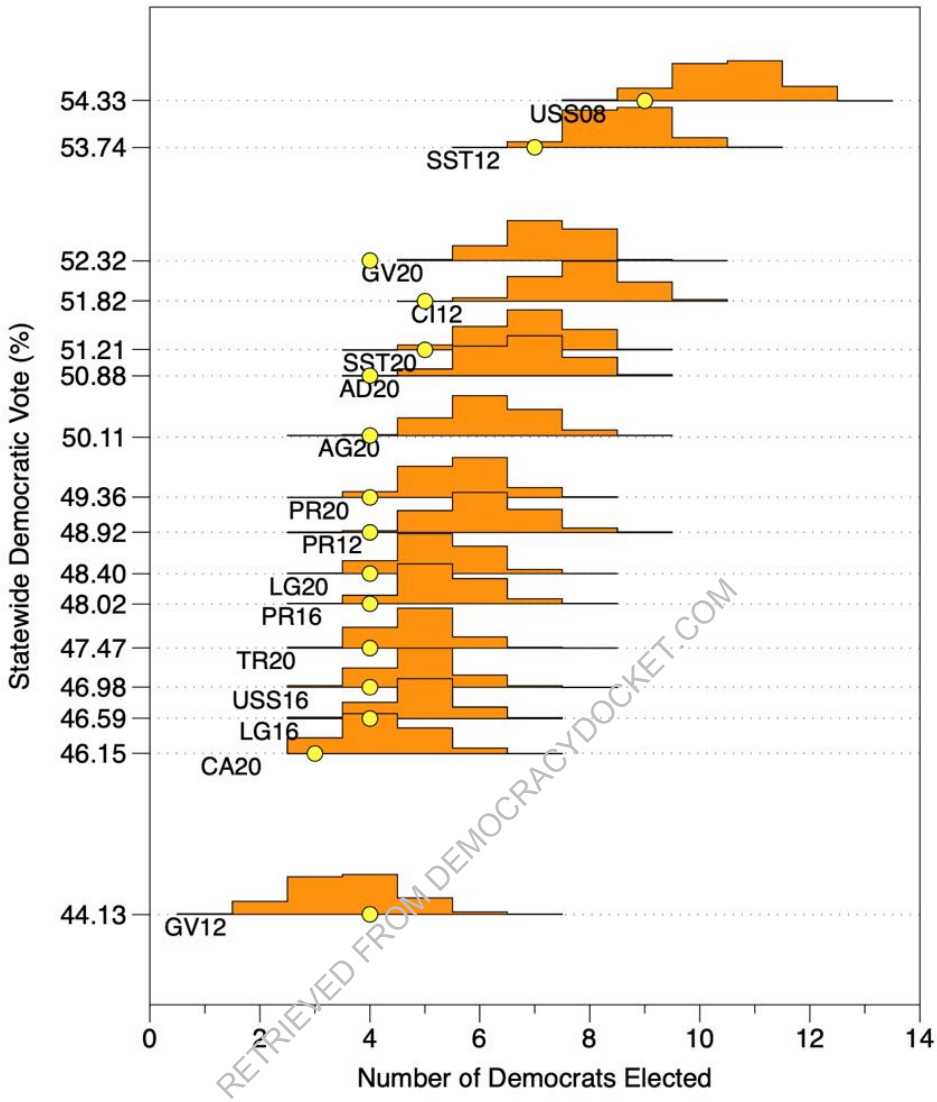
The trial court further found that the Plan's extreme pro-Republican bias cannot be explained by either North Carolina's political geography or the 2021 Adopted Criteria. (R

pp 3670, 3673–74, FOF ¶¶ 466, 478–82). Legislative Defendants offered no defense of the Congressional Plan. (R p 3658, FOF ¶ 424).

a. Dr. Jonathan Mattingly

The court adopted the analysis of Dr. Jonathan Mattingly, James B. Duke Professor of Mathematics at Duke University, and found that "the Congressional map is the product of intentional, pro-Republican partisan redistricting." (R p 3564, FOF ¶ 140); *see* (R pp 3563–64, FOF ¶¶ 135–59). The court found that "[t]he enacted map sticks at 4 Democrats and 10 Republicans despite large shifts in the statewide vote fraction across a wide variety of elections, in elections where no nonpartisan map would elect as few as 4 Democrats and many would elect 7 or 8." (R p 3564, FOF ¶ 140). "The Congressional map is an 'extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.'" *Id.* (quoting Ex. pp 4793–94).

For his analysis, Dr. Mattingly employed an algorithm developed in his academic research to generate a representative set, or "ensemble," of 80,000 congressional maps that comply with traditional redistricting criteria. (R pp 3563–64, FOF ¶¶ 138–39). Dr. Mattingly then used votes from multiple prior North Carolina statewide elections reflecting a range of electoral environments and outcomes to compare the partisan performance and characteristics of the enacted Congressional map to the simulated maps. (R p 3564, FOF ¶ 139). As Dr. Mattingly showed in the figure below, the enacted Congressional map (represented by a yellow dot) sticks at four Democratic seats even in elections where nearly all of the simulated maps (represented by the orange histograms) would elect more than four Democrats:



Mattingly Figure 9.0.1: Each histogram represents the range and distribution of possible Democratic seats won in the ensemble of plans; the height is the relative probability of observing the result. The yellow dots represent the results from the enacted congressional plan under the various historic votes.

For example, when Democrats win 52.32% of the statewide vote in the Governor 2020 election, the overwhelming majority of simulated maps elect seven or eight Democrats, while the enacted map sticks at four. (Ex. p 4793); *see* (R p 3564, FOF ¶ 140). That outcome is never seen across any of the 80,000 nonpartisan maps, as shown by the fact that the yellow dot is entirely to the left of the orange histogram. (Ex p 4793).

As Dr. Mattingly's analysis showed and the trial court found, the map-makers achieved these results by "cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts," which is "the key signature of intentional partisan redistricting." (R p 3567, FOF ¶ 151). Dr. Mattingly ordered the 14 districts in his ensemble of nonpartisan plans from lowest Democratic vote fraction to highest. "Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—i.e., the districts Democrats would win no matter what—in comparison to the enacted plan." *Id.* "And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan." *Id.* This cracking and packing, the trial court found, was "responsible for the enacted congressional plan's nonresponsiveness when more voters favor Democratic candidates." *Id.* The court found that these results "could not be explained by political geography or natural packing," and "did not rest on any assumption about proportional representation." (R p 3569, FOF ¶ 159).

b. Dr. Jowei Chen

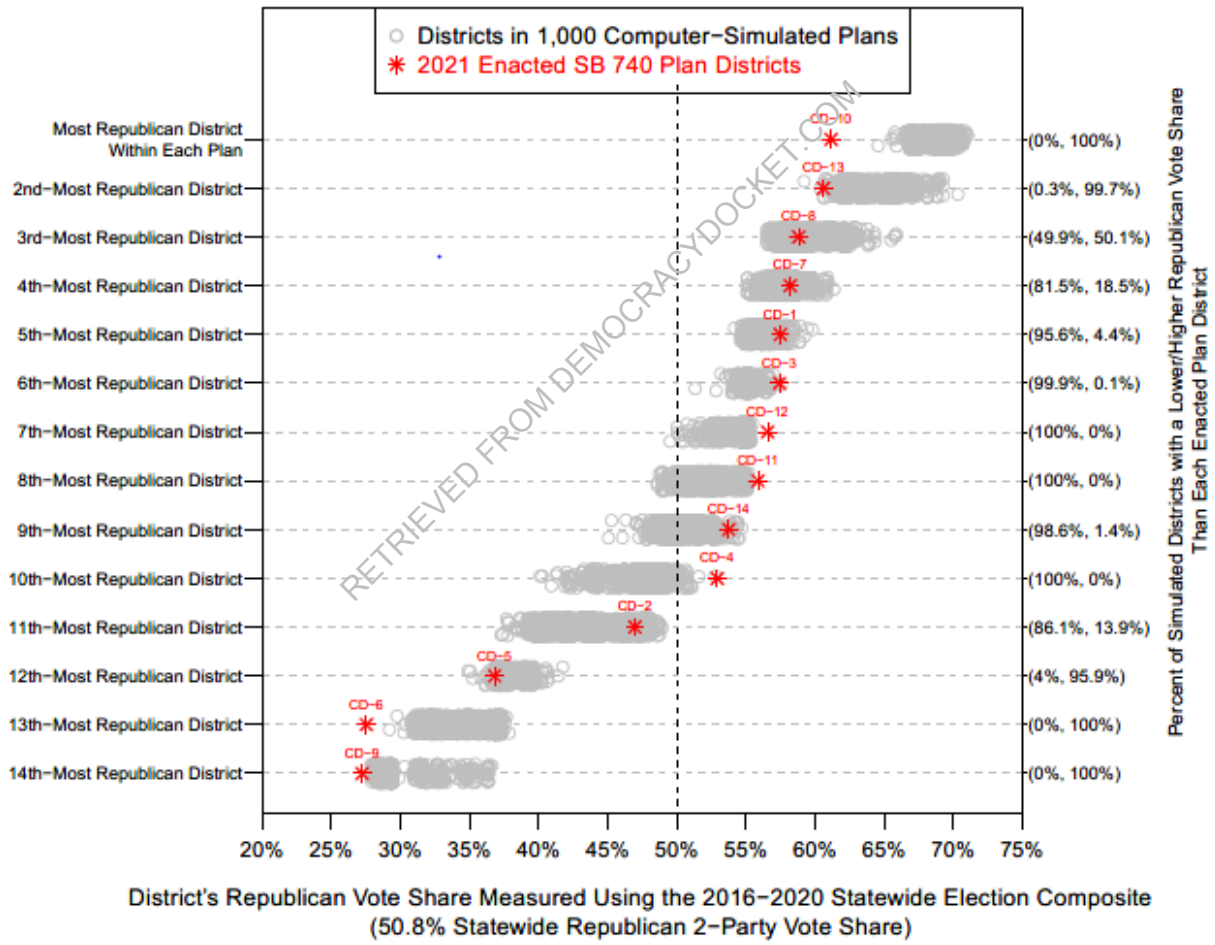
The trial court also adopted the analysis of Dr. Jowei Chen, Associate Professor of political science at the University of Michigan, who used a computer algorithm to generate 1,000 simulated congressional plans that adhere to the legislature's adopted criteria and ignore partisan considerations. (R pp 3556–58, 3658–59, FOF ¶¶ 115–20, 425–27). Based on Dr. Chen's comparisons of the enacted plan to his simulations, the court concluded that "the enacted congressional plan was designed specifically to ensure that Democrats cannot

win more than four congressional seats under any reasonably foreseeable electoral environment." (R pp 3669, FOF ¶ 459); *see* (R pp 3658–74, FOF ¶¶ 425–82).

Dr. Chen compared the partisan attributes of each congressional district in the enacted plan with the districts in each of his simulated plans using election results from ten recent statewide elections, as shown below.

Figure 4:

Comparisons of Enacted SB 740 Plan Districts to 1,000 Computer-Simulated Plans' Districts



(Ex. p 4415); *see* (R pp 3661, FOF ¶ 435–36, 3669, FOF ¶ 458–59). As this figure shows, the enacted plan "packs together Democratic voters" in the three most Democratic districts, more so "than virtually all of their counterpart districts in the 1,000 computer-simulated

plans." (R p 3665, FOF ¶ 447); *see* (R pp 3664–65, FOF ¶¶ 442–43). Likewise, the two most safely Republican districts in the enacted plan include more Democratic voters than nearly all of the simulated plans. (R p 3665, FOF ¶¶ 445–47). The extremely high number of Democratic voters in these safely Democratic and Republican districts "dr[e]w Democratic voters out of the more moderate districts," "enhancing Republican candidate performance" in the more moderate districts. (R p 3665, FOF ¶ 447). Through this systematic packing and cracking of Democratic voters, the enacted plan creates "ten Mid-Range Republican Districts"—i.e., districts that "favor Republican candidates within [a] narrow range"—making the plan "an extreme partisan outlier in terms of maximizing the number of Mid-Range Republican Districts" and minimizing competitive districts, "far beyond any of the 1,000 simulated plans created using a partisan-blind computer algorithm that follows the Adopted Criteria." (R p 3667, FOF ¶ 453). This, in turn, showed that "the enacted congressional plan was designed specifically to ensure that Republicans can efficiently and consistently win at least ten congressional seats and that Democrats are packed into the remaining districts." (R p 3668, FOF ¶ 455). Dr. Chen confirmed these findings using "a variety of [other] methods redistricting scholars commonly use to compare the relative partisan bias of districting plans," all of which the court found to be persuasive evidence of partisan intent and effect. (R pp 3669–71, FOF ¶¶ 460–69).

Dr. Chen's analysis also established that the enacted plan is an extreme outlier within particular regions of the state. (R pp 3671–73, FOF ¶¶ 470–80). For example, Dr. Chen examined the Piedmont Triad area, where the enacted plan split Guilford County into three different districts. (R pp 3671–72, FOF ¶ 471). In the enacted plan, even though

each of the three fragments of Guilford County "voted solidly Democratic in recent statewide elections," their three congressional districts are "safely Republican" because the plan pairs each fragment "with more Republican areas in surrounding counties." (R p 3672, FOF ¶ 471). This level of Democratic cracking did not occur in "virtually all of the computer-simulated plans." *Id*. Dr. Chen made similar findings for the Research Triangle and Mecklenburg County, all of which the court adopted, and all of which confirmed that the "enacted congressional map was … designed in order to accomplish the legislature's predominant partisan goals." (R pp 3672–73, FOF ¶¶ 474–80).

Dr. Chen also compared the enacted plan to his simulated plans to analyze their relative adherence to the 2021 Adopted Criteria. (R pp 3658–61, FOF ¶¶ 425–34). He found, and the trial court agreed, that the "enacted congressional plan fails to follow, and subordinates" several of the Adopted Criteria's requirements. (R p 3659, FOF ¶¶ 429, 431, 434). For example, the enacted plan splits one more county than necessary, showing that the mapmakers did "not comply with the Adopted Criteria's rule against unnecessary division of counties." (R p 3659, FOF ¶ 428). And the plan "unnecessarily splits three heavily Democratic counties—Mecklenburg, Wake, and Guilford Counties—into three districts each." (R p 3660, FOF ¶ 429).

These results cannot be explained "by North Carolina's political geography or the political composition of the state's voters." (R p 3674, FOF ¶ 482). Dr. Chen's algorithm "drew simulated plans using North Carolina's unique political geography," enabling him "to identify how much of the electoral bias in the enacted congressional plan is caused by North Carolina's political geography and how much is caused by the map-drawer's

intentional efforts to favor one political party over the other." (R p 3674, FOF ¶ 481). The answer is clear: "th[e] additional level of partisan bias in the enacted congressional plan can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party." (R p 3674, FOF ¶ 482).

c. Dr. Wesley Pegden

The trial court also adopted the analysis of Dr. Wesley Pegden, Associate Professor of mathematics at Carnegie Mellon University, in finding the 2021 Congressional Plan to be an extreme partisan outlier—one "more carefully crafted to favor Republicans than at least 99.9999%" of all possible districtings of North Carolina following the legislature's criteria. (R p 3575, FOF ¶ 175); *see* (R pp 3570–77, FOF ¶¶ 160–83).

Rather than generating comparison congressional maps from scratch, Dr. Pegden's algorithm began with the enacted map and made a series of tiny, random changes to the district boundaries. The algorithm repeated this process trillions of times, generating a huge number of comparison maps in sequence. The algorithm ensured that each of these tiny changes complied with the nonpartisan redistricting criteria like those the legislature imposed: contiguity, compact districts, county preservation, municipal preservation, VTD preservation, incumbency protection, and population deviation. (R pp 3571–72, FOF ¶ 166); *see* (R pp 3572–73, FOF ¶¶ 168–69). After each of these tiny changes, Dr. Pegden's algorithm compared the new map to the enacted map in terms of how many seats Democrats would be expected to win, on average. (R p 3573, FOF ¶¶ 170–71). Dr. Pegden used recent statewide election results, applying a "random uniform swing" to the historical

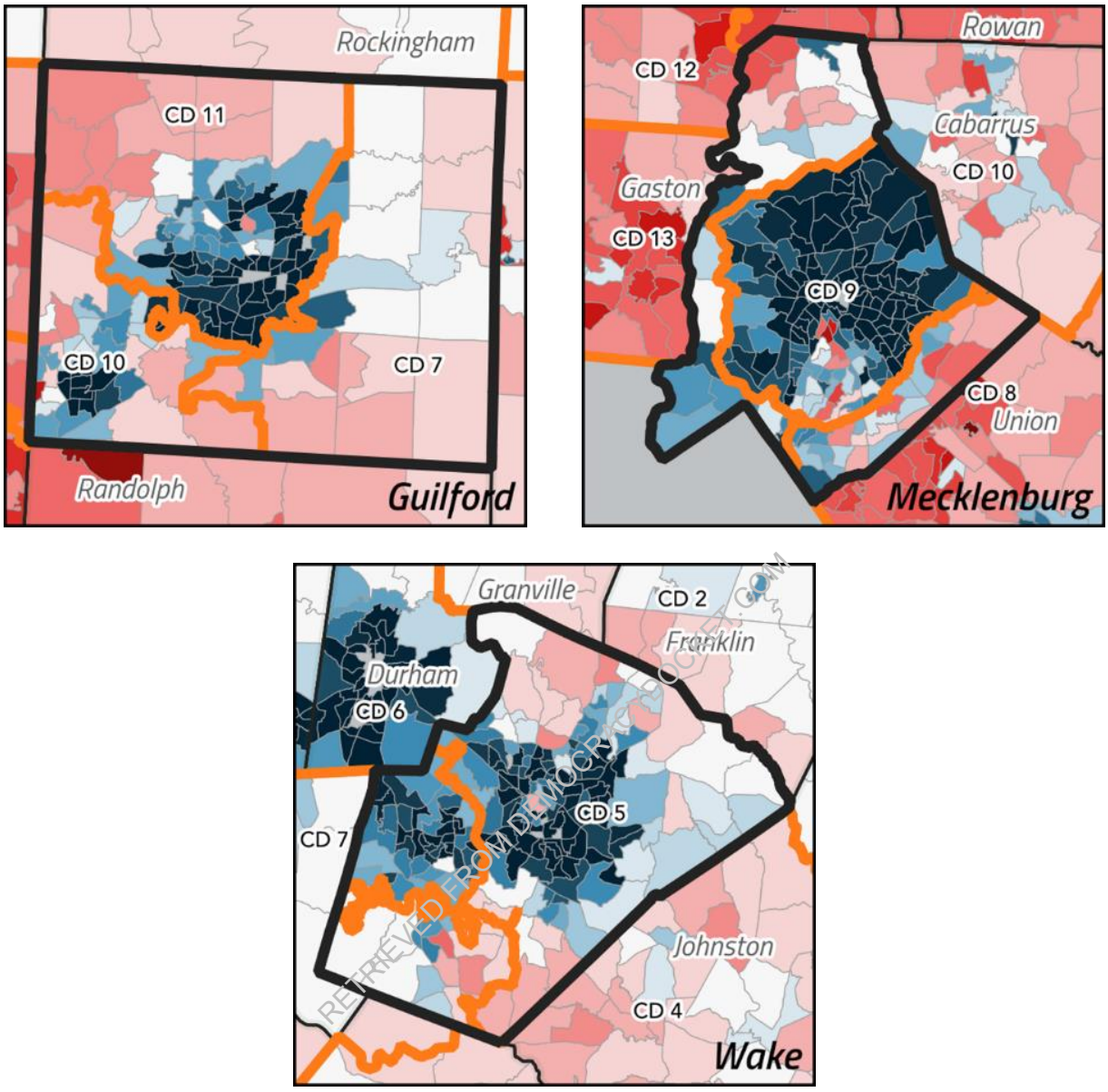
election results to capture how a given comparison map would perform over a range of electoral environments. (R p 3573, FOF ¶ 1771).

Using this method, Dr. Pegden concluded, and the trial court agreed, that the enacted congressional map is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated by making small random changes to the enacted boundaries. (R pp 3574–75, FOF ¶ 175). This "first-level analysis" alone showed "that the 2021 congressional plan was 'drawn to optimize partisan advantage in the enacted plan.'" (R p 3575, FOF ¶ 176) (quoting Ex. p 4530). But Dr. Pegden also conducted a "second-level analysis," which applied peer-reviewed theorems developed in his academic work to calculate, with "mathematical[] precis[ion]," how the enacted plan compares to *all possible* congressional maps of North Carolina that comply with his nonpartisan criteria. *Id.* Dr. Pegden's second-level analysis showed the enacted map to be "more carefully crafted to favor Republicans"—in terms of "how precisely the district boundaries align with partisan voting patterns so as to advantage Republicans"—than 99.9999% of all possible districtings of North Carolina complying with the nonpartisan criteria. (R pp 3574–75, FOF ¶¶ 175–76). And as the court explained, Dr. Pegden's results could not "be explained by North Carolina's political geography"; his algorithm "compares the enacted map to other maps of North Carolina, with the very same political geography." (R p 3577, FOF ¶ 183).

d. Dr. Christopher Cooper

Finally, the trial court adopted the analysis of Dr. Christopher A. Cooper, Madison Distinguished Professor of Political Science and Public Affairs at Western Carolina University, who specializes in the political geography and history of North Carolina. (R pp

3558–62, 3675–98, FOF ¶¶ 121–34, 484–566). Dr. Cooper analyzed the partisan effects of the congressional district boundaries. (R p 3558, FOF ¶ 123). Dr. Cooper explained that while North Carolina following the 2020 Census "gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle … and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." (R p 3558, FOF ¶ 124). The enacted map does so "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each," despite there being "no population-based reason to divide each of these three Democratic-leaning counties across three districts." (R pp 3558–59, FOF ¶ 125). Dr. Cooper illustrated this analysis using maps that were shaded in red and blue to display the partisanship of each VTD using the results of two 2020 statewide elections, with district boundaries in orange. (R pp 3558–59, FOF ¶ 126).



The court found that this tripartite split, which itself "disadvantag[es] Democratic voters," (R p 3558, FOF ¶ 125), also "has 'ripple effects throughout the map,'" (R p 3560, FOF ¶ 127) (quoting Ex. p 4219). The Congressional Plan "is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for districts elsewhere in the state." *Id.*

The trial court also adopted Dr. Cooper's analysis of how each individual district in the congressional plan is gerrymandered to advantage Republicans:

- CD1 combines the Democratic-leaning areas of Pitt County with counties in North Carolina's northeastern corner, thereby diluting those Democratic votes in an otherwise Republican-leaning district. (R pp 3675–76).

- CD2 stretches from Washington County, on Albemarle Sound, to Caswell County, northeast of Greensboro, pairing together counties that have never been included in the same congressional district in North Carolina's history. Although many of the areas in CD2 were formerly included in the same congressional district as Greenville, the Legislative Defendants placed these Democratic-leaning areas of Pitt County in CD1, to the east, to make CD2 more favorable to Republicans. (R pp 3676–77, 3678, FOF ¶¶ 486–88).

- CD3 includes portions of the 3rd, 7th, and 9th 2019 congressional districts in the southeastern corner of the state, stretching from the Sandhills region to Wilmington, in order to intentionally favor Republicans. (R pp 3679–80, FOF ¶¶ 489, 491–92, 495).

- CD4 combines the Democratic-leaning areas in Fayetteville with Republican-leaning areas to the north to create a district that favors Republicans and has no incumbent. (R pp 3680–81, FOF ¶¶ 498, 500).

- CD5 "packs the Democratic voters" in Wake County to create an overwhelmingly Democratic district that increases the probability that Republicans will win the adjacent districts to the north, east, and south. (R p 3682, FOF ¶¶ 503–05).

- CD6, one of the three congressional districts that includes part of Wake County, is "a really good example of packing Democratic voters across multiple counties." (R pp 3683–84, FOF ¶ 514). The Democratic voters in western Wake County are packed with Democratic voters in Durham and Orange counties to "increase[e] the probability that Republicans can win in the adjacent districts." (R pp 3683, 3684, FOF ¶¶ 514, 516).

- CD7 is "drawn to include several heavily Republican counties while carefully avoiding concentrations of Democratic voters" so that the district "will reliably elect Republicans to office." (R pp 3685, 3686, FOF ¶¶ 521, 523). It includes portions of Guilford and Wake counties but not the "most Democratic-leaning VTDs in those counties." (R p 3684, FOF ¶ 519).

- CD8 stretches from the Sandhills to include a portion of eastern Mecklenburg County, splitting it "in such a way that the most Democratic-leaning VTDs within that county fall outside of CD8." (R pp 3686, 3687, FOF ¶¶ 526, 528).

- CD9 "packs the most-Democratic VTDs in Mecklenburg County within one district," while Mecklenburg's Republican-leaning and competitive VTDs sit in districts to the east and west, allowing those districts to be more favorable to Republicans. (R pp 3687–88, ¶¶ FOF 531, 533).

- CD10 contains the "heavily Democratic VTDs in High Point, within Guilford County" and separates them from the Democratic voters in the portions of Guilford, Forsyth, and Mecklenburg counties that sit in adjacent districts. (R pp 3689, 3690, FOF ¶¶ 536, 542).

- CD11 combines the "high country" areas in Watauga and Ashe counties with "Democratic-leaning VTDs in Greensboro," "thereby ensuring that Greensboro voters will not be represented by a Democrat." (R p 3692, FOF ¶¶ 546–47, 551). The "tiny sliver of Watauga County" in CD11 includes the residence of a Republican incumbent (Rep. Virginia Foxx), "double bunking" her with a Democratic incumbent (Rep. Kathy Manning) in a new district that "leans heavily towards the Republican Party." (R p 3692, FOF ¶ 549).

- CD12 separates the Democratic voters in Winston-Salem from the Democratic voters in High Point, combining Winston-Salem with Republican-leaning VTDs to the south in order to advantage Republicans. (R pp 3693, 3694, FOF ¶¶ 554, 556).

- CD13 splits Mecklenburg County in the east and includes the "Republican strongholds" of McDowell and Polk counties to the west. (R pp 3694, 3696, FOF ¶¶ 557, 564). Mecklenburg and Polk counties have never been included in the same congressional district, but are now combined to produce a district likely to elect a Republican. (R pp 3694–95, FOF ¶¶ 559–61).

- CD14 stretches from North Carolina's southwest end all the way north to Watauga County, joining areas that had not shared a congressional district since 1871. (R p 3696, FOF ¶¶ 564, 566).

2. The 2021 House and Senate Plans are extreme partisan gerrymanders.

The trial court also adopted the analyses of *Harper* Plaintiffs' experts establishing that the 2021 House and Senate Plans are extreme partisan outliers, intentionally and carefully designed to maximize Republican advantage on a statewide basis and in specific

county groupings and to ensure Republican supermajorities or majorities. The court found that the analysis of Legislative Defendants' own expert largely reenforced these conclusions. (R pp 3592, 3617).

a. The plans entrench Republican dominance on a statewide basis.

For both the House and Senate plans, Dr. Mattingly again generated a representative "ensemble" of nonpartisan plans using a computer algorithm. (R p 3564–65, FOF ¶ 141). The trial court found, "based upon Dr. Mattingly's analysis, that the House and Senate plans are extreme outliers that systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps." (R p 3565, FOF ¶ 142). It further found that "the intentional partisan redistricting in both chambers is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it." *Id.* The court also found that the House Plan is "especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority." *Id.*; *see also* (R p 3566, FOF ¶¶ 145–46). The probability that such partisan bias arose without intentional effort by the General Assembly was "astronomically small." *Id.*

Dr. Pegden also analyzed the 2021 House and Senate Plans using the same methodology as his congressional analysis. (R p 3575, FOF ¶ 177). The trial court found, "as did Dr. Pegden, that the House and Senate maps are partisan outliers in their partisan bias and the degree to which they are optimized for partisan advantage." *Id.* The trial court

found, "as Dr. Pegden shows in his first-level analysis, that—in every run—the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." (R p 3577, FOF ¶ 181). It also found "that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." *Id.*

The trial court also adopted Dr. Cooper's conclusion that the effect of the 2021 House and Senate Plans was to benefit the Republican Party. (R p 3562, FOF ¶ 131). Legislative Defendants retained discretion over which counties to group together in certain groupings, as well as over where to draw the district boundaries within each grouping that Dr. Cooper analyzed. The trial court found that "Legislative Defendants' exercise of this discretion in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates' partisan advantage, and [that] this finding is consistent with a finding of partisan intent." (R p 3562, FOF ¶ 132).

b. The plans maximize Republican advantage in specific county groupings.

The court further found, as set forth below, that numerous Senate and House county groupings are "the product of intentional pro-Republican partisan redistricting." (R pp 3597, 3601, 3602–03, 3608, 3612, 3615, 3617, FOF ¶¶ 246, 256, 259, 280, 292, 300, 308) (Senate clusters); (R pp 3622, 3626, 3629, 3633, 3637, 3641, 3646, 3650, FOF ¶¶ 321, 333, 344, 354, 364, 375, 386, 399) (House clusters).

With respect to the particular Senate clusters, the trial court found as follows:

- **Granville-Wake:** Legislative Defendants "pack[ed]" Democratic voters into Senate Districts 14, 15, 16, and 18, to make Districts 13 and 17 "as competitive as possible for Republican candidates." (R pp 3594, 3597, FOF ¶¶ 236, 246); *see also* (R pp 3596–97, FOF ¶ 241) (agreeing with Dr. Mattingly that Republicans will win Districts 13 and 17 under the enacted map even "where they never would under the nonpartisan ensemble" of simulated maps); (R p 3597, FOF ¶ 243) (agreeing with Dr. Pegden that this cluster is more carefully crafted to advantage Republicans than 99.999969% of all possible districtings that satisfy his nonpartisan criteria); *see also* (R p 3597, FOF ¶ 245) ("partisan outlier" according to Legislative Defendants' expert Dr. Barber).

- **Cumberland-Moore:** The two districts in this cluster, Senate Districts 19 and 21, both include portions of Fayetteville and Hope Mills, "but the most Democratic-leaning VTDs in those cities are packed into Senate District 19." (R pp 3599, 3601, FOF ¶¶ 250, 256). Dr. Mattingly's analysis showed that Legislative Defendants "cracked out" Democratic voters from District 21 and "packed" them into District 19 "to make the map maximally nonresponsive" to changes in the election environment. (R p 3600, FOF ¶ 253); *see also* (R pp 3600–01, FOF ¶ 254) (Dr. Pegden: cluster more carefully crafted to advantage Republicans than 99.999984% of all possible districtings); (R p 3601, FOF ¶ 255) (Dr. Barber: cluster advantages Republicans and is not responsive to changes in the Democratic vote share).

- **Guilford-Rockingham:** Legislative Defendants drew this cluster to "pack Democratic voters into Senate Districts 27 and 28," while allowing District 26 to "wrap around those other districts in a 'C-shape' that connects the northern and southern

boundaries" to create a "safe Republican" district. (R pp 3602–03, 3605, FOF ¶¶ 259, 267); *see also* (R pp 3603–04, FOF ¶ 262) (Dr. Mattingly: districts "constructed to pack an exceptional number of Democrats" in District 28 and "crack Democrats out of" District 26, which contains fewer Democratic voters than any of simulated plans); (R pp 3603–04, FOF ¶ 264) (Dr. Pegden: cluster more carefully crafted to advantage Republicans than 99.99987% of all possible districtings).

- **Forsyth-Stokes:** Legislative Defendants chose to pair Forsyth County with Stokes County, even though it could have been paired with another county in an alternate grouping, because Stokes County "provided them with a better counter-weight to the heavily-Democratic VTDs in Winston-Salem." (R p. 3606, FOF ¶ 270). Within this chosen grouping, Legislative Defendants then "packed" Democratic voters in Senate District 32 and left District 31 "to wrap around three sides of" Winston-Salem in order to "remain safely Republican." (R pp. 3606, 3608, FOF ¶¶ 271, 280); *see also* (R p 3607, FOF ¶ 275) (Dr. Mattingly: level of packing "almost never seen" in nonpartisan ensemble); (R p 3608, FOF ¶ 277) (Dr. Pegden: cluster is more carefully crafted for Republicans than 99.9947% of all districtings); (*id.*, FOF ¶ 279) (Dr. Barber: cluster advantages Republicans and is not responsive to changes in the Democratic vote share).

- **Iredell-Mecklenburg:** Legislative Defendants packed Democrats into Senate Districts 38, 39, 40, and 42, thereby making Districts 37 and 41 "artificially favorable to Republican candidates." (R pp 3610, 3612, FOF ¶¶ 284, 292); *see also* (R p 3611, FOF ¶ 288) (Dr. Mattingly: districts have lower fraction of Democrats in two most Republican districts than all 80,000 nonpartisan plans, and Republicans will win two of the

six districts in this grouping "in many elections where the majority or vast majority of plans" in nonpartisan ensemble would lead to only one Republican victory); (R p 3612, FOF ¶ 290) (Dr Pegden: cluster more carefully crafted for Republicans than 99.9943% of all districtings); (R p 3612, FOF ¶ 291) (Dr. Barber: cluster is pro-Republican "partisan outlier").

- **Northeastern Senate County Groupings:** Legislative Defendants chose county groupings for Senate Districts 1 and 2 that always resulted in two Republican-leaning districts, whereas the potential alternative grouping would have created one district in the north favoring the Democrats that included "many of the more racially diverse counties in the state," and one district to the south favoring Republicans. (R pp 3614–15, FOF ¶¶ 296–97). Dr. Mattingly found that under the alternative possible grouping, Democrats would have won one of the two districts under every statewide election in 2016 and 2020. (R p 3615, FOF ¶ 298).

- **Buncombe-Burke-McDowell:** Legislative Defendants chose not to pair Buncombe County with Henderson County and instead grouped Buncombe with Burke and McDowell Counties "to neutralize the Democratic stronghold in and around Asheville to a greater extent than under the alternate potential grouping." (R pp 3616, 3617, FOF ¶¶ 303, 305). Within this chosen grouping, Legislative Defendants then drew "one lopsidedly Democratic district" in Senate District 49, thereby making District 46 "reliably Republican." (R p 3617, FOF ¶¶ 304, 308).

With respect to particular House clusters, the trial court found as follows:

- **Guilford:** Legislative Defendants "packed" Democrats into House Districts 57, 58, 60, and 61 so that Districts 59 and 62 would be "artificially favorable to Republican candidates." (R pp 3619, 3622, FOF ¶¶ 312, 321); (R pp 3620–21, FOF ¶ 316) (Dr. Mattingly: Democrats "cracked out" of Districts 59 and 62 and more packed into remaining districts than in all 80,000 nonpartisan plans); (R p 3621, FOF ¶ 318) (Dr. Pegden: more carefully crafted for Republicans than 99.99991% of all districtings); (*id.*, FOF ¶ 320) (Dr. Barber: pro-Republican "partisan outlier").

- **Buncombe:** Legislative Defendants created a Republican-leaning House District 116 in heavily Democratic Buncombe County by "pack[ing] as many Democratic voters as possible into House District 114," around Asheville. (R pp 3623, 3626, FOF ¶¶ 325, 333); *see also* (R p 3624, FOF ¶ 328) (Dr. Mattingly: "huge jump in the Democratic vote share" between District 116 and District 115, meaning "elections nonresponsive to the votes cast and . . . cost Democrats a seat in multiple environments."); (R p 3625, FOF ¶ 330) (Dr. Pegden: more carefully crafted for Republicans than 99.938% of all districtings); (*id.*, FOF ¶ 332) (Dr. Barber: cluster advantages Republicans and not responsive to changes in Democratic vote share).

- **Mecklenburg:** Legislative Defendants avoided placing any Republican-leaning VTDs in eight of the 13 districts within this House county grouping, packing those districts with Democrats and allowing House Districts 98 and 103 to be "carved out of the pockets of Republican-leaning VTDs in the north and southeast portions of Mecklenburg County so as to be particularly favorable to Republican candidates." (R pp 3627, 3629, ¶¶ FOF 337, 344); *see also* (R p 3628, FOF ¶ 340) (Dr. Mattingly: cracking and packing

makes Districts 98 and 103 "competitive, or [turns] them into Republican seats, when in the majority of the nonpartisan plans those two seats safely elect Democrats"); (R p 3629, FOF ¶ 342) (Dr. Pegden: more carefully crafted for Republicans than 95.0% of all districtings); (R p 3629, FOF ¶ 343) (Dr. Barber: cluster advantages Republicans and not responsive to changes in Democratic vote share).

- **Pitt:** Legislative Defendants split Greenville "at a particularly consequential location," to "pack[] the most heavily Democratic VTDs together in House District 8, allowing for House District 9 to lean towards the Republican candidate." (R pp 3630, 3633, FOF ¶¶ 347, 354) (R p 3630, 3633, FOF ¶¶ 347, 354); *see also* (R p 3632, FOF ¶ 351) (Dr. Mattingly: only 1.1% to 5.3% of non-partisan comparison maps place more Democratic voters in District 8 than the enacted plan); (R pp 3632–33, FOF ¶ 352) (Dr. Pegden: more favorable for Republicans than 96.3% of his simulated maps, and more carefully crafted for Republicans than 89.1% of all districtings).

- **Durham-Person:** Legislative Defendants "create[d] an artificially competitive district," House District 2, in heavily Democratic Durham County "by joining the more competitive VTDs in eastern and northern Durham County with Person County, to the north," and "pack[ing] the most Democratic portions of the City of Durham" into the remaining three districts in this cluster. (R pp 3634, 3637, FOF ¶¶ 357, 364); *see also* (R pp 3636–37, FOF ¶ 361) (Dr. Mattingly: cracking means "that in Republican wave elections, the Republicans gain that seat even though they rarely would" in nonpartisan ensemble, and no nonpartisan maps "showed a smaller fraction of Democrats" in District 2 than in the enacted plan); (R. p 3637, FOF ¶ 362) (Dr. Pegden: more carefully crafted for

Republicans than 99.79% of all districtings); (*id.*, FOF ¶ 363) (Dr. Barber: cluster advantages Republicans and not responsive to changes in Democratic vote share).

- **Forsyth-Stokes:** By "packing the Democratic voters in and around Winston-Salem" in House Districts 71 and 72, Legislative Defendants drew the other three districts in this grouping, Districts 74, 75, and 91, as "Republican-leaning districts." (R pp 3638, 3641, FOF ¶¶ 367, 375); *see also* (R pp 3640–41, FOF ¶¶ 371-72) (Dr. Mattingly: packing and "extreme cracking" of Democrats, more so than 99.98% of nonpartisan plans, means "Republicans regularly win three out of five seats in this cluster even in situations where the Democrats would win three in the vast majority of plans in the nonpartisan ensemble"); (R p 3641, FOF ¶ 373) (Dr. Pegden: more carefully crafted for Republicans than 99.73% of all districtings); (*id.*, FOF ¶ 374) (Dr. Barber: grouping is "partisan outlier" in 3 of the 11 elections considered and produces fewer Democratic seats than a majority of simulations in 8 of those elections).

- **Wake:** Legislative Defendants drew district lines that favor Republicans in House Districts 35 and 37 by "[p]acking the majority of Democratic voters" into the remaining 11 districts in this grouping. (R pp 3643, 3646, FOF ¶¶ 378, 386); *see also* (R p 3645, FOF ¶ 383) (Dr. Mattingly: enacted plan "is in the most extreme 0.42% of plans in terms of cracking of Democrats" when compared with nonpartisan ensemble); (R p 3646, FOF ¶ 384) (Dr. Pegden: more favorable to Republicans than 99.27% of simulated plans, and more carefully crafted for Republicans than 97.8% of all districtings); (*id.*, FOF ¶ 385) (Dr. Barber: grouping was "partisan outlier" in 4 of 11 elections considered, producing fewer Democratic seats than 90–98% of simulated maps).

- **Cumberland:** Legislative Defendants created "two competitive districts" in House Districts 43 and 45 "by packing the most heavily Democratic VTDs in Fayetteville into Districts 42 and 44." (R pp 3648, 3650, FOF ¶¶ 392, 399); *see also* (R p 3649, FOF ¶ 396) (Dr. Mattingly: only around 1% of nonpartisan maps include smaller fraction of Democratic votes than District 43 under most of the elections considered); (R p 3650, FOF ¶ 397) (Dr. Pegden: cluster more favorable to Republicans than 83.5% of simulated plans, and "wave threshold" analysis, showing the smallest swing in results necessary to give Democrats an additional seat, found cluster to be "partisan outlier"); (*id.*, FOF ¶ 398) (Dr. Barber: cluster advantages Republicans and not responsive to changes in Democratic vote share).

- **Brunswick-New Hanover:** Legislative Defendants "pack[ed] Democratic voters in and around Wilmington" in House District 18, allowing the remaining three districts, particularly District 20, "to lean more heavily towards the Republican candidate." (R pp 3652, 3654, FOF ¶¶ 404, 410); *see also* (R pp 3653–54, FOF ¶ 407) (Dr. Mattingly: Second- and -third-most Republican districts contain fewer Democratic votes than 99.5% of nonpartisan plans); (R p 3654, FOF ¶ 408) (Dr. Pegden: cluster more favorable to Republicans than 89.4% of simulated plans, and cluster is "partisan outlier" with a "wave threshold more favorable to Republicans" than 99.72% of simulated plans).

- **Cabarrus-Davie-Rowan-Yadkin:** Although the trial court's decision appears to have inadvertently omitted analysis of this cluster, *Harper* Plaintiffs' experts established that Legislative Defendants drew these districts to advantage Republicans. Dr. Cooper explained how Legislative Defendants drew the most competitive district in

this cluster, House District 82, to include the Democratic-leaning municipalities of Concord and Kannapolis but to "conspicuously exclude[] Democratic VTDs near the northeastern border of Mecklenburg County." (Ex. pp 4297–98). Dr. Mattingly's analysis found that Democrats were packed into three safe Republican districts and were "cracked out" of District 82. (Ex. p 4769). Dr. Barber's analysis similarly found that Democrats would win one seat under 90% or more of his simulated nonpartisan plans, whereas Democrats win zero seats under the enacted plan. (Ex. p 9384).

D. The trial court held that Plaintiffs' claims are nonjusticiable.

Despite its extensive factual findings of extreme partisan gerrymandering, the trial court held that Plaintiffs' constitutional claims are "nonjusticiable" due to a lack of "satisfactory and manageable criteria or standards." (R p 3756, FOF ¶ 144). The court thus denied relief, entered judgment for Legislative Defendants, and ordered the reopening of candidate filing at 8:00 A.M. on 24 February 2022. (R p 3769).

STANDARD OF REVIEW

"This Court reviews de novo legal conclusions of a trial court." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019). The trial court's factual findings are reviewed for clear error. *State v. Reed*, 373 N.C. 498, 507 (2020).

ARGUMENT

I. Partisan gerrymandering claims under the North Carolina Constitution are justiciable.

The trial court found that the 2021 Plans are extreme partisan gerrymanders that intentionally and effectively maximize Republican advantage and entrench Republican

control. But it held that the North Carolina judiciary is powerless to do anything about it because there are no judicially manageable standards for resolving partisan gerrymandering claims. (R pp 83–93, FOF ¶¶ 135-156). That is incorrect.

"It is the duty of this Court to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith." *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996). Judicial review is thus the default. Only in rare situations—involving "political questions"—may courts categorically refuse to adjudicate constitutional claims.

"The political question doctrine controls, essentially, when a question becomes not justiciable because of the separation of powers provided by the Constitution." *Cooper v. Berger*, 370 N.C. 392, 407, 809 S.E.2d 98, 107 (2018) (quotation marks omitted) (cleaned up). "The doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* at 407–08, 809 S.E.2d at 107 (quotation marks omitted) (cleaned up). The "dominant considerations" in determining whether the political question doctrine applies are "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination." *Id.* at 408, 809 S.E.2d at 107 (quotation marks omitted). "In other words, the Court necessarily has to undertake a separation of powers analysis in order to determine whether the political question doctrine precludes judicial resolution of a particular dispute." *Id.*

Under these standards, constitutional challenges to partisan gerrymandering are "not within the narrow category of exceptional cases covered by the political question doctrine." *Common Cause*, 2019 WL 4569584, at *126. *First*, while the General Assembly is authorized to enact the redistricting plans, this Court has long held that the North Carolina Constitution constrains "the General Assembly's execution of the legislative reapportionment process," and that "it is well within the power of the judiciary of [this] State to require valid reapportionment or to formulate a valid redistricting plan." *Stephenson v. Bartlett*, 355 N.C. 354, 362, 370, 562 S.E.2d 377, 384, 389 (2002). "To hold otherwise would abrogate the constitutional limitations . . . that the people of North Carolina have imposed on . . . redistricting and reapportionment in the State Constitution." *Id.*, 355 N.C. at 371–72, 562 S.E.2d at 390. Consistent with that recognition, this Court has repeatedly adjudicated claims that redistricting plans violate the North Carolina Constitution—including its Equal Protection Clause, which is among the constitutional provisions relied upon by Plaintiffs here. *See Blankenship v. Bartlett*, 363 N.C. 518, 522–28, 681 S.E.2d 759, 763–66 (2009); *Stephenson*, 355 N.C. at 376, 380–81, 562 S.E.2d at 392, 395; *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989).

Second, this case, perhaps more than any other, shows that there are judicially manageable standards to resolve partisan gerrymandering claims under the North Carolina Constitution. The trial court had no trouble concluding that the 2021 Plans are extreme partisan gerrymanders. It easily discerned the Legislative Defendants' intent through overwhelming circumstantial evidence, including extensive mathematical and statistical evidence from Plaintiffs' experts showing that the partisan bias in the 2021 Plans could not

be explained as anything other than an intentional effort to maximize Republican partisan advantage. And the court had no trouble identifying the effect of the gerrymander by quantifying the number of expected seats won and lost by each party across a wide range of election outcomes using statistical modeling that has become routine in partisan gerrymandering cases in North Carolina and throughout the country. The notion that courts are incapable of identifying extreme partisan gerrymanders through manageable standards is belied by the fact that so many of them—including the court below—have done just that.

The standard for resolving partisan gerrymandering claims is "utterly ordinary." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2517 (2019) (Kagan, J., dissenting). Plaintiffs must show that the challenged plan was an intentional and effective partisan gerrymander. Courts work with this sort of standard—with dual requirements of intent and effect—all the time. And courts have used it to adjudicate partisan gerrymandering challenges to redistricting plans in North Carolina and elsewhere. *See, e.g.*, *Harper I*, slip op. at 16 (enjoining North Carolina's 2016 congressional plan as an unconstitutional partisan gerrymander); *Common Cause*, 2019 WL 4569584, at *1–2 (invalidating North Carolina's 2017 state legislative plans as unconstitutional partisan gerrymanders); *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (invalidating Pennsylvania's 2011 congressional plan as an unconstitutional partisan gerrymander).

Courts in these cases had no trouble determining that the challenged plans were purposefully drawn for partisan advantage. In some cases, the plaintiffs presented smoking-gun evidence of partisan intent in the form of statements and actions of legislators and their staff. *See, e.g.*, *Harper I*, slip op. at 13; *Common Cause*, 2019 WL 4569584, at *11. But

courts have just as readily found partisan intent through evidence that the extreme partisan bias in the challenged plans could not have occurred absent the map-makers' intent to pack and crack one party's voters in order to advantage the other party. Plaintiffs in these cases have produced statistical analyses in which experts compare the partisanship of the enacted plan to computer-simulated plans drawn using the state's own nonpartisan redistricting criteria under a wide variety of electoral environments. *See, e.g.*, *Common Cause*, 2019 WL 4569584, at *18; *Harper I*, slip op. at 12; *League of Women Voters*, 178 A.3d at 770–77. Proof that the enacted plan is an extreme outlier in terms of partisan bias is strong evidence that the plan's partisan result was by design.

And courts have quantified the effect of partisan gerrymanders through similarly objective means. Using this computer-simulation methodology, many plaintiffs in partisan gerrymandering cases have shown that the challenged plans result in fewer districts favoring one party than would have existed if map drawers followed non-partisan redistricting principles. *Common Cause*, 2019 WL 4569584, at *18; *League of Women Voters*, 178 A.3d at 774. These analyses show that the partisan effects persist across a wide range of electoral environments, producing the additional consequence of denying one party a majority of seats in the state's legislature or congressional delegation that would be expected under the non-partisan simulated plans. *See id.*

It was well within the judicial capabilities of the trial court to find that the Congressional, House, and Senate Plans were extreme partisan gerrymanders using these same peer-reviewed statistical methodologies. Adopting the analyses of each of the *Harper* Plaintiffs' experts, the trial court found that all three Plans exhibited a degree of partisan

bias so extreme that it could only have resulted from an intentional effort to secure Republican partisan advantage. (R pp 3565, 3577, 3658, FOF ¶¶ 142, 181, 423). It found that all three Plans created a disadvantage for Democrats in the number of seats in North Carolina's General Assembly and congressional delegation, including, in the Assembly, by preventing Democrats from breaking the Republican legislative majority or supermajority even in electoral environments when they would do so in the overwhelming majority of nonpartisan maps. (R p 3566, FOF ¶¶ 145-47). And the court accepted the nonpartisan maps as fair comparisons, as it found that the methodologies used "did not incorporate as output requirements any ideas of proportional representation or notions of fairness." (R pp 3563–64, FOF ¶ 138).

The trial court nonetheless held that claims of partisan gerrymandering are not justiciable. This is a remarkable holding. If affirmed, it would mean that North Carolina courts are categorically forbidden from adjudicating any challenge to the partisan gerrymandering of election districts, no matter how extreme. The court's primary rationale was that, although these particular gerrymanders unquestionably were intentional and effective, there is purportedly no objective, universal standard for deciding "how much" partisanship is "extreme." (R p 3755, Conclusions of Law ("COL") ¶¶ 140-45).

But this misunderstands justiciability. For a claim to be justiciable, there need not be a definitive, one-size-fits-all test that will easily resolve every case. Justiciability is about the power of the courts to resolve entire *categories* of cases. *Cooper*, 370 N.C. at 408, 809 S.E.2d at 107. Courts are inherently in the business of developing and refining standards—especially constitutional standards—through the adjudication of particular

cases. If courts were limited to applying rigid tests, they would lack the power to resolve the many categories of important constitutional claims that require the evaluation and balancing of competing interests—for example, challenges to content-based restrictions on speech, which must be narrowly tailored to serve compelling government interests. How narrowly must a law be tailored, and how compelling is compelling enough? When does a time, place, and manner restriction on speech become so restrictive or burdensome as to violate the constitution? Courts have the power to decide those questions by resolving the constitutionality of particular speech regulations and evaluating particular government interests in the cases before them.

So too here. Indeed, the U.S. Supreme Court held that redistricting claims were justiciable without articulating any test for evaluating such claims in *Baker v. Carr*, 369 U.S. 168 (1962). It announced the principle of "one person, one vote" in broad terms two years later and explained that "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). And sure enough, courts refined the "one person, one vote" standard in the years that followed. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725; *White v. Weiser*, 412 U.S. 783 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968). This Court can similarly hold that courts have the power to hear partisan gerrymandering claims—as other courts have already held—while allowing this standard to be refined in future cases that actually require closer parsing.

Declining to draw a bright line between "extreme" and "non-extreme" partisan gerrymanders in this case will not, as the trial court feared, create an unmanageable standard. Courts in North Carolina and across the country have easily identified illegal partisan gerrymanders in recent years. They have done so because a standard with a dual requirement of intent and effect necessarily limits judicial intervention to extreme cases. While some cases have involved open admissions of partisan gerrymandering, *see, e.g.*, *Harper I*, slip op. at 13, such smoking guns have disappeared as courts have recognized that partisan gerrymandering violates constitutional rights. The absence of direct evidence going forward will, as was true here, require plaintiffs to prove intent through statistical evidence that the challenged plans' partisan bias is so substantial that it cannot be explained as anything other than the product of intentional gerrymandering. Because this degree of partisan bias will only occur in extreme cases, this is precisely the sort of "clear, manageable, and politically neutral" standard that forms the basis of a justiciable claim.

Moreover, if this Court wishes to adopt a precise threshold or cutoff, it need look no further than the standard offered by Legislative Defendants' own expert: Plans that result in a greater degree of partisan bias than "the middle 50% of simulation results" are outliers and therefore presumptively unconstitutional. (R p 3587, FOF ¶ 215) (adopting the findings of Legislative Defendants' expert Dr. Barber). Legislative Defendants' "middle 50%" standard would easily invalidate the 2021 Plans under the trial court's findings. The trial court found that the Congressional and House Plans were more carefully crafted to ensure partisan advantage than over 99.9999% (and the Senate Plan, more than 99.99%) of the trillions of simulated plans drawn using the General Assembly's own redistricting

criteria. (R pp 3570–77, FOF ¶¶ 160–83) (adopting Dr. Pegden's analysis.); *see also* (R pp 3562–64, FOF ¶¶ 135–39) (adopting Dr. Mattingly's analysis and finding that the 2021 Plans "systemically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection" of tens and hundreds of thousands of simulated maps); (R p 3666, FOF ¶ 451) (adopting Dr. Chen's analysis and finding that 11 of the 14 districts in the congressional plan exhibit more partisan bias than 95% of districts drawn in simulated maps). While any legal standard invites close calls, this case is not one of them. By any measure, redistricting plans found to be the worst among *trillions* of possible maps drawn using the General Assembly's own redistricting criteria are extreme partisan gerrymanders beyond any reasonable doubt.

The rest of the trial court's justiciability analysis is similarly unpersuasive. The trial court held that courts have no role to play because redistricting "is in the exclusive province of the legislature." (R p 3754, COL ¶ 137). But again, it is settled law that the Constitution of this State imposes limitations on the General Assembly's redistricting authority that are enforceable in court. "It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997). There is no redistricting exception to this principle. The North Carolina Constitution constrains "the General Assembly's execution of the legislative reapportionment process," and "it is well within the power of the judiciary of [this] State to require valid reapportionment or to formulate a valid redistricting plan." *Stephenson*, 355 N.C. at 370, 375–76, 562 S.E.2d at 389, 392; *see Blankenship*, 363 N.C. at 522–28, 681 S.E.2d at 763–66; *Preston*, 325 N.C. 438, 385 S.E.2d 473; *see also League*

of Women Voters (PA), 178 A.3d at 822 ("[I]t is the duty of the Court, as a co-equal branch of government, to declare, when appropriate, certain acts unconstitutional."). In contrast, cases where this Court has applied the political question doctrine involves constitutional provisions conferring exclusive authority to the General Assembly. *See Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) (rejecting a challenge to a statute setting the proper age for children to attend public school because the Constitution placed "the determination of the proper age for school children . . . squarely . . . in the hands of the General Assembly"); *Bacon v. Lee*, 353 N.C. 696, 698, 717, 549 S.E.2d 840, 843, 854 (rejecting clemency application challenge because the Constitution "expressly commits the substance of the clemency power to the sole discretion of the Governor").

Finally, dicta in *Stephenson* about the consideration of "partisan advantage" does not preclude this Court from declaring that partisan gerrymandering violates the Constitution. *Stephenson* did not hold that North Carolina's constitution permits partisan gerrymandering. Quite the contrary, it expressly contemplated that it might not:

> The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735 (1973), *but it must do so in conformity with the State Constitution*. To hold otherwise would abrogate the constitutional limitations or 'objective constraints' that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Stephenson, 355 N.C. at 371–72, 562 S.E.2d at 390 (emphasis added).

Read in context and in light of the citation to *Gaffney*, *Stephenson* was merely noting that *federal law* permitted some consideration of partisanship. Moreover, *Gaffney* was a case that approved a districting plan that "undert[ook], not to minimize or eliminate the

political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Gaffney*, 412 U.S. at 754. So when *Stephenson* cited *Gaffney* for the proposition that the federal constitution permits mapmakers to consider politics, but noted that any such consideration in North Carolina must comply with North Carolina's constitution, it certainly was not endorsing the view that North Carolina's constitution permitted partisan gerrymandering to disfavor a particular political party.

In *Rucho*, the U.S. Supreme Court held that federal courts are not suited to the task, "unlimited in scope," of adjudicating gerrymandering claims for all 50 states, involving multiple districting plans for each, every 10 years. 139 S. Ct. at 2507. But the Court made clear that its holding "does not condone excessive partisan gerrymandering," nor does it "condemn complaints about districting to echo into a void." *Id.* Rather, "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.*

As detailed below, partisan gerrymanders like the 2021 Plans violate North Carolina's Constitution, and manageable standards exist for this State's courts to resolve challenges to gerrymandered plans. This Court should not leave claims challenging extreme partisan gerrymandering to echo into a void.

II. The 2021 Plans violate the North Carolina Constitution's Free Elections Clause.

The 2021 Plans violate the North Carolina Constitution's Free Elections Clause, which declares that "All elections shall be free." N.C. Const., art. I, § 10.

A. The history and purpose of the Free Elections Clause is to prevent the government from manipulating legislative elections.

North Carolina's Free Elections Clause, which has no parallel in the U.S. Constitution, dates back to the North Carolina Declaration of Rights of 1776. The framers of the North Carolina Declaration of Rights based the Free Elections Clause on a similar provision of the 1689 English Bill of Rights providing that "election of members of parliament ought to be free," Bill of Rights 1689, 1 W. & M. c. 2 (Eng.). *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797–98 (1992). This provision of the 1689 English Bill of Rights grew out of the King's efforts to manipulate parliamentary elections, including by changing the electorate in different areas to achieve "electoral advantage." J.R. Jones, The Revolution of 1688 in England 148 (1972). The king's attempt to maintain control of parliament by manipulating elections led to a revolution, and after dethroning the king, the revolutionaries called for a "free and fair parliament" as a critical reform. Grey S. De Krey, Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution 241, 247–48, 250 (2007).

Before North Carolina adopted its Declaration of Rights, several other states included versions of the free elections clause in their Declarations of Rights, all based on the same provision of the 1689 English Bill of Rights. The Framers of North Carolina's Declaration of Rights drew inspiration for North Carolina's Free Elections Clause from these other states, which included Pennsylvania and Virginia. *See* Orth, 70 N.C. L. Rev. at 1797–98. As with the English provision, these other states' provisions were designed

specifically to prevent the manipulation of elections for legislative bodies. For instance, Pennsylvania's clause arose in response to laws that manipulated elections for representatives to Pennsylvania's colonial assembly. *League of Women Voters*, 178 A.3d at 804. Those colonial laws led to the "underrepresentation" of, and even "denial of representation" to, certain geographic areas; the "colonial government remained dominated" by certain counties at the expense of "western regions of the colony and the City of Philadelphia." *Id.* at 805–06. Pennsylvania's version of the free elections clause was intended to end "the dilution of the right of the people of [the] Commonwealth to select representatives to govern their affairs," and to codify an "explicit provision[] to establish protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* at 806, 808.

North Carolina's Free Elections Clause was adopted to serve the same purpose. The Free Elections Clause, in conjunction with the companion provision of the State Constitution now found in Article I, § 9 concerning redress of grievances, mandates that elections in North Carolina must be "free from interference or intimidation" by the government, so that all North Carolinians are freely able, through the electoral process, to pursue a "redress of grievances and for amending and strengthening the laws." John V. Orth & Paul M. Newby, The North Carolina State Constitution 55–57 (2d ed. 2013). "[T]his pair of sections concerns the application of the principle of popular sovereignty." *Id.* at 55. As this Court explained nearly a century ago, the Free Elections Clause reflects that "[o]ur government is founded on the consent of the governed," and the right to free

elections "must be held inviolable to preserve our democracy." *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937).

North Carolina has broadened and strengthened the Free Elections Clause since its adoption in 1776 to make these purposes clear. The original clause stated that "elections of members, to serve as Representatives in the General Assembly, ought to be free." N.C. Dec. of Rts., VII (1776). The next version of the State's constitution, adopted in 1868, declared that "[a]ll elections ought to be free," expanding the principle to include all elections in North Carolina. N.C. Const. art. I, § 10 (1868). In the current Constitution, adopted in 1971, the Free Elections Clause now mandates that "all elections *shall* be free." N.C. Const. art. I, § 10 (emphasis added). This change was intended to "make it clear" that the Free Elections Clause and other "rights secured to the people by the Declaration of Rights are commands and not mere admonitions to proper conduct on the part of the government." *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 639, 286 S.E.2d 89, 97 (1982) (quoting Report of the N.C. State Const. Study Comm'n to the N.C. State Bar and the N.C. Bar Ass'n, 75 (1968)).

B. The Free Elections Clause prohibits the government from manipulating district boundaries to predetermine the outcome of elections.

In interpreting the North Carolina Constitution, courts "should keep in mind that this is a government of the people, in which the will of the people,—the majority,—legally expressed, must govern. . . ." *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897). North Carolina courts have thus interpreted the Free Elections Clause to require "that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the People. . . ." *Common Cause*, 2019 WL 4569584, at *110.

The Free Elections Clause prohibits the government from manipulating the electoral process to predetermine the outcome of elections. In the context of redistricting, the Clause prohibits the General Assembly from drawing district boundaries intentionally to predetermine the outcome of individual elections, and to guarantee overall control of the legislature. Where the ruling party has manipulated the redistricting plan to ensure that it remains in control of government, elections are not "free." The text, history and purpose of the Free Elections Clause, as well as judicial precedent, supports this interpretation.

Starting with the text, the Free Elections Clause unequivocally mandates that "[a]ll elections" in North Carolina "shall be free." N.C. Const., Art. I, § 10. As the Pennsylvania Supreme Court explained in interpreting its clause, the "plain and expansive sweep" of the word "free" conveys an "intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters …, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal

participation in the electoral process for the selection of his or her representatives in government." *League of Women Voters*, 178 A.3d at 804.

The history of the Free Elections Clause confirms the intention to prohibit the government from manipulating elections—legislative elections in particular—to entrench the current rulers in power. As explained above, the Clause's original precursor was designed to prevent the king from manipulating parliamentary elections to maintain his control over parliament, and Pennsylvania's version of the clause likewise sought to end efforts by those in power to entrench their control by interfering with the ability of certain disfavored citizens to obtain representation in the legislative body. North Carolina's Free Elections Clause serves precisely these same purposes.

This Court has enforced the Free Elections Clause to invalidate laws that interfere with voters' ability to freely choose their representatives. In *Clark v. Meyland*, the Court struck down a law that required voters seeking to change their party affiliation to take an oath supporting the party's nominees "in the next election and … thereafter." 261 N.C. 140, 141, 134 S.E.2d 168, 169 (1964). The Court held that this attempt to manipulate the outcome of future elections "violate[d] the constitutional provision that elections shall be free." *Id.* at 143, 134 S.E.2d at 170. A federal court also applied the Free Elections Clause to strike down a North Carolina law that singled out unaffiliated candidates for differential treatment from major party candidates because it impermissibly infringed an unaffiliated candidate's ability to "advance[] his political beliefs and to cast his votes effectively." *Obie v. N.C. State Bd. of Elections*, 762 F. Supp. 119, 121 (E.D.N.C. 1991).

"[P]artisan gerrymandering . . . strikes at the heart of" the Free Elections Clause principle that elections should not be manipulated to subvert the will of the people. *Common Cause*, 2019 WL 4569584, at *112. Extreme partisan gerrymanders—i.e., "redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others"—are "contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Harper I*, slip op. at 7. The three-judge panel in *Harper I* correctly applied these principles to enjoin the 2016 congressional plan—which was designed to ensure ten safe Republican seats and three safe Democratic seats—as an extreme partisan gerrymander that disregarded the popular will. *Id.* at 7, 12–13.

The three-judge panel in *Common Cause* court held the same as to the 2017 House and Senate plans, which "individually and collectively[] deprive[d] North Carolina citizens of the right to vote for General Assembly members in elections that are conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." 2019 WL 4569584, at *112. There, as here, "[u]sing their control of the General Assembly, Legislative Defendants manipulated district boundaries, to the greatest extent possible, to control the outcomes of individual races so as to best ensure their continued control of the legislature." *Id.* And there, as here, "Plaintiffs' experts [had] demonstrated that the 2017 Plans were designed, specifically and systematically, to maintain Republican majorities in the state

House and Senate," and "to predetermine election outcomes in specific districts and county groupings." *Id.*

C. The 2021 Plans violate the Free Elections Clause because they prevent election outcomes from reflecting the will of the people.

The 2021 Plans, too, violate the Free Elections Clause. As the trial court found, Legislative Defendants intentionally designed all three plans to be "highly non-responsive to the changing opinion of the electorate." (R p 2637, FOF ¶¶ 140-42). It found that the Congressional Plan "was designed specifically to ensure that Republicans can efficiently and consistently win at least ten [of the State's fourteen] congressional seats. . . ." (R p 3668, FOF ¶ 455). It further found that, under the enacted Congressional Plan, numerous districts are safe Republican seats even though they would be far more competitive, or even Democratic-leaning, under a nonpartisan plan. *See* (R pp 3665–66, 86, FOF ¶¶ 448-51, 140). The House and Senate Plans were similarly intended to entrench Republicans in power regardless of the popular will, and as the trial court found, they are "especially effective in preserving Republican supermajorities" in electoral environments in which Democrats would break the supermajority under a nonpartisan plan. (R p 3565, FOF ¶ 142).

This extreme partisan advantage is the result of deliberate packing and cracking of Democratic voters throughout the state. The Congressional Plan, for example, dilutes Democratic voting power principally by splitting each of the three largest counties in North Carolina—which are also the three most heavily Democratic areas in the state—across three districts, despite the fact that there is no population-based reason to split them this many times. (R p 162, FOF ¶ 125) (citing Ex. p 4207). The drawing of county clusters in

the House and Senate Plans, too, are carefully manipulated to ensure that Republican voters are efficiently distributed throughout the state while Democratic voters are distributed in a manner that largely wastes their votes. *See* (R p 3600, FOF ¶ 253) (finding that Democrats were "packed" and "cracked" to "make the map maximally nonresponsive" to shifting public opinion); *see also* (R pp 3592–3657, 3675–3696, FOF ¶¶ 233-422, 484-566).

The very purpose of the Free Elections Clause is to prohibit this sort of intentional manipulation of election district boundaries. By purposefully drawing the 2021 Plans to keep Republicans in power even when voters far prefer Democrats, the Legislative Defendants have deprived North Carolinians of the right to vote in congressional and legislative elections that allow "the will of the people,—the majority,—legally expressed, [to] govern." *Lattimore*, 120 N.C. at 428, 26 S.E. at 638. Indeed, "'republican liberty' demands 'not only, that all power should be derived from the people; but that those entrusted with it should keep it in dependence on the people.'" *Rucho*, 139 S. Ct. at 2511–12 (Kagan, J., dissenting) (quoting 2 The Federalist No. 37, p. 4). But by intentionally predetermining election outcomes, the 2021 Plans dishonor that vision and prevent elections in this State from reflecting the popular will.

D. The trial court's analysis of the Free Elections Clause is unpersuasive.

The trial court acknowledged that extreme partisan gerrymandering—which clearly infected all of the challenged plans—may be "incompatible with democratic principles," (R p 3756, COL ¶ 145), but then held that the Free Elections Clause offers those principles no protection or redress. This holding, which is subject to de novo review, was in error.

The trial court rested its interpretation on the supposed intent of individuals who drafted antecedents to North Carolina's Declaration of Rights—namely, the 1689 English Bill of Rights and the 1775 Virginia Declaration of Rights. But these antecedents cut against the trial court's interpretation. For example, the trial court acknowledged that "the words as originally used in the English Bill of Rights [] were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage." (R p 3738, COL ¶ 77). Specifically, the Clause responded to King James II's "campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed." (*Id.*, COL ¶ 78). This history is entirely consistent with Plaintiffs' claim: the concept of "free elections" has, from the beginning, extended beyond narrow concerns about restrictions on the franchise. Votes may be cast and counted without direct interference, but elections still are not free if the electoral system has been manipulated by leaders to entrench their own power rather than to reflect the people's will.

The trial court nonetheless read the English Free Elections Clause to be concerned only with interference perpetrated by the Crown, not the Parliament. (*Id.*, COL ¶ 79). But this contrast only confirms the breadth of North Carolina's clause. While the English Bill of Rights was created by Parliament to declare and establish the prerogatives of Parliament, *see* (*id.*, COL ¶ 78), North Carolina's Constitution is not so limited. *Compare* English Bill of Rights ("That the Freedom of Speech … *in Parliament* ought not to be impeached or questioned in any Court or Place *out of Parliament*"; "That Election of Members *of*

Parliament ought to be free") (emphases added) *with* North Carolina Declaration of Rights ("All elections shall be free."; "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained."). Article I of North Carolina's Constitution declares the rights of its people, not its legislature, and it prohibits the legislature from transgressing those rights. By the trial court's logic, all manner of constitutional protections in North Carolina with predecessors in the English Bill of Rights—the freedom of speech among them—would protect only legislators.

Regardless, even accepting the trial court's narrow conception of the Clause's historical purpose, constitutional rights are not ancient artifacts. The trial court's suggestion that North Carolina's Free Elections Clause cannot restrict legislative acts because the English predecessor was concerned only with the Monarchy is akin to reading North Carolina's Religious Liberty Clause not to apply to Catholics because the 17th Century Parliament was concerned only with protecting Protestants. A right enacted in a specific historical context is not forever confined to that exact context.

The trial court also noted that malapportioned "Rotten Boroughs" existed in England after the English Bill of Rights, and that the North Carolina Legislature originally created malapportioned counties as units of representation. *See* (R pp 3741, 3743–45, COL ¶¶ 92, 96, 98-103). But just as the Equal Protection Clause prohibits racial discrimination notwithstanding the persistence of segregation well into the 20th Century, the fact that malapportionment persisted in England after passage of the English Bill of Rights does not mean that the Clause was intended to permit such manipulation. Likewise, after centuries of flagrant abuse, courts recognized that malapportionment is incompatible with

constitutional rights. *Reynolds*, 377 U.S. at 580 ("Citizens, not history or economic interests, cast votes.").

While Plaintiffs in this case do not allege malapportionment, the analogy is instructive. Just as North Carolina's Constitution was not judicially interpreted to restrict partisan gerrymandering until *Common Cause*, North Carolina's Equal Protection Clause was not judicially interpreted to restrict malapportioned judicial districts until 2009. *See Blankenship*, 363 N.C. 518, 681 S.E.2d 759. Justice delayed is better than justice denied. The North Carolina Constitution does not contain a grandfather clause whereby violations that persist long enough become immune to scrutiny. Nor are constitutional rights forfeited by historical disuse. The regrettable fact that North Carolinians may not have previously enjoyed the full protection of their Free Elections Clause should only add urgency to the vindication of Plaintiffs' claims here.

For similar reasons, the trial court's suggestion that a drafter of Virginia's Free Elections Clause would not have anticipated its application to partisan gerrymandering, (R p 3745, COL ¶ 106), does not control the interpretation of North Carolina's Clause. "[T]he limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a [law] give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1737 (2020). The Constitution's unsubtle command that "[a]ll elections shall be free" cannot be subverted any time electoral threats emerge from different actors or in more pernicious forms than were contemplated

centuries ago. Where the General Assembly aggressively manipulates district boundaries in an effort to preordain political control, elections plainly are not "free."

The trial court failed to grapple with this fact. The court recognized that the framers of North Carolina's Constitution intended "legislative excess" to be remedied through regular elections. (R p 3742, COL ¶¶ 94-95). But what protection can an election provide where the Legislature's excess is the extreme distortion of elections themselves, such that legislative control is all but impervious to public opinion? Constitutions are required precisely because citizens cannot depend entirely on legislative enactments to honor and preserve their fundamental rights. And North Carolina's Constitution protects against this very scheme—the requirement that "[a]ll elections shall be free" is explicit. N.C. Const., art. I, § 10. Because the 2021 Plans impose an extreme partisan gerrymander that systematically skews electoral districts to favor Republican candidates regardless of public sentiment, they violate the Free Elections Clause and cannot stand.

III. The 2021 Plans violate the North Carolina Constitution's Equal Protection Clause.

The North Carolina Constitution's Equal Protection Clause declares that "[n]o person shall be denied the equal protection of the laws." N.C. Const., art. I, § 19. The 2021 Plans violate North Carolina's Equal Protection Clause, irrespective of whether those plans violate the U.S. Constitution. *See Michigan v. Long*, 463 U.S. 1032 (1983).

A. North Carolina's Equal Protection Clause provides greater protection for voting rights than its federal counterpart.

This Court has repeatedly held that North Carolina's Equal Protection Clause provides greater protection for voting rights than federal equal protection provisions.

Stephenson, 355 N.C. at 377–81 & n.6, 562 S.E.2d at 393–95 & n.6; *Blankenship*, 363 N.C. at 522–28, 681 S.E.2d at 763–66; *see Harper I*, slip op. at 7. "It is beyond dispute that [North Carolina courts] 'ha[ve] the authority to construe [the North Carolina Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.'" *Stephenson*, 355 N.C. at 381 n.6, 562 S.E.2d at 395 n.6 (quoting *State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988)). North Carolina courts can and do interpret even "identical term[s]" in the State's Constitution more broadly than their federal counterparts. *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 749, 392 S.E.2d 352, 357 (1990).

Specifically, North Carolina's Equal Protection Clause protects "the fundamental right of each North Carolinian to *substantially equal voting power*." *Harper I*, slip op. at 7 (citing *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394 (emphasis in original)). "It is well settled in this State that 'the right to vote on equal terms is a fundamental right.'" *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 (quoting *Northampton Cnty.*, 326 N.C. at 747, 392 S.E.2d at 356)).

These principles apply with full force in the redistricting context. *Id*. Thus, in *Stephenson*, this Court held that the use of single- and multi-member districts in a redistricting plan violated Article I, § 19, even though such a scheme did not violate the U.S. Constitution. *Stephenson*, 355 N.C. at 377–81 & n.6, 562 S.E.2d at 393–95 & n.6. The Court explained that such a redistricting plan restricted the "*fundamental* right under the State Constitution" to "substantially equal voting power and substantially equal

legislative representation." *Id.* at 382, 562 S.E.2d at 396 (emphasis in original). That was because, as a practical matter, voters in multi-member districts had a greater opportunity to influence their representatives. "[T]hose living in [multi-member] districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative." *Id.* at 379, 562 S.E.2d at 394. Because the "classification of voters" between single- and multi-member districts created an "impermissible distinction among similarly situated citizens," it "necessarily implicate[d] the fundamental right to vote on equal terms," triggering "strict scrutiny." *Id.* at 377–78, 562 S.E.2d at 393–94.

Similarly, in *Blankenship*, this Court held that Article I, § 19 mandates one-person, one-vote in judicial elections, even though the U.S. Constitution does not. 363 N.C. at 522–24, 681 S.E.2d at 762–64. The Court again stressed that "[t]he right to vote on equal terms in representative elections ... is a fundamental right" and therefore "triggers heightened scrutiny." *Id.* And in *Northampton County*, this Court applied strict scrutiny to invalidate certain rules related to voting for drainage districts, holding that the rules at issue deprived one county's residents of the "fundamental right" to "vote on equal terms" with residents of a neighboring county. 326 N.C. at 747, 392 S.E.2d at 356.

These same principles require invalidation of redistricting plans that are designed, intentionally and effectively, to discriminate against and disadvantage voters who favor a particular political party by depriving those voters of equal voting power. As the three-judge panel in *Harper I* explained, "partisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of the law because, by seeking to

diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party." *Harper I*, slip op. at 8. Likewise, in the 2019 *Common Cause* case, the three-judge panel held that extreme partisan gerrymandering infringes upon a "fundamental right," because "the classification of voters based on partisanship in order to pack and crack them into districts is an impermissible distinction among similarly situated citizens aimed at denying equal voting power." *Common Cause*, 2019 WL 4569584, at *113 (internal quotation marks omitted).

B. The 2021 Plans violate the Equal Protection Clause because they were intentionally designed to favor Republicans and have the effect of depriving Democratic voters of substantially equal voting power.

A redistricting plan violates North Carolina's Equal Protection Clause if (1) the map-drawers drew the district lines intentionally to entrench their party in power by diluting the votes of citizens favoring the other party, and (2) the plan has the intended effect of substantially diluting those citizens' votes. *Harper I*, slip op. at 8. If plaintiffs show both partisan intent and effect, the defendants may only defend the plan by establishing that its extreme partisan bias is "narrowly tailored to advance a compelling governmental interest." *Stephenson*, 355 N.C. at 377–78, 562 S.E.2d at 393.

First, as discussed above and as the trial court in this case unanimously found, Legislative Defendants intentionally designed each of the 2021 Plans to maximize Republican bias and advantage, and to entrench Republicans in power, by diluting the voting power of Democratic voters. That finding is reviewable only for clear error, and it is obviously correct.

To evaluate discriminatory intent, "a court must undertake a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Holmes v. Moore*, 270 N.C. App. 7, 16–17, 840 S.E.2d 244, 254–55 (2020) (quoting *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977)); *accord, e.g., State v. Bennett*, 374 N.C. 579, 597 n.4 (2020). Discriminatory purpose need not be "the sole or even a primary motive," but rather just "a motivating factor." *Holmes*, 270 N.C. App. at 16–17, 840 S.E.2d at 254–55 (internal quotation marks and citation omitted). And discriminatory purpose can be inferred from the totality of the relevant facts, including, among other things, the "historical background" and the "impact" of the challenged action. *Id.*

As to the historical background, there can be no dispute that Legislative Defendants have repeatedly and intentionally discriminated against Democratic voters in redistricting, including this cycle. The trial court correctly found that the congressional and state legislative plans drawn and enacted by the General Assembly in 2016 and 2017, respectively, were undisputed, intentional partisan gerrymanders. (R pp 3741–43, COL ¶¶ 91–97). And while Legislative Defendants nominally forbade the use of partisan data in drawing the maps this cycle, they made no effort to enforce this restriction. The evidence shows that the House and Senate Redistricting Committees "did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data," and "no restrictions on the use of outside maps were ever implemented or enforced." (R pp 3737, COL ¶ 73). And Representative Hall admitted that in drawing the enacted House plan, he relied on "concept maps" drawn outside the public committee room, using unknown electronic devices and unknown

redistricting software, in open violation of his committee's own purported restrictions and his public commitments to Democratic members that he had not participated in any such activities.

The trial court also correctly found that the mathematical and statistical evidence provides irrefutable evidence of intentional discrimination—namely, the dilution of Democratic voting power to maximize Republican advantage and entrench Republican power. "The analysis and conclusions of Plaintiffs' experts establishes that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." (R p 3658, FOF ¶ 423). The 2021 House and Senate plans are likewise "extreme outliers" that "systematically favor the Republican Party" and that are the product of "intentional partisan redistricting." (R p 3565, FOF ¶ 142). The trial court made this finding both for the Senate and House maps as a whole and for a multitude of specific county groupings. Those findings are correct and not clearly erroneous. Dr. Pegden, for example, concluded that the Congressional Plan is more favorable to Republicans, and more carefully crafted to ensure Republican advantage, than 99.9999% of trillions of simulated plans generated by making tiny changes to the enacted plan. (R p 3575, FOF ¶ 175). For the House plan, that was true 99.9999% of the time; for the Senate plan, 99.9%. (R p 3577, FOF ¶ 181). Other experts reached similar conclusions, quantifying the extreme cracking and packing in district after district and cluster after cluster in all three of the challenged plans.

As these experts explained and the trial court agreed, the likelihood that the 2021 Plans' extreme Republican bias occurred without intentional efforts by the map-drawers to

advantage Republicans and disadvantage Democrats is "astronomically small." (R p 3565, FOF ¶ 142) (quoting Ex. p 4722). This intentional "classification of voters" based on partisanship in order to pack and crack them into and out of districts is an "impermissible distinction among similarly situated citizens" aimed at denying equal voting power. *Stephenson*, 355 N.C. at 377–78, 562 S.E.2d at 393–94.

Second, the 2021 Plans have their "intended effect" of advantaging Republicans by diluting the voting power of Democratic voters and depriving them of substantially equal voting power and the right to vote on equal terms, in violation of Article I, § 19. As to the congressional plan, for example, the trial court found that "the enacted map sticks at 4 Democrats and 10 Republicans despite large shifts in the statewide vote fraction across a wide variety of elections, in elections where no nonpartisan map would elect as few as 4 Democrats and many would elect 7 or 8." (R p 3564, FOF ¶ 140). As to the state legislative plans, the trial court found that the enacted plans routinely enable Republicans to preserve a supermajority in election environments in which Democrats would break the supermajority in any non-gerrymandered map. (R pp 3565–66, FOF ¶ 142, 146). Moreover, "[e]lections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps." (R p 3565, FOF ¶ 144). "In every election scenario, Republicans won more individual seats that they statistically should under nonpartisan maps" in the state House and Senate. *Id.*

The 2021 Plans achieve these effects by packing and cracking Democratic voters across the districts, just like the 2016 congressional plan enjoined in *Harper I* and the 2017 state legislative plans struck down under the Equal Protection Clause in the 2019 *Common*

Cause case. *Harper I*, slip op. at 18; *Common Cause*, 2019 WL 4569584, at *116. As under those plans, the margins of victory in districts under the 2021 Plans—not just the total seat counts—confirm the effective dilution of Democratic voting power. The trial court correctly found that "cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates." (R p 3567, FOF ¶ 151). The same is true of the 2021 House and Senate Plans. (R p 3567–68, FOF ¶¶ 152-154). This "packing and cracking diminishes the 'voting power' of Democratic voters" across all districts, both for those whose votes are wasted in packed Democratic districts and those whose votes have no meaningful chance in cracked districts. *Common Cause*, 2019 WL 4569584, at *116 (quoting *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980)). Thus, Democratic voters in packed and cracked districts "are substantially less likely to ultimately matter in deciding the election results" when compared to Republican voters. *Id.*

Ultimately, there is nothing "equal" about the "voting power" of Democratic voters when they have no realistic chance of electing a representative to Congress or winning a majority or breaking the Republican supermajority in either chamber of the General Assembly under the 2021 Plans. "The right to vote is the right to participate in the decision-making process of government." *Texfi Indus.*, 301 N.C. at 13, 269 S.E.2d at 150. Democratic voters cannot meaningfully participate in the decision-making process of government when the maps are drawn to systematically prevent Democrats from having a

say in Congress or the General Assembly. In other words, the 2021 Plans "not only deprive Democratic voters of equal voting power in terms of electoral outcomes, but also deprive them of substantially equal legislative representation." *Common Cause*, 2019 WL 4569584, at *116 (citing *Stephenson*, 355 N.C. at 382, 562 S.E.2d at 396). Just as the "political reality" is that "legislators are much more inclined to listen to and support a constituent than an outsider," *Stephenson*, 355 N.C. at 380, 562 S.E.2d at 395 (quoting *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355, *cert. denied*, 385 U.S. 851, 87 S. Ct. 79, 17 L.Ed.2d 80 (1966)), the reality is that legislators are far more likely to represent the interests and policy preferences of voters of the same party "rather than their constituency as a whole." *Common Cause*, 2019 WL 4569584, at *116 (internal quotation marks omitted).

Finally, there is no legitimate, nonpartisan justification for the 2021 Plans' extreme partisan bias, much less one that could satisfy strict scrutiny. Legislative Defendants cannot conceivably show that the 2021 Plans are narrowly tailored to achieve a compelling government interest. As the trial court found, all three plans fail to follow other of their own criteria for partisan ends.

In short, in drawing the 2021 Plans, Legislative Defendants engaged in the "intentional 'classification of voters' based on partisanship in order to pack and crack them into districts" and to "deprive [them] of the right to vote on equal terms." *Common Cause*, 2019 WL 4569584, at *117 (quoting *Stephenson*, 355 N.C. at 377–78, 562 S.E.2d at 393–94). Plaintiffs have established that the 2021 Plans violate the Equal Protection Clause.

C. The trial court's analysis of the Equal Protection Clause is unpersuasive.

The trial court agreed that as a factual matter each of the 2021 Plans was designed intentionally to maximize Republican advantage and entrench Republican power, and that each plan achieves this result by substantially reducing Democratic voting power on both a statewide basis and across numerous districts and county groupings. The court nevertheless held that the Equal Protection Clause categorically does not apply to intentional and effective discrimination against a political party's voters in redistricting—*i.e.*, partisan gerrymandering. But the trial court's reasoning, which is subject to de novo review, is erroneous and contrary to many of this Court's equal protection precedents.

Principally, the trial court held that the Equal Protection Clause cannot restrict partisan gerrymandering because the 1968 Study Commission stated that "it was not meant to 'bring about a fundamental change' to the power of the General Assembly," (R p 3733, COL ¶ 111) (citing Rept. of Study Commission at 10). For that reason, the trial court held that the Equal Protection Clause cannot "impose new restrictions on the political process of redistricting." (R p 3747, COL ¶ 111).

But the language the trial court cited was general prefatory language about multiple changes made to the North Carolina Constitution in 1971. This language was not specifically aimed at the addition of an equal protection clause; does not actually mention the General Assembly; and certainly does not refer to fundamental changes to the power of the "General Assembly" vis-à-vis the people or the voting public. *See* Rept. of Study Commission at 10. Instead, the language speaks of "fundamental change in the power of state and local government and the distribution of that power" as between those different

levels of government. *Id.* The point was merely to contrast new, "substantive" protections of individual rights (like the Free Speech and Equal Protection Clauses) with other constitutional changes in 1971 that altered the structure and organization of North Carolina's government (like changing the qualifications for judges and the term limits for Governor and Lieutenant Governor). *See* (R p 3729, COL ¶ 54).

In any event, the trial court's equal protection analysis is irreconcilable with this Court's decisions in *Stephenson* and *Blankenship*. In both of those cases, this Court held that North Carolina's Equal Protection Clause *did* "impose new restrictions on the political process of redistricting." (R p 3747, COL ¶ 111). Namely, it forbade the use of multi-member and single-member districts in the same plan, and required one-person, one-vote in judicial elections. Both of those decisions held that the Equal Protection Clause imposed new constraints on the General Assembly's discretion in redistricting. And thus neither decision is compatible with the trial court's holding that the Equal Protection Clause should be read as essentially precatory.

The trial court also purported to distinguish *Stephenson*, *Blankenship*, and *Northampton* on the ground that the voter plaintiffs in this case are "not denied the right to vote, nor are they in a district where they have less voting power than those in other districts." (R p 3750, COL ¶ 120). But that is untrue. Plaintiffs who are cracked into a district where they cannot elect a representative of their choice have less voting power than other voters. For example, Democratic voters in Guilford County, who are cracked into three congressional districts so that they have no chance to elect a representative who shares their political beliefs and party affiliation, have less voting power than Republican voters

in districts whose boundaries were carefully drawn to maximize Republican electoral advantage. And Democratic voters statewide, who will be subjected to Republican supermajority control in the General Assembly regardless of how they vote and regardless of how many fellow citizens they convince to join them, have less voting power than Republican voters who are the beneficiaries of the plans' extreme partisan bias.

The trial court's observation that "[n]othing about redistricting affects a person's right to cast a vote," (R p 3750, COL ¶ 123), could have been made in *Stephenson*, and *Blankenship*, and *Northahmpton*. But instead, in those cases, this Court confirmed that the mere ability to "cast" a vote is not sufficient under the Equal Protection Clause if the legislature has intentionally designed districts in a way that dilutes the power of that vote. So too here.

Finally, even if rational basis review applied (though it does not), the Court should still strike down these plans. Intentional discrimination that effectively entrenches one political party in power is profoundly anti-democratic and is not a legitimate or rational basis for legislation.

IV. The 2021 Plans violate the North Carolina Constitution's Free Speech and Assembly Clauses.

The North Carolina Constitution's Freedom of Speech Clause provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const., art. I, § 14. The Freedom of Assembly Clause provides in relevant part that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly

for redress of grievances." *Id.* § 12. The 2021 Plans violate both clauses, irrespective of whether those plans violate the U.S. Constitution. *See Long*, 463 U.S. 1032.

A. North Carolina's Free Speech and Assembly Clauses provide greater protections than their federal counterpart.

This Court has held that the North Carolina Constitution's Free Speech Clause provides broader rights than does federal law. In particular, the Court has held that the North Carolina Constitution affords a direct cause of action for damages against government officers in their official capacity for speech violations, even though federal law does not. *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Noting that "[o]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens," the Court explained that North Carolina courts "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Id.* Indeed, in recognizing a direct cause of action under the State Constitution, the Court expressly relied on the lack of a federal remedy, which left plaintiffs with "no other remedy … for alleged violations of his constitutional freedom of speech rights." *Id.*; *see also, e.g. Evans v. Cowan*, 122 N.C. App. 181, 183–84, 468 S.E.2d 575, 577–78, *aff'd*, 477 S.E.2d 926 (N.C. 1996) ("an independent determination of plaintiff's constitutional rights under the state constitution [was] required, and the state courts reserve the right to grant relief under the state constitution 'in circumstances under which no relief might be granted' under the federal constitution"); *McLaughlin v. Bailey*,

240 N.C. App. 159, 172, 771 S.E.2d 570, 579–80 (2015), *aff'd*, 781 S.E.2d 23 (N.C. 2016) (quoting *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985)).

Under the North Carolina Constitution's protections for speech and assembly, "[v]oting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression. . . ." *Common Cause*, 2019 WL 4569584, at *118–19. "Voting provides citizens a direct means of expressing support for a candidate and his views," *id.* at *119, and is no less protected "merely because it involves the 'act'" of casting a ballot, *State v. Bishop*, 368 N.C. 869, 874, 787 S.E.2d 814, 818 (2016). Similarly, "[c]itizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204–05 (2011). "[B]anding together with likeminded citizens in a political party" thus "is a form of protected association." *Common Cause*, 2019 WL 4569584, at *19.

A redistricting plan is subject to strict scrutiny where it burdens protected expression based on viewpoint by discriminatorily making the votes cast for one party's candidates less effective. The guarantee of free expression "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Notably, a plan "need not explicitly mention any particular viewpoint to be impermissibly discriminatory." *Common Cause*, 2019 WL 4569584, at *121. And "[v]iewpoint discrimination is *most* insidious where the targeted speech is political." *Harper I*, slip op. at 9 (emphasis in original). "When a legislature engages in extreme partisan gerrymandering, it identifies certain preferred speakers (e.g., Republican voters) while targeting certain disfavored

speakers (e.g., Democratic voters) because of disagreement with the views they express when they vote." *Id.* at 10.

B. The 2021 Plans violate the Free Speech and Assembly clauses.

1. The 2021 Plans impermissibly discriminate against the protected expression and association of Democratic voters.

Legislative Defendants' intentional effort to disfavor and burden expression based on viewpoint violates these constitutional protections. In drawing the 2021 Plans, Legislative Defendants "identified[] certain preferred speakers" (Republican voters) and targeted certain "disfavored speakers" (Plaintiffs and other Democratic voters) for "disfavored treatment" because of disagreement with the political beliefs they express through their votes. *Citizens United*, 558 U.S. at 340–41. And Legislative Defendants designed the plans to be "non-responsive[]" to voters' expression of their political beliefs in elections "when more voters favor Democratic candidates." (R p 3567, FOF ¶ 151).

The 2021 Plans independently violate Article I, § 12 by "burden[ing] the associational rights of disfavored voters. . . ." *Harper I*, slip op. at 10. The *Common Cause* court correctly held that a redistricting plan is subject to strict scrutiny where it burdens disfavored association by restricting "the ability of like-minded people across the State to affiliate in a political party and carry out [their] activities and objects." 2019 WL 4569584, at *122 (internal quotation marks omitted); *see also Harper I*, slip op. at 8–11. "Democratic voters who live in cracked districts have little to no ability to instruct their representatives or obtain redress from their representatives on issues important to those voters." *Common Cause*, 2019 WL 4569584, at *122. The same is true under the 2021 Plans. The trial court

here correctly found that Democratic voters in each of the plans' many cracked districts have no real chance of successfully banding together to elect candidates of their choice, and that statewide the expected loss of Democratic representation in Congress, the House, and the Senate is significant and durable, resisting even substantial swings in favor of Democrats.

The 2021 Plans fail strict scrutiny—and indeed fail at any level of scrutiny. "Discriminating against citizens based on their political beliefs does not serve any legitimate government interest." *Common Cause*, 2019 WL 4569584, at *123. "Blatant examples of partisanship driving districting decisions are unrelated to any legitimate legislative objective." *Id.* at *115 (internal quotation marks omitted). "[P]artisan gerrymanders are incompatible with democratic principles" and are "contrary to the compelling governmental interests established by the North Carolina Constitution 'in having fair, honest elections,' where the 'will of the people' is ascertained 'fairly and truthfully.'" *Id.* at *115–16 (internal citations omitted).

2. The 2021 Plans impermissibly retaliate against Democratic voters based on their protected speech and association.

"In addition to forbidding discrimination," North Carolina's Freedom of Speech and Assembly Clauses "also bar retaliation based on protected speech" or conduct. *Id.* at *123; *see also McLaughlin*, 240 N.C. App. at 172, 771 S.E.2d at 579–80; *Elrod v. Burns*, 427 U.S. 347, 356 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990). "Courts carefully guard against retaliation by the party in power." *Harper I*, slip op. at 10. To prevail on a retaliation theory, a plaintiff must show that "(1)

the [challenged plan] take[s] adverse action against them, (2) the [plan] w[as] created with an intent to retaliate against their protected speech or conduct, and (3) the [plan] would not have taken the adverse action but for that retaliatory intent." *Common Cause*, 2019 WL 4569584, at *123 (citing *McLaughlin*, 240 N.C. App. at 172, 771 S.E.2d at 579–80).

The 2021 Plans meet all three elements. As to adverse action, "[i]n *relative* terms, Democratic voters under the [2021 Plans] are far less able to succeed in electing candidates of their choice than they would be under plans that were not so carefully crafted to dilute their votes. And in *absolute* terms, Plaintiffs are significantly foreclosed from succeeding in electing preferred candidates." *Id*. (emphasis in original). As to intent, the trial court made numerous findings—both qualitative and quantitative—that the 2021 Plans "intentionally targeted Democratic voters based on their voting histories." *Common Cause*, 2019 WL 4569584, at *124. And as to causation, the analyses of Plaintiffs' experts uniformly showed, and the trial court agreed, that other factors like political geography or adherence to nonpartisan redistricting criteria could not possibly explain the discriminatory results. "The adverse effects described above would not have occurred if Legislative Defendants had not cracked and packed Democratic voters and thereby diluted their votes." *Common Cause*, 2019 WL 4569584, at *124; *see* (R pp 3569, 3577, 3674, FOF ¶¶ 159, 183, 481-82).

C. The trial court's analysis of the Free Speech and Assembly Clauses is unpersuasive.

Again, the trial court found that the 2021 Plans' systematic packing and cracking of Democratic voters prevents Democrats from electing their preferred representatives in

Congress, the House, and the Senate. The court nonetheless held that this intentional and effective packing and cracking could not violate the Free Speech and Assembly Clauses. That is incorrect.

As in its equal protection analysis, the trial court relied heavily on a prefatory phrase in legislative history suggesting that certain 1971 state constitutional amendments were not intended to "'bring about a fundamental change' to the power of the General Assembly." (R p 3747, COL ¶ 111) (quoting Rept. of Study Comm'n at 10). But, again, this generalized, prefatory language—which did not so much as mention the Freedom of Speech and Assembly Clauses or the General Assembly—provides no basis for nullifying substantive constitutional protections, and numerous decisions of this Court confirm that protections added to the Constitution in 1971 constrain the power of the General Assembly in significant ways.

The trial court also believed itself bound to interpret the North Carolina Constitution's speech and assembly protections as "in alignment" with their federal counterparts. (R p 3751, COL ¶ 125); *see* (R p 3752, COL ¶ 129). But the court ignored controlling decisions holding that the state's protections are broader. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290. The cases that the trial court cited only confirm the point. (R p 3751, COL ¶ 125). For example, this Court in *State v. Petersilie* explained that although the federal and state free-speech guarantees may be "similar," "this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States." 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993) (quoting *State v. Hicks*, 333 N.C. 467, 483, 428 S.E.2d 167, 176 (1993)). And as this Court

has explained in the context of associational rights, "[w]hen interpreting the Constitution of North Carolina," this Court is "not bound by federal court rulings, so long as [its] decision comports with the United States Constitution." *Libertarian Party of N.C.*, 365 N.C. at 47, 707 S.E.2d at 203. Moreover, and as the trial court acknowledged, North Carolina's Freedom of Assembly Clause includes a "right to instruct … representatives" that does not exist at all in the federal First Amendment. (R pp 3751–52, COL ¶ 127). Extreme partisan gerrymandering independently violates that right, which has no federal counterpart: "Democratic voters who live in cracked districts have little to no ability to instruct their representatives or obtain redress from their representatives on issues important to those voters." *Common Cause*, 2019 WL 4569584, at *122.

Finally, the trial court suggested that Plaintiffs "are free to engage in speech" and to "engage in their associational rights and rights to petition" "no matter the effect the Enacted Plans have on their district." (R pp 3751–52, COL ¶¶ 125, 129). But a restriction on speech or assembly need not be absolute to violate the Constitution. The fact that Democratic voters can still cast ballots under gerrymandered maps, and can still speak to their fellow Democrats, changes nothing. The government unconstitutionally burdens speech where it renders disfavored speech less effective, even if it does not ban such speech outright. The government may not burden the "speech of some elements of our society in order to enhance the relative voice of others" in electing officials. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49, 96 S. Ct. 612 (1976)). Put differently, the government may not restrict a citizen's "ability to effectively exercise" their free speech rights. *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C.

App. 429, 451, 253 S.E.2d 473, 486 (1979), *aff'd,* 299 N.C. 399, 263 S.E.2d 726 (1980). "It is thus no answer to say that petitioners can still be 'seen and heard'" if the burdens placed on their speech "have effectively stifled petitioners' message." *McCullen v. Coakley*, 573 U.S. 464, 490, 134 S. Ct. 2518, 2537 (2014).

Accordingly, "[t]he government unconstitutionally burdens speech where it renders disfavored speech *less effective*"—as the General Assembly has done here—"even if it does not ban such speech outright." *Common Cause*, 2019 WL 4569584, at *121 (emphasis in original). "[T]he distinction between laws burdening and laws banning speech is but a matter of degree," *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 565 (quoting *United States v. Playboy Ent. Group, Inc*., 529 U.S. 803, 812 (2000)), and thus "the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell,* 564 U.S. at 565–66 (quoted in *Common Cause*, 2019 WL 4569584, at *121).

By the trial court's logic, the General Assembly could impose a smaller cap on political expenditures made for Democratic candidates than for Republican candidates, on the theory that Democratic supporters could still "engage in speech." (R p 3751, COL ¶ 125). But that would be obvious unconstitutional discrimination. *See Davis v. FEC,* 554 U.S. 724, 128 S. Ct. 2759 (2008) (invalidating campaign finance law that disfavored candidates who self-financed their campaigns). And so is this. The trial court found that the district boundaries in the 2021 Plans were manipulated to ensure that Democratic voters have less ability than Republican voters to elect representatives of their choice and to elect a majority in each chamber of the General Assembly. Democratic voters may still be able to "cast ballots under gerrymandered maps," but systematically packing and cracking these

voters based on their political beliefs and party affiliation, with the goal and effect of making their votes less effective, violates the North Carolina Constitution. *Common Cause*, 2019 WL 4569584, at *121.

V. The *Harper* Plaintiffs have standing.

The trial court further erred by holding that *Harper* Plaintiffs lack standing. (R pp 3713–14, COL ¶¶ 7-17). Under settled principles of North Carolina law, the *Harper* Plaintiffs have standing to challenge their own congressional and legislative districts, the county groupings that contain their legislative districts, and the congressional and legislative maps as a whole.

"[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, our State's standing jurisprudence is broader than federal law." *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) (internal quotation marks omitted); accord *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) ("While federal standing doctrine can be instructive as to general principles . . . , the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine."); *see also Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 607, 853 S.E.2d 698, 733 (2021). "At a minimum, a plaintiff in a North Carolina court has standing to sue when it would have standing to sue in federal court." *Common Cause*, 2019 WL 4569584, at *105.

Since Plaintiffs would have standing to sue even under the stricter federal standard for standing identified in *Gill v. Whitford*, 138 S. Ct. 1916, 1930–31 (2018), they necessarily have standing under state law. *Gill* held that any plaintiff who "lives in a

cracked or packed district" has standing to challenge that district and all districts necessary to reshape their district to free it of partisan influence. *Id.* at 1931–32. The trial court correctly found that the *Harper* Plaintiffs reside in all North Carolina congressional districts, that "these districts are the result of partisan packing or cracking, and there is a plausible alternative that would not create the same partisan composition of the districts that are a result on partisan packing or cracking." (R p 3707, FOF ¶ 615). It made identical findings as to the house and senate districts where Plaintiffs reside. (*Id.*, FOF ¶¶ 616-17.)

Under North Carolina law, Plaintiffs also have standing to challenge the county groupings that contain their house and senate districts. As the trial court correctly explained, "because the unique manner in North Carolina in which one state legislative district is drawn in a county grouping necessarily is tied to the drawing of some, and possibly all, of the other districts within that same grouping, a challenge to the entire county grouping by an individual plaintiff constitutes the necessary 'personal stake in the outcome of the controversy' for a plaintiff to have standing to challenge all districts within a county grouping." (R p 3713, COL ¶ 8) (citing *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879; *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002)).

The Plaintiffs also have standing under North Carolina law to challenge the entire house and senate maps regardless of where in the state they live. The harm created by the overall gerrymander of the state house and senate maps, which is the result of a series of choices to gerrymander particular clusters, includes the fact that those plans create what the trial court called "firewalls" preventing Democrats from breaking the Republican majority or supermajority even in electoral environments when they would do so in the

overwhelming majority of nonpartisan maps. (R p 3566, FOF ¶¶ 145-47). Because of the significance of legislative control to the laws and policies in this State, every North Carolinian has a personal stake sufficient under North Carolina law to challenge a map on the ground that it creates a gerrymander guaranteeing one-party control of the legislature.

VI. The Court should order a remedial process to adopt lawful new maps.

Based on the facts and law, the Court should declare that the enacted 2021 Congressional, Senate, and House Plans violate the North Carolina Constitution and enjoin their use in the 2022 elections and any future election. The Court should further order an efficient remedial process to ensure that lawful new plans are in place before the reopening of the candidate filing period, scheduled for 24 February 2022.

A. The General Assembly's repeated unlawful conduct justifies the appointment of a special master to draw remedial plans.

The record and the trial court's findings of fact conclusively establish that Legislative Defendants engaged in intentional extreme partisan gerrymandering in drawing all three enacted plans, in violation of their own map-drawing criteria and procedures. Their conduct in 2021 caps a decade of unlawful racial and partisan gerrymandering. Because Legislative Defendants refused to draw constitutional districts, four of the past five congressional elections in North Carolina have been held using maps that courts later declared unconstitutional. Defendant Berger presided over the adoption of unconstitutional racial gerrymanders in 2011, and Defendant Moore was a member of the legislature that passed those plans. *See Covington*, 316 F.R.D. at 124–25. Both Defendants Berger and

Moore presided over the passage of unconstitutional partisan gerrymanders in 2016 and 2017. *See Harper I*, slip op. at 18; *Common Cause*, 2019 WL 4569584, at *1–3.

While Legislative Defendants openly admitted to their partisan gerrymandering in 2016 and 2017, the lopsided partisan maps in 2021 were the product of secrecy and deception. Representative Hall actively misled his colleagues in the House—as well as the public, the Plaintiffs, and the trial court—regarding his use of "concept maps" during secret "strategy sessions" with a legislative aide and others, outside of public view, and then lost or destroyed all record of these concept maps. (Ex. pp 3376–77, 3380–81). And in 2017, Republican legislative leaders actively misled a federal court regarding their remedial map-drawing activities to avoid court-ordered special elections in which they would have lost their veto-proof supermajorities. *See Common Cause*, 2019 WL 4569584, at *103–05 (three-judge panel was "troubled by representations made by Legislative Defendants, or attorneys working on their behalf, in briefs and arguments to the *Covington* Court and to General Assembly colleagues at committee meetings that affirmatively stated that no draft maps had been prepared even as late as August 4, 2017").

By engaging in intentional extreme partisan gerrymandering and calculated deception in 2021, after their history of unlawful racial and partisan gerrymandering over the past decade, Legislative Defendants have forfeited their right to redraw the maps now. With only a short time available to adopt new plans before the reopening of the candidate filing period, this Court has ample justification to remedy Legislative Defendants' constitutional violations on its own by appointing a Special Master to draw nonpartisan maps now, following the General Assembly's stated redistricting criteria.

Harper Plaintiffs propose that the Court engage Dr. Nathaniel Persily, a professor at Stanford Law School, as Special Master. Dr. Persily has served as a Special Master to North Carolina federal and state courts during the remedial map-drawing phases of prior redistricting lawsuits, including *Covington* and *Common Cause v. Lewis*.[1] Immediately engaging a Special Master to draw nonpartisan maps is the surest method of implementing constitutional redistricting plans without further delay to the election schedule.

B. If the Court permits the General Assembly to redraw the maps, it should set forth procedures to ensure the new maps are not gerrymandered.

If the Court chooses to give Legislative Defendants yet another chance, it should order the General Assembly to enact proposed remedial plans within the statutory two-week period, N.C.G.S. § 120–2.4(a), and should set forth procedures for promptly reviewing the General Assembly's proposed remedial plans and, if necessary, the adoption of alternative court-approved plans with the assistance of a Special Master.

First, the Court should immediately retain a Special Master to evaluate the General Assembly's new maps. During the two-week period in which the General Assembly is drawing new maps, the Special Master should prepare alternative remedial plans for the Court's consideration if the remedial plans enacted by the General Assembly fail to remedy the unlawful partisan gerrymandering. Once again, engaging a Special Master now minimizes the risk of further election delays.

Second, the Court should prohibit the General Assembly from replicating the same biased choices that led the 2021 plans to unconstitutionally favor Republicans. As one

[1] Dr. Persily's CV is available at https://law.stanford.edu/directory/nathaniel-persily.

example, to correct the most glaring partisan anomalies of the 2021 Congressional plan, the Court should require the remedial Congressional plan to avoid trisecting Wake, Mecklenburg, and Guilford Counties, and require that the plan afford the voters of the Piedmont Triad the ability to elect a congressional candidate of their choice.

While the 2021 Adopted Criteria require the maps to minimize county splits, the 2021 Congressional Plan trisects each of the three largest counties—Wake, Mecklenburg, Guilford, all of which are heavily Democratic—diluting the impact of Democratic voters, while splitting no other county more than once. (R pp 3558–60, FOF ¶¶ 125–27).

The trisection of Guilford County in particular was designed to eliminate a Democratic Congressional seat. The 2021 Congressional Plan cracks the county into three parts, splits Greensboro in two, and double-bunks incumbent Democratic Representative Kathy Manning with incumbent Republican Virginia Foxx in an overwhelmingly Republican district. (R pp 3561, 3671–72, FOF ¶¶ 471, 539). In doing so, Legislative Defendants violated their own adopted criteria regarding counties and municipalities, and abandoned their stated goal of avoiding double-bunking incumbents. The trial court found that "the three-way splitting of Guilford County and resulting creation of three safe Republican districts in the Piedmont Triad area could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria," (R p 3672, FOF ¶ 473), but was instead "designed in order to accomplish the legislature's predominant partisan goals." (R p 3673, FOF ¶ 480). Legislative Defendants made no attempt to justify their intentional packing and cracking of hundreds of thousands of Guilford and Forsyth County voters to dilute their voting power.

Third, before approving the General Assembly's proposed new maps, the Court should allow all parties to submit briefs addressing whether those maps adequately remedy the unlawful partisan gerrymandering.

Fourth, following the parties' submission of briefs, the Special Master should submit a report to this Court assessing whether the General Assembly's new plans are an adequate remedy. In making that assessment, the Special Master should consider the statistical analyses of experts who testified at trial. If the Court then determines that the General Assembly's new plans do not adequately remedy the unlawful partisan gerrymandering, the Court should adopt alternative maps prepared by the Special Master and order that those alternative maps be used in the 2022 primary and general elections.

CONCLUSION

The Court should reverse the trial court's judgment and hold that *Harper* Plaintiffs' claims are justiciable, that *Harper* Plaintiffs have standing, and that the 2021 Congressional, House, and Senate Plans violate the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly Clauses. The Court should further order an efficient remedial process to ensure that lawful new plans are in place before the reopening of the candidate filing period, currently scheduled for 24 February 2022, by appointing a special master to draw its own remedial plans in the event that any new plans enacted by the General Assembly fail to pass constitutional muster.

Respectfully submitted, this 21st day of January, 2022.

PATTERSON HARKAVY LLP

Electronically submitted
Burton Craige, NC Bar No. 9180
Narendra K. Ghosh, NC Bar No. 37649
Paul E. Smith, NC Bar No. 45014
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed have authorized me to list their names on this document as if they had personally signed it.

ELIAS LAW GROUP LLP

Abha Khanna*
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Phone: (206) 656-0177
Facsimile: (206) 656-0180
AKhanna@elias.law

Lalitha D. Madduri*
Jacob D. Shelly**
Graham W. White**
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

ARNOLD AND PORTER KAYE SCHOLER LLP

Elisabeth S. Theodore**
R. Stanton Jones**
Samuel F. Callahan**
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
elisabeth.theodore@arnoldporter.com

**Admitted pro hac vice*
***Pro hac vice motion pending*

Counsel for Harper Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate procedure, counsel for Plaintiff certifies that the foregoing brief, which was prepared using a 13-point proportionally spaced font with serifs.

Electronically submitted
Narendra K. Ghosh

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of January, 2022, a copy of the foregoing Plaintiff-Appellants' Brief was electronically filed and served by electronic mail on counsel of record for Defendants-Appellees as follows:

Amar Majmundar
Stephanie A. Brennan
Terence Steed
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
amajmundar@ncdoj.gov
sbrennan@ncdoj.gov
tsteed@ncdoj.gov

Counsel for the State Defendants

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Jeffrey Loperfido
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
katelin@scsj.org
jeffloperfido@scsj.org

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com

Phillip J. Strach
Alyssa Riggins
John E. Branch, III
Thomas A. Farr
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Ave., Suite 200
Raleigh, NC 27612
phil.strach@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
john.branch@nelsonmullins.com
tom.farr@nelsonmullins.com

Mark E. Braden
Katherine McKnight
Baker Hostetler LLP
1050 Connecticut Avenue NW,
Suite 1100
Washington, DC 20036
mbraden@bakerlaw.com
kmcknight@bakerlaw.com

Counsel for the Legislative Defendants

Stephen D. Feldman
Adam K. Doerr
Erik R. Zimmerman
Robinson, Bradshaw & Hinson PA
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com

oliviamolodanof@hoganlovells.com

Counsel for Plaintiff Common Cause

Sam Hirsch
Jessica Ring Amunson
Zachary C. Schuaf
Karthik P. Reddy
Urja Mittal
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, D.C. 20001
shirsch@jenner.com
jamunson@jenner.com
zschauf@jenner.com
kreddy@jenner.com
umittal@jenner.com

Counsel for NCLCV Plaintiffs

Electronically submitted
Narendra K. Ghosh