No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

Plaintiffs-Appellants,

REBECCA HARPER, et al.,

Plaintiffs-Appellants, and

COMMON CAUSE,

Plaintiff-Intervenor-Appellant,

v.

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

Defendants-Appellees.

From Wake County
21 CVS 015426
21 CVS 50085

OPENING 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 S.B. 744, the remedial Senate plan enacted by the General Assembly on February 17, 2022, cures the constitutional defects in the invalidated 2021 Senate plan?

STATEMENT OF THE CASE

This is an appeal of the Remedial Order 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. This Court issued an order on 4 February 2022, and a subsequent opinion on 14 February 2022, invalidating the 2021 Plans as 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, and remanding to the trial court for remedial proceedings. This Court ordered that, in accordance with N.C.G.S. § 120-2.4(a), the General Assembly be given two weeks to enact proposed remedial congressional and state legislative districting plans for the trial court's review on remand. This Court further allowed all parties and intervenors to submit proposed remedial plans for the trial court's consideration.

On remand, the trial court on 16 February 2022 appointed three Special Masters to assist it in reviewing the parties' proposed remedial plans. The Special Masters in turn hired four expert advisors to assist their evaluation of the plans. On 17 February 2022, the General Assembly enacted a remedial Senate plan, S.B. 744, as well as remedial congressional and House plans. On 18 February 2022, Legislative Defendants submitted the General Assembly's enacted remedial plans to the trial court. *Harper* Plaintiffs, *NCLCV*

Plaintiffs, and Plaintiff-Intervenor Common Cause also each submitted their own proposed remedial plans.

The trial court issued the Remedial Order on 23 February 2022. The Remedial Order stated that the Special Masters recommended approving the General Assembly's enacted remedial Senate and House plans and rejecting its remedial congressional plan as once again unconstitutional. The trial court adopted the Special Masters' findings in full, and thus approved the enacted remedial Senate and House plans. It declined to approve the enacted remedial congressional plan, and instead adopted an interim congressional plan drawn by the Special Masters.

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

This Court held in invalidating the General Assembly's 2021 redistricting plans that a plan is unconstitutional if it fails to provide voters with "substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same vote share] in that same election." *Harper v. Hall*, 380 N.C. 317, 387, 868 S.E. 2d 499, 549 (N.C. 2022). The remedial Senate plan enacted by the General Assembly and approved by the trial court flunks this constitutional standard.

The record evidence on this question is uniform. The trial court's Special Masters hired four expert advisors to assess whether the remedial Senate plan complies with this Court's opinion and order in this case. *All four advisors* found that the remedial Senate plan provides grossly unequal voting power to Democratic and Republican voters. Dr. Eric McGhee found that, in tied elections, "Republicans would still hold 27 or 28 seats," and that they would likely "maintain" their advantage "throughout the decade." (R p 5074). Dr. Bernard Grofman found that the remedial Senate plan contains a "substantial pro-Republican bias," creates "24 Republican leaning districts," and that Democrats would have to win "nine of the nine competitive seats to win a majority in the Senate." (R p 5042). Dr. Sam Wang found that, across elections, the plan favors Republicans by over two seats, and is biased in favor of Republicans across all standard statistical metrics. (R p 5085). And, comparing the remedial Senate plan to an ensemble of computer-generated non-partisan plans, Dr. Tyler Jarvis found "strong evidence of partisan gerrymandering"—the enacted plan is "often a significant outlier in favor of the Republicans." (R pp 5116, 5119).

The unanimous findings of these advisors—and all of the parties' experts—make clear that even in elections where Democrats win a substantial majority of the statewide vote, Democrats will be unable to win a majority in the Senate. Republicans, on the other hand, are all but guaranteed a majority in the upper chamber and can even win *supermajorities* with the slimmest of victories in the statewide popular vote. Even the Legislative Defendants' own expert found severe partisan asymmetry in the plan, determining that a substantial 55% share of the statewide popular vote would win a clear supermajority for Republicans (33 seats), while providing no such opportunity for

Democrats (28 seats). (R pp 4749-50). Simply put, the remedial Senate plan fails to provide Democratic and Republican voters with "substantially the same opportunity to electing a supermajority or majority" as the North Carolina Constitution requires. *Harper*, 380 N.C. at 387, 868 S.E.2d at 549. It is the hallmark of an unconstitutional redistricting plan and should, in the view of one of the Special Masters' advisors, "be viewed as a pro-Republican gerrymander." (R p 5042); *see* (R p 5042) ("substantial pro-Republican bias"); (R p 5119) ("strong evidence of partisan gerrymandering").

The trial court nonetheless approved the remedial Senate plan because the Special Masters viewed it as compliant with two of the many statistical standards this Court identified—those based on the "mean-median difference" and the "efficiency gap." But the trial court's assessment of the evidence on mean-median difference was simply wrong; the evidence overwhelmingly showed that the remedial Senate plan fails the 1% threshold that this Court identified. And regardless, as this Court explained, no "mathematical threshold[ ]" can dictate a redistricting plan's constitutionality. *Harper*, 380 N.C. at 386, 868 S.E. 2d at 548. The trial court's myopic decision to approve a plan based on its performance on this basis effectively nullifies this Court's landmark ruling declaring partisan gerrymandering unconstitutional. It signals to the General Assembly that so long as it can construct a map compliant with one statistical measure, brazen gerrymandering is fair game. And contrary to the trial court's suggestion, no "presumption of constitutionality" justifies hands-off judicial review of redistricting plans. If anything, courts apply an especially *stringent* standard in evaluating remedial legislation after

finding—as the trial court did here—that the legislature intentionally discriminated against its citizens.

This Court must reverse the decision below and remand with instructions for the trial court to adopt the *Harper* Plaintiffs' proposed remedial Senate plan, or another remedial Senate plan that "will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan" as the Constitution of this State requires.

STATEMENT OF THE FACTS

A. Plaintiffs challenge the 2021 redistricting plans.

Following the 2020 census, the General Assembly enacted new congressional, state House, and state Senate maps on 4 November 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).

Harper Plaintiffs—25 North Carolina voters—filed this action on 18 November 2021 challenging the plans under the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. Chief Justice Newby appointed a panel of three trial-court judges to hear the case. N.C. Gen. Stat. § 1-267.1. *Harper* Plaintiffs' case was consolidated with *N.C. League of Conservation Voters v. Hall*, No. 21 CVS 015426, and Plaintiff Common Cause intervened. The trial court denied Plaintiffs' motions for a preliminary injunction on 2 December 2021, but on 8 December this Court reversed, granted a preliminary injunction, stayed the candidate filing period, and postponed the state's primaries to 17 May 2022.

Following a four-day bench trial, the trial court issued a final judgment on 11 January 2022 finding that all three of the enacted 2021 plans were extreme partisan gerrymanders. (R pp 3512–771). Based on the analyses of Plaintiffs' experts, the court found that the enacted Senate plan was intentionally and carefully designed to maximize Republican advantage on a statewide basis and in specific county groupings and to ensure Republican supermajorities or majorities. (R pp 3564–77, 3597–3617). The analysis of Legislative Defendants' own expert largely reenforced these conclusions. (R pp 3592, 3617). Despite its extensive factual findings of extreme partisan gerrymandering, the trial court rejected Plaintiffs' constitutional claims as nonjusticiable. (R p 3756, FOF ¶ 144). The court thus denied relief, entered judgment for Legislative Defendants, and ordered the reopening of candidate filing on 24 February 2022. (R p 3769).

B. This Court invalidates the 2021 redistricting plans.

This Court reversed. In a February 4 order supplemented by an opinion on February 14, the Court "adopted in full" the trial court's "extensive and detailed factual findings" regarding the partisan intent and effect of all three 2021 plans. (R p 4073; *see* R p 3819). But this Court held that the trial court erred in rejecting Plaintiffs' claims as nonjusticiable under North Carolina law. The Court held that all three of Plaintiffs' claims—under the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses—were justiciable. (R pp 4039–55).

This Court held that, under these constitutional provisions, North Carolina's redistricting plans must give "voters of all political parties substantially equal opportunity to translate votes into seats across the plan." (R pp 4058–59). In particular, "voters are

entitled to have substantially the same opportunity to elect[] a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised" a given percentage "of the statewide vote share in that same election." (R pp 4062-63). While the Court did "not believe it prudent or necessary to . . . identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander," it identified "multiple reliable ways of" evaluating these claims, including "mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis. . . ." (R pp 4057-58). "If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional." (R pp 4058-59) By way of example, the Court observed that "any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections" could be treated "[a]s presumptively constitutional." (R p 4061). It also could be "entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional." (*Id.*)[1]

[1] Mean-median difference is a measure of partisan bias that represents the difference between the average Democratic vote share and the median Democratic vote share across all districts. (R pp 4060, 4755, 4812). The efficiency gap compares each party's "wasted votes"—which is the total of (1) all of the votes for the party in districts where that party lost, plus (2) the number of votes in winning districts that were not necessary to the victory. (R pp 4061, 4755–56). Larger mean-median differences or efficiency gaps suggest that one party's voters have been packed and cracked more effectively than the other's. (R p 4812).

This Court explained, however, that when a plan fails to provide partisan symmetry, it "is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is 'narrowly tailored to advance a compelling governmental interest.'" (R p 4056 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 377, 382, 562 S.E.2d 377, 393, 396 (2002)). And creating "partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government as secured in the … Declaration of Rights." (R pp 4056-57).

Applying these principles to the enacted 2021 Senate plan, this Court concluded that the plan "constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power." (R p 4082). The Court relied on the trial court's findings "that the [Senate map is] a result of intentional, pro-Republican partisan redistricting," and that every Senate county grouping at issue "minimized Democratic districts and maximized safe Republican districts through the 'packing' and 'cracking' of Democratic voters. . . ." (R p 4084). "Based on these findings and numerous others," it was "abundantly clear … that the 2021 North Carolina Senate map substantially diminishe[d] and dilute[d] on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution." (R p 4085). And the plan "fail[ed] strict

scrutiny" given "the breadth and depth of the evidence that partisan advantage predominated over any traditional neutral districting criteria" and the lack of any evidence that the plan "advance[ed] some compelling neutral priority." (R pp 4082-86).

Justice Morgan, joined by Justice Earls, wrote separately to emphasize the "dispositive strength of [North Carolina's] Free Elections Clause." (R p 4094). Chief Justice Newby, joined by Justices Berger Jr. and Barringer, dissented, expressing the view that partisan gerrymandering does not violate the North Carolina Constitution. (R p 4096).

C. The parties submit remedial plans to the trial court.

The Court remanded the case for remedial proceedings pursuant to N.C. Gen. Stat. § 120-2.4. The Court gave the General Assembly two weeks to enact remedial plans; authorized the other parties to submit their own proposed remedial plans at the same time; and instructed the trial court to adopt compliant plans by noon on February 23. (R p 3823). On 16 February 2022, the trial court appointed three special masters, who in turn hired expert assistants to assist in evaluating proposed remedial plans. (R pp 4176–82, 4870–71).

On 17 February 2022, the General Assembly enacted a remedial Senate map, S.B. 744, that passed on strict party-line votes in both chambers. (R p 4878). As *Harper* Plaintiffs explained in their objection, S.B. 744 failed the key metrics of partisan symmetry identified in this Court's order and opinion. In particular, *Harper* Plaintiffs' testifying expert Dr. Jonathan Mattingly and his colleague Dr. Gregory Herschlag measured the partisan symmetry of S.B. 744 by starting with symmetric, reciprocal pairs of Democratic and Republican vote shares (e.g., 53% Republican vs. 53% Democratic) across a range of recent, statewide elections and calculating how those two symmetric vote shares would

translate into seats for each party. (R pp 4740, 4747). Under this measure of partisan symmetry, the average deviation of S.B. 744 was 4.0125 seats, meaning that in any given election, across a range of vote shares from 50% to 55%, Republicans would elect four more Senators than Democrats would elect at the same vote share. (R p 4747). By comparison, *Harper* Plaintiffs' proposed remedial Senate plan produced an average deviation in seats won at a given party vote share of only 1.04375 seats. (*Id.*)

Based on the results of prior North Carolina elections, *Harper* Plaintiffs' experts also found that Republicans would win a majority of Senate seats half the time under S.B. 744 when *Democrats* won a majority of the statewide vote. In elections where Republicans won a majority of the statewide vote, in contrast, Republicans would *always* win a Senate majority under S.B. 744. (R p 4748). In addition, *Harper* Plaintiffs' experts concluded that S.B. 744 had a mean-median difference of 1.304%, exceeding the 1% mean-median threshold identified by this Court. (R p 4749).

The analysis of Legislative Defendants' expert Dr. Michael Barber confirmed that S.B. 744 exhibited partisan asymmetry, showing that Democrats would need to ascend from 50% vote share to nearly 55% vote share before gaining a 28th seat (still two seats short of a supermajority), whereas if Republicans experienced that same 5-point increase, their seat count would reach 33 (exceeding a supermajority). (R pp 4413, 4749–50).

D. The trial court enters the Remedial Order.

On 23 February 2022, the trial court issued a final order adopting the General Assembly's remedial Senate and House maps but finding that its remedial congressional map again violated the North Carolina Constitution. (R pp 4866–97). As to the Senate map,

the court concluded that the "analysis performed by the Special Masters and their advisors"—summarized in a report filed with the court's opinion—demonstrated that S.B. 744 was "satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion"—namely, this Court's reference to "mean-median difference of 1% or less" and "efficiency gap less than 7%." (R p 4879). "[T]o the extent there remains a partisan skew in the Remedial Senate Plan," the trial court stated that the "skew [wa]s explained by the political geography of North Carolina." (*Id.*)

The accompanying Special Masters' report explained that they considered "any plan with a mean-median difference of 1% or less … and an efficiency gap below 7%" to be "presumptively constitutional." (R p 4892). The Special Masters thus recommended upholding S.B. 744, relying principally on the fact that "[a]ll of the advisors and experts found the efficiency gap of the proposed remedial Senate plan to be less than 7%" and stating (incorrectly) that the "majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%." (*Id.*). "In addition to these facts," the Special Masters described having "considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters concluded under the metrics identified by the North Carolina Supreme Court the remedial Senate plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it

give appropriate deference to the General Assembly and uphold the constitutionality of the remedial Senate plan." (*Id.*).

Importantly, the Special Masters' report did not mention that *all four* of the Special Masters' assistants concluded that S.B. 744 failed key measures of partisan symmetry:

- Dr. Eric McGhee concluded that "in a tied election Republicans would still hold 27 or 28 seats," while "Democrats would need to win as much as 53 percent of the vote to claim 25 seats." (R p 5074). Dr. McGhee also found that S.B. 744 had a mean-median differential of 2.2%, more than double the 1% threshold. (R p 5072).
- Dr. Bernard Grofman likewise found "a substantial pro-Republican bias [in the enacted remedial Senate map] in terms of the likelihood that a majority of the voters will be able to win a majority of the seats." (R p 5042). He found that S.B. 744—just like the invalidated 2021 Senate plan—created "24 Republican leaning districts that, based on averaged recent data will, barring a political tsunami, elect Republicans; 17 Democratic leaning districts that will, barring a political tsunami, elect Democrats; and [9] competitive districts. Democrats would have to win nine of the nine competitive seats to win a majority in the Senate." (R pp 5039, 5042). "Because they all point in the same direction, the political effects statistical indicators of partisan gerrymandering argue for the conclusion that this NC Senate map should be viewed as a pro-Republican gerrymander." (R p 5043).
- Dr. Sam Wang found that across elections, the "seat partisan asymmetry is a 2.1-seat difference in favor of Republicans" and that "[a]ll of the five other metrics"—

mean-median difference, partisan bias, lopsided wins difference, declination, and efficiency gap—"also favor Republicans." (R p 5085).

- Dr. Tyler Jarvis found "strong evidence of partisan gerrymandering," including that S.B. 744 was "often a significant outlier in favor of the Republicans" in comparison to a randomly generated ensemble of non-partisan plans. (R pp 5116, 5119).

Contrary to the statement in the Special Masters' report that the "majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%" (R p 4892), two of the Special Masters' advisors (Drs. McGhee and Jarvis) found that the differential in fact exceeded 1%. (R pp 5072, 5124). And while the two other advisors (Drs. Grofman and Wang) found that S.B. 744's mean-median differential was less than 1%, both did so using only a single averaged election where the Republicans won a specific vote share, rather than a range of elections with varied results. (R pp 5078, 5039, 5042–43).[2]

Legislative Defendants appealed and moved to stay the trial court's order rejecting the General Assembly's remedial congressional map and instead adopting the court's own remedial interim congressional map. *Harper* and *NCLCV* Plaintiffs appealed and moved to stay the trial court's order adopting the General Assembly's remedial Senate map; and

[2] Legislative Defendants moved to disqualify Drs. Wang and Jarvis based on emails they sent to *Harper* Plaintiffs' experts at the outset of the remedial phase regarding the experts' analysis of the 2021 redistricting plans. Upon learning of these communications, *Harper* Plaintiffs promptly disclosed them to the trial court, and the court denied Legislative Defendants' motion. (R pp 4862–63, 4890–91).

Common Cause did the same for the enacted remedial Senate and House maps. (R pp 5143–59.) This Court denied all stay motions the same day.

STANDARD OF REVIEW

The trial court's legal interpretations are reviewed de novo. *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019). Its factual findings are reviewed for substantial evidence. *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013).

ARGUMENT

I. The General Assembly's enacted remedial Senate plan does not remedy the constitutional defects in the invalidated 2021 plan.

The North Carolina Constitution requires that redistricting plans provide voters of each party with substantially the same opportunity to elect a majority or supermajority of representatives in the General Assembly. The remedial Senate plan does no such thing. It prevents Democrats from winning a majority in the Senate under any reasonable election scenario and frequently gives a supermajority to Republicans even at vote shares close to 50-50. The remedial Senate plan is therefore plainly unconstitutional.

A. The North Carolina Constitution requires partisan symmetry.

Partisan gerrymandering violates the North Carolina Constitution because it deprives citizens of "the right to equal voting power" on the basis of partisan affiliation. *Harper*, 380 N.C. at 383, 868 S.E.2d at 546. Essential to equal voting power in districting is the requirement of partisan symmetry, *i.e.*, that "the districting plan will give voters of all political parties substantially equal opportunity to translate votes into seats across the

plan." *Id.* at 385, 868 S.E.2d at 548. As this Court explained, "voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percent of the statewide vote share in that same election." *Id.* at 387, 868 S.E.2d at 549. And "when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size[,] the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power." *Id.* at 383, 868 S.E.2d at 546-47.

Partisan symmetry is necessary to protect each of the constitutional rights that formed the basis of this Court's order and opinion. The Free Elections Clause, N.C. Const. art. I, § 10, prohibits partisan gerrymandering because "for an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power and the state may not diminish or dilute that voting power on a partisan basis." *Harper,* 380 N.C. at 376, 868 S.E.2d at 542. Voters do not have equal voting power if they lack an equal opportunity to translate votes into seats. An asymmetrical redistricting plan ensures that the ruling party can retain a legislative majority even when the people choose to vote them out of office, thus allowing "the legislature [to] manipulate[ ] the composition of the electorate to ensure that members of its party retain control, . . . prevent[ing] elections from reflecting the will of the people impartially." *Id.*

The Equal Protection Clause, N.C. Const art. I, § 19, similarly "encompasses 'the principles of substantially equal voting power and substantially equal legislative representation.'" *Id.* at 377, 868 S.E.2d at 543 (quoting *Stephenson*, 355 N.C. at 378, 562

S.E.2d 377). In legislative elections, "voters only have equal 'representational influence' if results fairly reflect the will of the people not only district by district, but in aggregate, and on equal terms." *Id.* at 379, 868 S.E.2d at 544. In a redistricting plan that lacks partisan symmetry, "those who have been deprived equal voting power lack the same opportunity as those from the favored party to elect a governing majority, even when they vote in numbers that would garner voters of the favored party a governing majority." *Id.* Such plans produce precisely the harms that the Equal Protection Clause guards against in redistricting: Voters from the disfavored party "have far fewer legislators who are 'responsive' to their concerns and who can together 'press their interests.'" *Id.* (quoting *Stephenson*, 355 N.C. at 379, 562 S.E.2d 377). And the government itself fails to reflect popular sovereignty, as "the 'will' on which the government 'is founded' is not that of the people of this state but that of the ruling party.'" *Id.*

The Free Speech Clause and Freedom of Assembly Clauses, *see* N.C. Const. art. I, §§ 12, 14, also require partisan symmetry because when legislators "apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views." *Harper*, 380 N.C. at 382, 868 N.E. 2d at 546. By giving North Carolinians of one party an unequal opportunity to elect legislative majorities and supermajorities, asymmetrical plans subject these voters "to disfavored status based on their views," thereby "undermin[ing] the role of free speech and association in formation of the common judgment" and "distort[ing] the expression of the people's will and the channeling of the

political power derived from them to their representatives in government based on viewpoint." *Id.*

B. The enacted remedial Senate plan does not provide partisan symmetry.

This Court explained that partisan symmetry can be measured "by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions." *Harper*, 380 N.C. at 383, 868 S.E.2d at 547. The record evidence is abundantly clear that the remedial Senate plan flunks this constitutional standard. The trial court's contrary finding is unsupported by any evidence—let alone substantial evidence—and must be reversed.

1. The Special Masters' four assistants uniformly found that the enacted remedial Senate plan fails to provide partisan symmetry.

The Special Masters retained four expert assistants to provide quantitative analysis of the remedial Senate plan: Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang. *See* (R p 4892). Each assistant found that the Remedial Senate Plan fails to provide North Carolinians with substantially equal voting power.

First, Dr. Bernard Grofman (the Jack W. Peltason Chair of Democracy Studies and Distinguished Professor of Political Science at the University of California, Irvine) found that the remedial Senate plan—far from affording equal voting power to Democratic and Republican voters—"creates a distribution of voting strength across districts that is *very*

lopsidedly Republican." (R p 5042 (emphasis added)). Dr. Grofman has extensive experience with redistricting, having served as a special master to draw remedial maps for five different federal courts and for the Virginia Supreme Court. (R p 5027). He evaluated the proposed remedial maps using a "variety of metrics," including projections of Democratic-leaning, Republican-leaning, and competitive seats; the mean-median difference; measures of symmetry in translating votes to seats; the efficiency gap; and compactness. (R p 5037).

Dr. Grofman found that although North Carolina is a "nearly evenly divided" state, the remedial Senate plan creates 24 safe Republican districts, 17 safe Democratic seats, and 9 competitive seats. (R p 5042). Dr. Grofman explained that "Democrats would have to win nine of the nine competitive seats to win a majority in the Senate," while Republicans need to win only two competitive seats. (R p 5042). He accordingly determined that the remedial Senate plan exhibits "a substantial pro-Republican bias in terms of the likelihood that majority of the voters will be able to win a majority of the seats[.]" (R p 5042).

Moreover, while recognizing that the mean-median difference suggested only "a slight Republican edge," he cautioned that "the median is only one district" and it was more important to "look at the overall map." (*Id.*) Measuring across all districts, Dr. Grofman found that the Republicans had a "seats bias" of 4.07%—meaning that Republicans at a given vote share would win substantially more seats than Democrats at that same vote share—and a "vote bias" of 2%—meaning that "only a win by considerably more than 50% of the statewide vote can yield the Democrats a majority of seats." (*Id.*) Dr. Grofman also

observed that "these two bias measures" were "at least twice as high" in the Remedial Senate Map" than in the maps proposed by the *Harper* and *NCLCV* Plaintiffs—the General Assembly's map was "much more extreme with respect to partisan bias than either of the alternatives." (*Id.*). Dr. Grofman thus had no trouble concluding that the remedial Senate plan "should be viewed as a pro-Republican gerrymander." (R p 5043). His report makes clear that the Remedial Senate Plan fails to provide North Carolinians with a substantially equal opportunity to translate votes into seats as the Constitution requires.

Second, Dr. Eric McGhee (a Research Fellow for the Public Policy Institute of California) also found that the Remedial Senate Plan fails to provide partisan symmetry. Dr. McGhee is a political scientist who created the efficiency-gap metric and frequently publishes and consults on issues involving partisan advantage and redistricting. (R p 5057). To analyze the enacted remedial plans, Dr. McGhee used a model developed by PlanScore, a nonpartisan website that scores redistricting plans on measures of partisan advantage. (R p 5058). As Dr. McGhee explained, PlanScore's model uses the results of historical elections as a baseline but, unlike other models, seeks to account for potential changes in voting patterns that would have occurred had the districts at issue been used during those historical elections. (*Id.*)

Using this model, Dr. McGhee found that the Remedial Senate Plan gave Republicans an advantage of 4.8% to 5.1% in terms of the number of seats they would be expected to win in a perfectly tied election. (R p 5072). Thus, "in a tied election Republicans would still hold 27 or 28 seats"—an outright majority—while Democrats would need to win at least 53% of the statewide vote to win a majority. (R p 5074). He

further noted that over the past decade, "Republicans managed to win 53 percent of the state senate vote once, while the most Democrats achieved was just over 50 percent." (R p 5074). This advantage, which Dr. McGhee determined Republicans would very likely "maintain . . . throughout the decade" (*id.*), does more than create an unequal opportunity to elect legislative majorities; it forecloses the possibility that Democratic voters can elect a majority under any plausible election scenario. Dr. McGhee also found that the remedial Senate plan had a mean-median differential of 2.2% (R p 5072), which exceeds the 1% mean-median threshold identified by this Court as one potential measure of presumptive constitutionality, *see Harper*, 380 N.C. at 386, 868 S.E. 2d at 548.

Third, Dr. Sam Wang (a Professor of Neuroscience at Princeton University and Director of the Electoral Innovation Lab) similarly found that the remedial Senate plan provides grossly unequal opportunities for North Carolinians to elect legislative majorities. Dr. Wang used multiple metrics to analyze the proposed remedial plans, including a measure of "partisan seat symmetry" that asked "how many seats each party would win if it attained the same statewide share of the vote." (R p 5077). Using this symmetry analysis to evaluate a range of historical elections, Dr. Wang found that the universe of plausible election outcomes almost always results in Republican control of the Senate: "The range of likely outcomes is 19 to 26 Senate seats for Democrats, and 24 to 31 Senate seats for Republicans." (R p 5085). And a tied statewide vote would produce 27 Republican seats and 23 Democratic seats. (R p 5087). Indeed, Dr. Wang evaluated the remedial Senate plan across six different metrics—seat partisan asymmetry, mean-median difference, partisan

bias, lopsided wins difference, declination angle, and efficiency gap—and determined that the plan "favor[s] Republicans in [all] six metrics evaluated." (R p 5097).

Finally, Dr. Tyler Jarvis (a Professor of Mathematics at Brigham Young University) found "strong evidence of partisan gerrymandering" in favor of Republicans. (R p 5119). Dr. Jarvis leads a non-partisan research group at Brigham Young that studies partisan gerrymandering, and previously consulted on these issues for the Utah Independent Redistricting Commission. (R p 5102). In addition to evaluating the proposed remedial plans using statistical measures like those used by the other assistants, Dr. Jarvis also analyzed the plans by comparing them to ensembles of non-partisan plans prepared by *Harper* Plaintiffs' expert Dr. Mattingly prior to the merits phase of the litigation. (R pp 5104, 5116).

Using this ensemble analysis, Dr. Jarvis found that the remedial Senate plan "is often a significant outlier in favor of the Republicans" in terms of seats won when compared to the non-partisan ensemble. (R p 5116). For example, using the results of the 2020 presidential election, a very close election where Democrats won 49.36% of the statewide vote (*see* R p 5285), the remedial Senate plan produced an expected 29 Republican seats—more Republican seats than 99% of non-partisan comparison plans in the ensemble. (R p 5117). Measured across eleven historical elections, these "seat margins" gave "strong evidence of partisan gerrymandering in" the remedial Senate plan. (R p 5119). Dr. Jarvis also found that the mean-median differential for the remedial plan was 1.4% in favor of Republicans, again exceeding the 1% threshold identified by this Court as an indicator of unconstitutionality. *Harper*, 380 N.C. at 386, 868 S.E. 2d at 548.

2. *Harper* Plaintiffs' experts find significant, asymmetric treatment of Democratic and Republican voters.

Like the Special Masters' assistants, *Harper* Plaintiffs' experts also found that the remedial Senate plan fails to provide partisan symmetry. *Harper* Plaintiffs' testifying expert Dr. Jonathan Mattingly and his colleague Dr. Greg Herschlag (both Professors of Mathematics at Duke University with extensive experience quantifying partisan gerrymandering) assessed the partisan symmetry of the remedial Senate plan by measuring the absolute deviation between the number of seats that the two parties are expected to elect at the same given vote share. (R p 4755). This deviation is zero in a districting plan that treats both parties with perfect symmetry; as the deviation increases, so too does the degree of partisan *asymmetry*. (R p 4755).

Drs. Mattingly and Herschlag measured this deviation by calculating the number of seats won by each party under reciprocal, symmetric pairs of Democratic statewide vote shares (i.e., 48% and 52%) across recent statewide elections. (R p 4755). To take an example using the 2016 gubernatorial election: Drs. Mattingly and Herschlag took the results of that election and applied a "uniform swing" to the election results to reflect a 48% Democratic statewide vote share for that election, uniformly increasing the percentage across all districts to reflect a particular statewide vote share, in an effort to determine how the map may perform in different election climates. They then calculated how many Republican Senators would be elected under the remedial Senate plan with that 48% Democratic vote share. They then applied a uniform swing to that election so that it reflected the corresponding, reciprocal Democratic vote share—*i.e.*, 52%—and computed

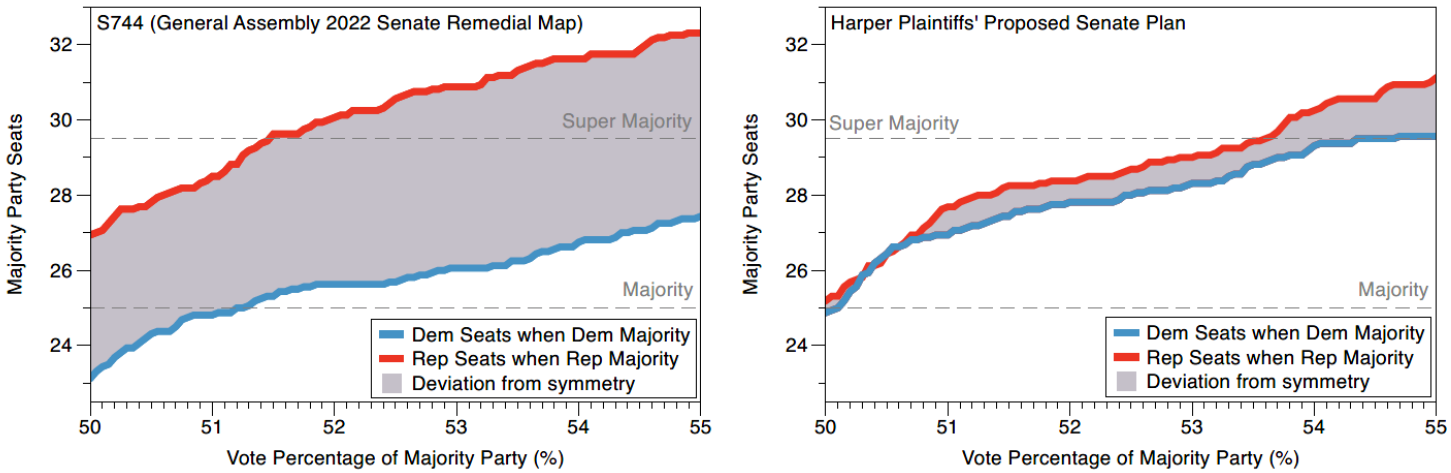
the number of *Democratic* Senators that would be elected with that 52% Democratic vote share. Drs. Mattingly and Herschlag then calculated the *absolute difference* between the number of Republican Senators elected with 48% Democratic vote share and the number of Democratic Senators elected with a 52% Democratic vote share. Thus, if 27 Republicans were elected with 48% Democratic vote share, and 25 Democrats were elected with 52% vote share, the absolute difference would be *2* seats. Plaintiffs' experts repeated that process using several sets of reciprocal vote fractions—45% and 55%, 46% and 54%, 47% and 53%, and 49% and 51%. They did this for 16 recent statewide elections and then calculated the average of the absolute difference between the number of Republican seats elected (under the lower Democratic vote share) and the number of Democratic seats elected (under the higher Democratic vote share).

Under this measure of partisan symmetry, the deviation in the remedial Senate plan is an enormous 4.0125 seats. (R p 4760). This means that in any given election, across a range of vote shares between 50% and 55%, Republicans would be expected to elect four more Senators than Democrats would elect *at the same vote share*. As *Harper* Plaintiffs' experts explained, this four-seat deviation "is enough to potentially grant the Republicans a supermajority, whereas the Democrats either split the chamber or gain the smallest possible majority" when each party wins 52% of the statewide vote. (R p 4759).

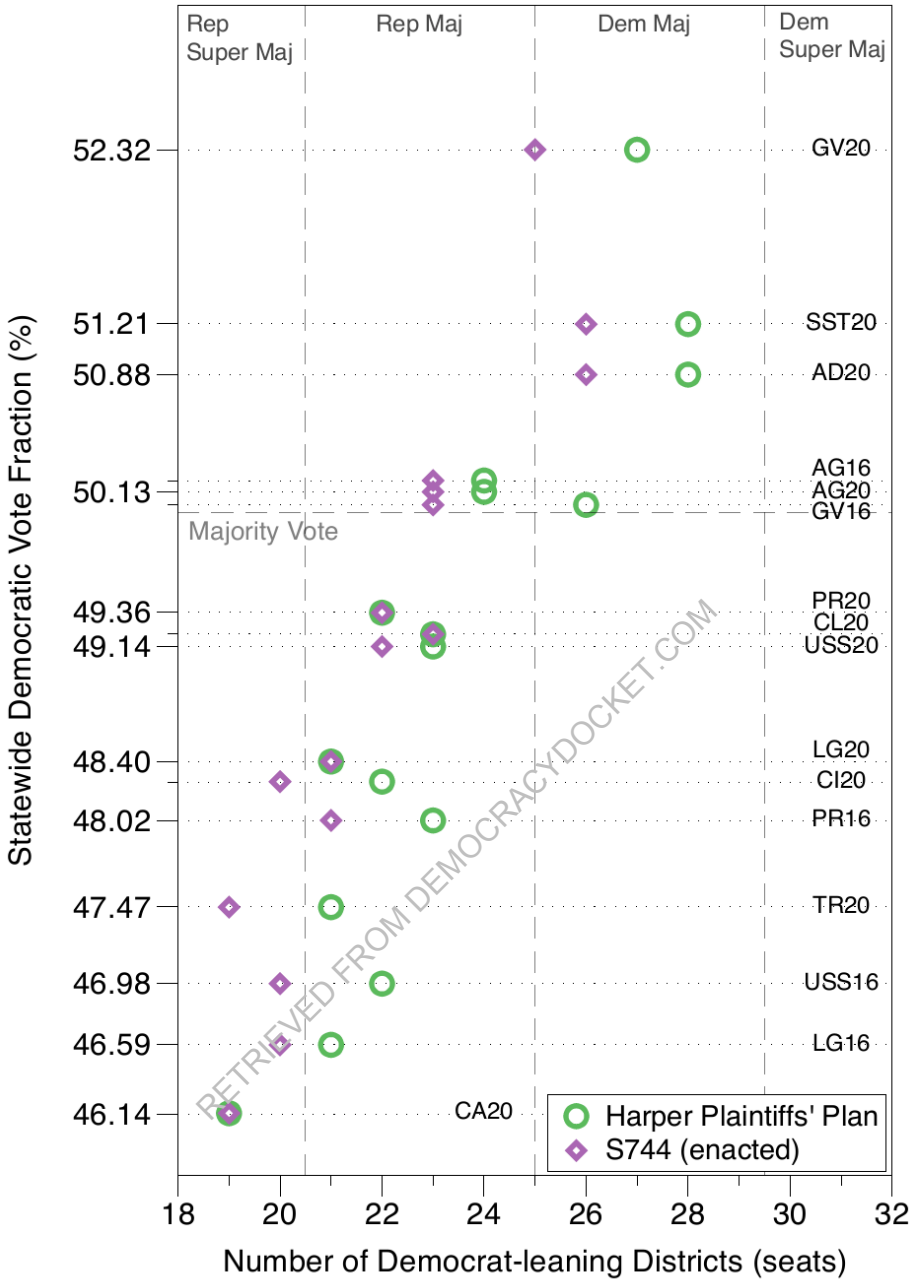
Drs. Mattingly and Herschlag compared the partisan symmetry of the remedial Senate plan to the partisan symmetry of other possible Senate plans to confirm that this extreme degree of asymmetry could not be explained by North Carolina's political geography. They drew twenty maps at random from their original ensemble of non-partisan

plans, which were generated by a computer before the merits phase of this litigation and compared the partisan symmetry of those plans to that of the enacted remedial plan. Drs. Mattingly and Herschlag found that if Legislative Defendants had selected *a single random plan* from that ensemble of 80,000 computer-generated maps—which were not drawn to prioritize partisan symmetry in any way—that plan would have had better partisan symmetry than S.B. 744 with 99.6% probability. (R p 4759). Further cementing that North Carolina's political geography does not require a massive four-seat disparity between the parties, the remedial plan proposed below by *Harper* Plaintiffs produced an average deviation in seats won at a given party vote share of only 1.04375 seats. (*Id.*)

Drs. Mattingly and Herschlag found this asymmetry to be significant across election outcomes, as shown in Figure 4 from their remedial-phase report. (R p 4760). Figure 4, reproduced below, reflects the number of seats for each party that are expected at the same vote share in the remedial Senate plan and in *Harper* Plaintiffs' proposed Senate plan, using uniform swing analysis. Once again, the contrast reflects a grossly unequal opportunity to translate votes into seats:



Drs. Mattingly and Herschlag examined seat counts using the results of historical elections and found that they confirmed the existence of extreme asymmetry in the remedial Senate plan. As shown in Figure 3 of their report (R p 4759), Drs. Mattingly and Herschlag found that Democrats under the remedial Senate plan would be expected to win a minority of seats in *half* the elections where they won a majority of the vote. Yet again, this antidemocratic result is not symmetrical: Drs. Mattingly and Herschlag found that there was not a single historical election in which the Republicans would win a majority of votes but a minority of seats. They also found that the asymmetry will protect Republican supermajorities: If Democrats win 51.21% of the vote (as they did in the 2020 Secretary of State election), they would barely win a majority of seats under the Remedial Senate Plan. Meanwhile, if Republicans win a similar vote share (like in the 2020 Commissioner of Insurance election), they will win a safe supermajority:

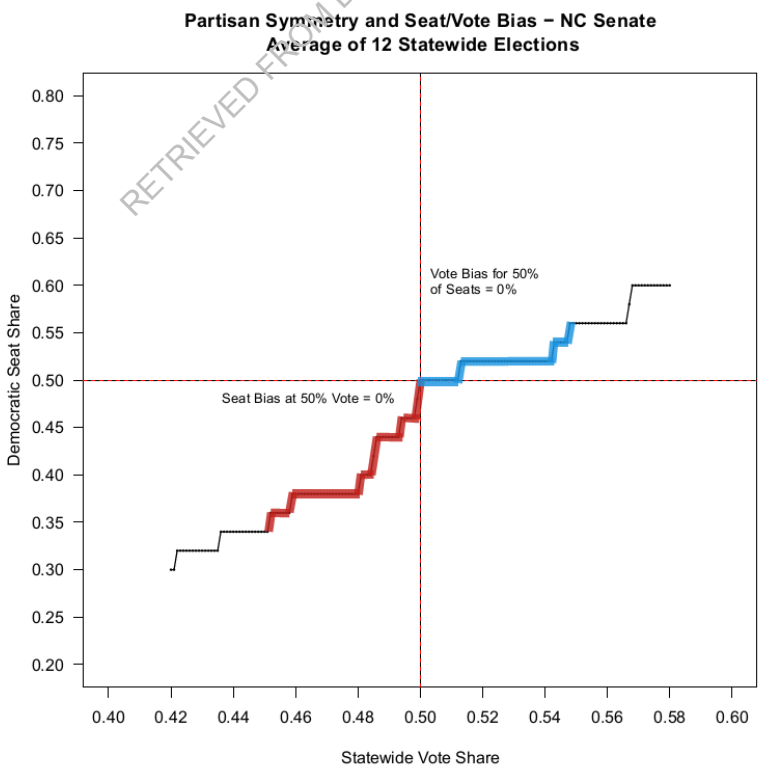


Drs. Mattingly and Herschlag further concluded that Legislative Defendants' proposed Senate plan also fails the 1% mean-median threshold, with a mean-median difference of 1.304%. (R p 4759). By comparison, *Harper* Plaintiffs' proposed Senate plan has a mean-median difference of 0.228%. (*Id.*)

3. Legislative Defendants' expert agrees that the remedial Senate plan treats voters asymmetrically.

Even the analysis of Legislative Defendants' expert, Dr. Michael Barber, confirmed the lack of partisan symmetry in the remedial Senate plan. (R p 4413). As shown in Dr. Barber's Figure 9(b) from his remedial-phase report, highlighted in red and blue below, Democrats need dramatic increases in vote share to produce additional seats and have effectively no chance at winning a supermajority even at unprecedented vote shares. For example, Democrats must ascend from 50% vote share to nearly 55% vote share before gaining a 28th seat, and even then would remain two seats short of a supermajority. If Republicans experience that same five-point increase from 50% to 55%, their seat count jumps to 33 seats—well over a supermajority. (R p 4413).

(b) 2022 Remedial plan



* * *

In sum, the quantitative evidence presented to the trial court uniformly showed the same thing: The enacted Remedial Senate Plan does not give voters "substantially the same opportunity to elect[] a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised" a given percentage "of the statewide vote share in that same election." *Harper*, 380 N.C. at 387, 868 S.E. 2d at 549. It is therefore unconstitutional.

II. The trial court's analysis thwarts this Court's decision and if upheld would sanction end-runs around decisions invalidating unconstitutional plans.

A. The trial court failed to meaningfully assess whether S.B. 744 treats voters equally.

The trial court largely ignored the overwhelming evidence—presented by both the parties and the Special Masters' assistants—that S.B. 744 exhibits extreme partisan asymmetry. Instead, in adopting S.B. 744, the court relied on the "analysis performed by the Special Masters and their advisors," which, in the court's view, demonstrated that S.B. 744 was "satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion." (R p 4879). The court identified only two relevant "statistical ranges"—namely, that the plan had a "mean-median difference of 1% or less" and an "efficiency gap [of] less than 7%." The special masters likewise recommended upholding S.B. 744 on the ground that S.B. 744 satisfied those two particular tests, giving conclusive weight to the fact that "[a]ll of the advisors and experts found the efficiency gap of the proposed remedial Senate plan to be less than 7%" and the "majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%." (*Id.*).

The trial court's treatment of mean-median difference and the efficiency gap as conclusive is erroneous for two independent reasons: (1) it is factually incorrect, and (2) it misconstrues the legal requirements of this Court's decision.

First, the trial court's finding regarding one of the two metrics to which it accorded dispositive weight—the mean-median difference—was plainly wrong. The special masters stated that the "majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%." (R p 4892). That is incorrect. Two of the special masters' advisors (Drs. McGhee and Jarvis), along with both sets of Plaintiffs' experts who submitted reports (Drs. Mattingly and Herschlag for *Harper* Plaintiffs and Common Cause; Dr. Duchin for *NCLCV* Plaintiffs), concluded that the mean-median difference exceeded 1%. (R pp 4563, 5072, 5124). And while the two other advisors (Drs. Grofman and Wang) concluded that S.B. 744's mean-median difference was less than 1%, both used only a single election composite where the Republicans won a specific vote share, rather than a range of elections with varied results. (R pp 5039, 5042–43, 5078). Put simply, the evidence did not show that S.B. 744 *actually* complied with the metric that the trial court improperly treated as conclusive. There was no basis for the trial court's conclusion that S.B. 744 satisfies this Court's constitutional rule, and its decision should be reversed.

Second, and independently, the trial court's myopic approach to evaluating S.B. 744's partisan fairness cannot be squared with this Court's decision. This Court declared a broad constitutional rule: Under North Carolina's Declaration of Rights, redistricting plans must give "voters of all political parties substantially equal opportunity to translate votes

into seats across the plan[.]" (R pp 4058–59). To guide courts in effectuating that rule, the Court identified "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," including not just "mean-median difference analysis [and] efficiency gap analysis" but also "close-votes, close-seats analysis[] and partisan symmetry analysis." (R p 4058). These various measures, the Court explained, "may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography." (*Id.*)

But, critically, this Court expressly declined to establish "precise mathematical thresholds" that would "demonstrate or disprove the existence of an unconstitutional partisan gerrymander." (R pp 4057–58). To be sure, this Court referred to "[s]everal *possible* bright-line standards"—including a mean-median difference of 1% and an efficiency gap of 7%. (R pp 4059–60 (emphasis added)). But this Court did not hold that compliance with those particular numerical thresholds alone would render a plan constitutional. To the contrary, the Court specifically identified measures besides the mean-median difference and efficiency gap—including Dr. Duchin's "close-votes close-seats" analysis. (*Id.*) And further confirming that it did not intend compliance with those two "possible … standards" to be decisive, the Court observed that "[t]here may be other standards the parties wish to suggest to the trial court." (R p 4062).

Indeed, affording dispositive weight to the mean-median difference and efficiency gap is irreconcilable with this Court's own analysis of the 2021 plans. In holding the three enacted 2021 maps unconstitutional, this Court relied on an array of evidence ranging from

Dr. Cooper's analysis of the district boundaries themselves, to Dr. Mattingly's ensemble analysis, to Dr. Pegden's determination that the enacted plans were extreme outliers in terms of how carefully crafted they were to maximize Republican advantage, to Dr. Duchin's close-votes-close-seats analysis. (R pp 4082–85). In other words, this Court itself recognized that a holistic assessment of partisan fairness is necessary to ensure compliance with the Declaration of Rights. The trial court, like this Court, was required to consider *all* relevant evidence of S.B. 744's partisan bias and to decide whether "there is a significant likelihood that the districting plan will give voters of all political parties substantially equal opportunity to translate votes into seats across the plan[.]" (R pp 4058–59). Based on the extensive evidence submitted to the trial court and the findings of the Special Masters' assistants, the answer to that question is an unequivocal no. *Supra* Section I.B.

This Court's refusal to accord dispositive weight to any particular metric was not just prudent, but necessary to prevent circumvention of its holding. Specific metrics can be gamed. For example, as both the special masters' assistants and Plaintiffs' experts explained, the mean-median difference "can present a misleading picture of the partisan consequences of a map as a whole" because it depends on vote shares in "a single district" (namely, the median district). (R p 5030 (Mattingly-Herschlag Report); *see* R p 5041 (Dr. Grofman: "the median is only one district and we must look at the overall map")). Mapmakers can accordingly "manipulate" the mean-median difference by "assuring that in the particular district which is the median," the vote share is relatively close to the mean, even if "the map as a whole remains a clear partisan gerrymander." (R p 5030 (Mattingly-Herschlag Report; *see* R p 5030 (Dr. Grofman: mean-median difference "may be easier to

manipulate by mapmakers than some other measures")). Holistic assessment of all evidence of partisan fairness is necessary to ensure that such manipulation does not allow mapmakers to "deprive[] a voter of his or her fundamental right to substantially equal voting power." (R p 4071).

The trial court and special masters suggested that their narrow analysis of S.B. 744 might be justified by a "presumption of constitutionality." (R p 4892; *see* R p 4886). But this Court has made clear that this presumption—an application of the general principle that applies to all legislative acts (R p 4066)—is not a rubber stamp. "Rather than passively deferring to the legislature," the court's "responsibility is to determine whether challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of our state." (R p 3960). For that reason, this Court explained that a plan is "presumptively constitutional" only in particular circumstances—namely, if "there is a significant likelihood that the districting plan will give voters of all political parties substantially equal opportunity to translate votes into seats[.]" (R p 4058–59). If a map fails to provide this basic level of fairness, it "infringes on individual voter's fundamental right to equal voting power." (R p 4064). And "[o]nce a plaintiff shows that a map infringes on their fundamental right to equal voting power … the map is subject to strict scrutiny and is presumptively unconstitutional." (R p 4063).

Put differently, the presumption of constitutionality does not mean that courts may simply ignore compelling evidence of partisan asymmetry that would overcome the presumption of constitutionality. What the presumption means is that a plan will be invalidated *only if* there is evidence showing that it violates fundamental rights. And, as

explained, the Court required that the central inquiry into partisan fairness—*i.e.*, whether a "districting plan will give voters of all political parties substantially equal opportunity to translate votes into seats"—must consider all relevant evidence. That is especially so where each of the neutral, court-appointed experts whose mathematical findings the trial court and Special Masters relied on for purposes of invoking a presumption of constitutionality in fact had concluded that the Senate plan was substantially asymmetric in favor of the Republicans and was a partisan gerrymander. The trial court's assessment began and ended with two metrics, and that failure alone warrants reversal.

B. If affirmed, the trial court's analysis will greenlight brazen remedial-phase gerrymandering in violation of voters' constitutional rights.

Again, there is significant and essentially undisputed evidence that S.B. 744 will systematically entrench Republican control of the Senate. Upholding S.B. 744 based on the trial court's analysis would thus signal to mapmakers that they are free to enact blatant, intentional gerrymanders so long as they can engineer their map to satisfy one of the specific metrics identified in this Court's decision. Worse, it would signal to legislative leaders that extreme gerrymandering is fair game during the remedial phase of litigation—at least if they can manage to produce a remedial map that is marginally less egregious than the original one.

There is no basis in this Court's decision or elsewhere in the law for granting mapmakers that sort of free pass. Allowing a gerrymandered map to take effect imposes tremendous and often long-running burdens on individual rights. For that reason, courts in redistricting litigation take remedial review seriously. In recent remedial proceedings in

the Supreme Court of Ohio, for example, the court has not just once but multiple times rejected proposed remedial maps submitted by the Ohio Redistricting Commission for failure to comply with the court's constitutional holdings. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d ___, 2022 WL 354619, at *11-13 (Ohio Feb. 7, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d ___, 2022 WL 803033, at *1 (Ohio Mar. 16, 2022). And courts engage in serious constitutional scrutiny even while recognizing the general principle, also applicable in North Carolina, that a duly enacted redistricting plan (like all legislation) "is presumptively constitutional." 2022 WL 803033, at *5.

If anything, because Legislative Defendants here were *already* found to have engaged in intentional discrimination in enacting all three of the now-invalidated 2021 plans, the standard for assessing their proposed remedy must be *more* stringent than in the merits phase to ensure that the constitutional harm has been fully erased. As this Court explained, "Legislative Defendants presented no evidence at trial to disprove[] the extensive findings of fact of the trial court[] to the effect that the enacted plans are egregious and intentional partisan gerrymanders, designed to enhance Republican performance." (R p 3960). The trial court found the enacted 2021 Senate map in particular to be the "result of intentional, pro-Republican partisan redistricting," both across the plan and in all district groupings that it analyzed. (R pp 3991, 3994). Courts in other redistricting cycles have made similar findings: In 2016, federal courts invalidated North Carolina's 2011 congressional and state legislative maps as racial gerrymanders in violation of the U.S. Constitution. *Harris v. McCrory*, 159 F. Supp. 3d 600, 604–05 (M.D.N.C. 2016), *aff'd*

sub nom., *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117, 176–78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). And in 2019, North Carolina courts invalidated the General Assembly's remedial maps as extreme, intentional partisan gerrymanders in violation of the North Carolina Constitution. *Harper v. Lewis*, No. 19 CVS 12667, 2019 N.C. Super. LEXIS 122 (N.C. Super. Ct. Oct. 28, 2019); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

Following analogous findings of intentional discrimination, courts have placed the burden on the *defendant* to show that its proposed remedy will be effective in eliminating the defendant's prior discrimination. *See United States v. Virginia*, 518 U.S. 515, 547 (1996) ("Having violated the Constitution's equal protection requirement" by maintaining a male-only military college, "Virginia was obliged to show that its remedial proposal 'directly address[ed] and relate[d] to' the violation" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016) (once voter ID law was found to be racially discriminatory, "the burden rest[ed] on the State to prove that its proposed remedy"—amendment of the law to add a new exception—"completely cure[d] the harm").

Courts have conducted this burden-shifting specifically in the remedial phase of redistricting litigation. For example, after determining that the Florida Legislature's "plan had been drawn with improper intent" to "favor or disfavor a political party or an incumbent" in violation of the state constitution, the Florida Supreme Court "shifted the burden to the Legislature to justify its decisions in drawing the congressional district lines." *League of Women Voters of Fla. v. Detzner*, 179 So. 3d 258, 262 (Fla. 2015) (citation

omitted). The court indeed found that the trial court had committed a "significant[]" "legal error[]" by "analyz[ing] the Legislature's map as if it had not found the existence of unconstitutional intent, affording deference to the Legislature where no deference was due." *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371 (Fla. 2015). "Once a direct violation of the Florida Constitution's prohibition on partisan intent in redistricting was found," the state high court explained, "the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines." *Id.* Because the legislature failed to meet that burden, the court "reverse[d] the trial court's order upholding the Legislature's remedial redistricting plan." *Id.* at 365.

To be clear, S.B. 744 fails this Court's requirement of partisan fairness no matter who bears the burden to establish compliance with the Declaration of Rights. But given the significant evidence of partisan asymmetry, Legislative Defendants at minimum have failed to show that S.B. 744 cures the "intentional" and "extreme partisan bias" exhibited by the invalidated 2021 Plan. (R pp 4085–86). That alone requires reversal.

III. The Court should order the adoption of the *Harper* Plaintiffs' remedial plan.

The Court should remand with instructions to adopt the *Harper* Plaintiffs' remedial plan. That plan was created from on a base map selected from the ensemble generated by Dr. Jonathan Mattingly's computer algorithm, which he then filtered to pick the maps that performed best on measures of partisan fairness and partisan symmetry. Then a small number of changes were made to the map to unpair incumbents where possible and to improve compactness. (R pp 4452-4456).

The *Harper* map performs extremely well on all measures of partisan fairness. The average mean-median difference for this proposed map is 0.2278%. (R pp 4759-4760). The average efficiency gap using historical election results, without applying any uniform swing to these results, is 1.9817%. (*Id.*) The average efficiency gap calculated by conducting uniform swings on these election results, ranging from 45% to 55% Democratic vote share, is 1.9551%. (*Id.*) The partisan symmetry metric—i.e., the average deviation in seats won at a given party vote share—is 1.04375 seats, compared to 4.0125 seats in S.B. 744. (*Id.*)

The Special Masters' advisors agreed that the *Harper* Senate map treats both parties fairly. Dr. Grofman explained that, "[w]hen we compare these levels of partisan bias [in S.B. 744] to the level of partisan bias in the Harper and NCLCV maps we see that each of these two bias measures is at least twice as high in the legislative map as in the alternatives." (R p 5042). Dr. McGhee explained that, while the *Harper* plan still "favor[s] Republicans," "this Republican advantage is often less than half the size of the same advantage in the Legislative Defendants' [remedial] plan." (R p 5055). Dr. McGhee's metrics showed that the *Harper* plan has the least partisan bias of the various plans. (R pp 5054-5055).

Dr. Jarvis's metrics likewise showed that the *Harper* plan is less biased than S.B. 744 across multiple metrics, including mean-median (Table 5), partisan bias (Table 6), efficiency gap (Table 7), and declination (Table 8). (R pp 5124-5125). He further concluded that the *Harper* plan is "typical" of what you would expect from a non-biased redistricting plan in terms of seats won, "while [S.B. 744] is often a significant outlier in

favor of the Republicans." (R p 5116). He found no evidence of "partisan gerrymandering" in the *Harper* plan. (R p 5119). And Dr. Wang found that the *Harper* Senate plan resulted in "no clear advantage" to either party on five of the six metrics he considered, while S.B. 744 favored Republicans on all six metrics. (R p 5085).

CONCLUSION

The Court should reverse the trial court's order and remand with instructions to adopt the *Harper* Plaintiffs' remedial plan.

Respectfully submitted, this 27th day of June, 2022.

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

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